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ARGUED AND DETERMINED IN

THE SUPREME COURT OF SOUTH CAROLINA

COVERING

ALL THE CASES (LAW AND EQUITY) FROM THE ORGANIZATION OF THE COURT (BAY'S REPORTS) UP TO AND INCLUDING VOLUME 25 OF THE SOUTH CAROLINA REPORTS

ANNOTATED EDITION

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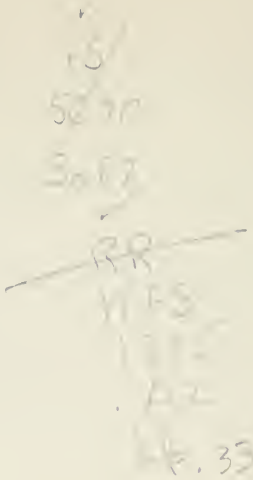

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REPORTS OF CASES

HEARD AND DETERMINED BY

THE SUPREME COURT

OF

SOUTH CAROLINA

VOLUME VIII

FROM APRIL, 1876, TO APRIL, 1877, INCLUSIVE

BY J. S. G. RICHARDSON

STATE REPORTER

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LAW

COLUMBIA, S. C.
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JUSTICES OF THE SUPREME COURT.

HON. F. J. MOSES, CHIEF JUSTICE.
HON. J. J. WRIGHT, ASSOCIATE JUSTICE.
HON. A. J. WILLARD, ASSOCIATE JUSTICE,
AND AFTERWARDS CHIEF JUSTICE.
HON. HENRY McIVER, ASSOCIATE JUSTICE.
HON. A. C. HASKELL, ASSOCIATE JUSTICE.

JUDGES OF THE CIRCUIT COURTS.

1ST CIRCUIT—	HON.	J. P. REED.
2D	"	"	P. L. WIGGIN.
3D	"	"	A. J. SHAW.
4TH	"	"	C. P. TOWNSEND.
5TH	"	"	R. B. CARPENTER.
6TH	"	"	T. J. MACKEY.
7TH	"	"	L. C. NORTHROP.
8TH	"	"	T. H. COOKE.

ATTORNEY GENERALS.

WILLIAM STONE AND JAMES CONNER, ESQS.

CLERK OF SUPREME COURT.

A. M. BOOZER, ESQ.

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REPORTS OF CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT OF SOUTH CAROLINA

JUSTICES OF THE SUPREME COURT DURING THE PERIOD COMPRISED IN THIS VOLUME.

HON. F. J. MOSES, CHIEF JUSTICE. (*a*)
HON. A. J. WILLARD, ASSOCIATE JUSTICE. (*b*)
(And afterwards Chief Justice.)
HON. J. J. WRIGHT, ASSOCIATE JUSTICE. (*c*)
HON. HENRY McIVER, ASSOCIATE JUSTICE. (*d*)
HON. A. C. HASKELL, ASSOCIATE JUSTICE. (*e*)

*COX v. EDWARDS.

(Columbia. April Term, 1876.)

[*Execution* ⟸238.]

Where a debt, secured by bond and mortgage, was levied on and sold by the Sheriff, the condition of the bond stipulating that the first installment of the debt shall be paid "at the sealing and delivery of this bond," and the Sheriff's advertisement was silent as to the payment thereof: *Held*, that the purchaser was liable for his bid, although the first installment had been paid and such payment had not been endorsed on the bond, and neither he nor the Sheriff knew of the payment at the time of the sale.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 662–664, 665, 770; Dec. Dig. ⟸238.]

[*Execution* ⟸238.]

The stipulation to pay "at the sealing and delivery of this bond" was sufficient of itself to put the purchaser upon the inquiry.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 662–664, 665; Dec. Dig. ⟸238; Bonds, Cent. Dig. § 102.]

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[*Execution* ⟸238.]

*Even if the terms of the condition of the bond were not sufficient to put the purchaser on the inquiry, under the rule "caveat emptor," which applies to Sheriffs' sales, he was liable for his bid,—his want of notice, in the absence of fraud, being no defense, and the doctrine of mutual mistake having no application to Sheriffs' sales.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 662–664, 665; Dec. Dig. ⟸238.]

[*Execution* ⟸238.]

For the purposes of an action to recover the purchase money, the highest bidder at a Sheriff's sale is fixed with the character of emptor by the Act of 1839.—Rev. Stat., 473.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 662–664, 665; Dec. Dig. ⟸238.]

Before Townsend, J., at Darlington, October, 1875.

Action by Thomas E. Cox, as Sheriff of Darlington County, against B. W. Edwards. The case was as follows:

On December 2d, 1872, the plaintiff, as Sheriff of Darlington County, offered for sale to the highest bidder for cash a bond of one J. B. White, payable to John A. Rodgers, conditioned for the payment of $4,800, as follows: $800 "at the signing and delivery of this bond;" the balance in four equal annual installments, with interest. It was dated January 11th, 1870, and the last installment fell due January 1st, 1874. The bond was secured by a mortgage of real estate, which described the bond as conditioned for the payment of $4,800. The Sheriff's advertisement of sale described the bond and the condition thereof, but was silent as to any payment of the bond or any part thereof. The $800 had been paid, but not at the time of the sealing and delivery of the bond, and its payment had not been entered thereon. The Sheriff read out the advertisement at the sale, and the defendant was the highest bidder, at the sum of $2,450, and, having ascertained that the $800 had been paid, he refused to comply with the terms of sale. Neither he nor the Sheriff knew at that time that the $800 had been paid. The Sheriff advertised the bond for resale in January, 1873, at defendant's risk. It was then sold, and purchased by the defendant at the price of $1,150. The action was to recover the differ-

(*a*) Died March 6th, 1877.
(*b*) Elected Chief Justice in place of Judge Moses.
(*c*) Resigned.
(*d*) Elected in place of Associate Justice Willard.
(*e*) Elected in place of Associate Justice Wright.

ence between the two highest bids of the defendant.

The bond had been levied upon by the Sheriff under an execution of Henry J. Rogers v. John A. Rogers, and the sale was made to satisfy that and other executions. The defendant asked the Court at the trial to instruct the jury as follows:

1. That the common law rule of caveat emptor, which does apply to Sheriffs' sales, applies only so far as the title and quality of the property sold are concerned.

*3

*2. That in law the quality of a bond is the solvency or insolvency of the obligor.

3. That the rule of caveat emptor is not the rule in case of the sale of a bond, whether the sale be by the Sheriff or any private person.

4. That the advertisement of the Sheriff was part of his contract of sale.

5. That whether the rule did or did not apply to the sale by the Sheriff of the bond as to its quality, the particular description thereof in his advertisement did imply a term that the bond was what it was represented to be.

6. That whether the rule did or did not apply to the sale by the Sheriff of the bond as to its quality, his reading the advertisement at the time of sale may be relied on by the defendant as a positive representation by the Sheriff that the character of the bond was such as he represented, and that the jury may infer that there was upon the sale a warranty that the bond sold was for the sum of $4,800, without right of credit thereon to the extent of $800.

7. That if at the time of sale the Sheriff and defendant both thought the bond to be for $4,800, without payment of $800 having been made thereon, then the case is one of mutual mistake, and the defendant is not liable in this action, even though the rule of caveat emptor should otherwise apply. That in such case there would be no contract.

8. That however completely the Sheriff may have guarded himself, or, by law, have guarded against contracting that the bond was of any particular quality, the contract of sale can be construed in no other way than that it was part of the agreement that the bond was for $4,800 and not for $4,000—not merely because the representation of it tended to such conclusion, but because both vendor and vendee actually so understood it. Otherwise, a contract never intended to be made would be enforced, if defendant should be held liable, as the action seeks to make him.

9. That in the sale of the bond the Sheriff was agent of John A. Rogers, the defendant in the execution under which it was sold; that if he was guilty of fraud in omitting the credit of $800 the contract of sale cannot be enforced against Edwards.

10. That concealment of a material fact, and such was the fact of payment of so large a sum by one who can derive a benefit therefrom, is equivalent to a positive misrepresentation and fraudulent.

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*11. That the concealment by John A. Rogers of so material a fact as said payment, whether by design or mistake, avoids the contract for the sale of the bond on the ground of legal fraud.

12. That whether Henry J. Rogers, the plaintiff in the execution under which the bond was sold, was cognizant of the fact of such payment before the sale, he is precluded from deriving any benefit from it; for by seeking such benefit he becomes particeps criminis, however innocent of the fraud in the beginning.

13. That caveat emptor cannot apply to the defendant, because he was never fixed with the character of emptor.

The third, fifth, sixth, seventh, eighth, tenth, eleventh, twelfth and thirteenth instructions asked for were denied; the first and fourth were given to the jury. The second was also given, "with the addition that the quantity and amount due were also the quality," &c. The ninth, so far as it related to agency, was given, but the rest was denied, and the jury was instructed that Edwards was fixed with the character of emptor by the statute for the purpose of recovering the difference of the bids out of him. The defendant excepted to so much of the charge as denied his instructions. The verdict was for the plaintiff and the defendant appealed.

Spain, for appellant:

That the rule caveat emptor applies to Sheriffs' sales, is admitted; but that it applies, without qualification or limit, in all cases, is by no means admitted. What is that rule? In Broom's Legal Maxims, (4th ed., 768,) the result of the authorities is thus stated: "Upon the whole, we may safely conclude that with regard to the sale of ascertained chattels there is not any implied warranty of either title or quality, unless there are some circumstances beyond the mere fact of such sale from which it may be implied." In the case of Eichholtz v. Bannister, (112 Eng., C. L., 721,) Erle, C. J., says this is the principle: "I am in possession of a horse or other chattel; I neither affirm or deny that I am the owner, (or that it is sound or unsound.) If you choose to take it as it is, without more, caveat emptor, you have no remedy, though it should turn out that I have no title, (or it is unsound.) When that is the whole of the transaction, it may be that there is no warrant of title" or quality. A sale by a Sheriff "is notice to buyers that the Sheriff has no knowledge of the title to the goods" or of their quality. Judge

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Kent *(2 Com., 478, 485,) tells us "the common law very reasonably requires the purchaser to attend, when he makes his contract, to the qualities of the articles he buys, which

are supposed to be within the reach of his observation and judgment, and which it is equally his interest and his duty to exert;" and, he adds, the law requires "the vendor to communicate those particulars and defects which cannot be supposed to be within the reach of such attention." The common law is not so unreasonable as to require a purchaser to attend when he makes his contract to the quality or character of the article, which is not within the reach of his observation and judgment.

The Circuit Judge instructed the jury, as asked, that the quality of a bond is the solvency or insolvency of the obligor. So far the purchaser could and ought to observe and judge; but the qualification, or addition, by the Judge, that the amount due was also of the quality of the bond, was carrying the rule into a region beyond possible observation and judgment of the buyer in a case where that amount was materially decreased by the suppression of a credit.

The doctrine of implied warranty "has always been applied to goods or effects of some intrinsic worth—to articles the nature of which is fixed and certain. It is obvious that the nature of a bond is always uncertain. Such is the mutability of human affairs that a man may be solvent to-day and insolvent to-morrow."—Colcock, J., in Walker v. Scott, 2 N. & McC., 288; Benton v. Gibson, 1 Hill, 56. In Colburn v. Matthews, (1 Strob., 238.) O'Neall, J., says "that in the sales of an unnegotiable security there is no implied warranty, either of its goodness or money value, is too plain to require law to sustain it."

So that, by law, in the sale of a bond the rule caveat emptor applies, whether the sale is by the Sheriff or obligee, as to the solvency of the obligor. But the amount due and the solvency of the maker are quite distinct things. And so as to promissory notes. Yet, without warranty of quality or solvency in such sales, there is an implied undertaking that the articles are what their appearance indicates, and that they are not disguised so as to appear what they are not. The purchaser will be presumed to have acted upon the appearances indicated, and, according to the rule, the plaintiff was bound to guarantee that these were real and not deceptive. These are the utterances of Johnson, J., in Strange v. Ellison, 2 Bailey, 385, and in reference to a promissory note with a forged endorsement, though there was no evidence

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that plaintiff *knew of the forgery at the time of the transfer or that he warranted the endorsement. Ellison agreed to deliver corn and fodder to Strange for the note, but, discovering the forgery, he refused, and the action was to enforce the executory contract. That case, in principle, is an exact precedent for this, and the two completely analogous, unless caveat emptor is Janus-faced, one having regard to sales by a Sheriff and the other to sales by all other parties, and if a bond without a credit, but subject to a credit, is deceptive in its appearance. There, as here, the plaintiff seems to have been in ignorance as to material facts, and, though the rule applied as to quality, it did not apply as to appearances.

The Judge says he refused the seventh instruction, which claims relief from liability, on the ground of mutual mistake. As to the fact of mistake, both appellant and respondent aver it. They thought the bond to be what it appeared, for $4,800, without credit.

In Strange v. Ellison there was no fraud, but relief was granted,—both parties being mistaken. In Holden v. Putnam Fire Insurance Company (7 Am. R., 292,) Andrews, J., says: "It is a constant practice of Courts of equity to relieve parties from contracts grounded in material error and mistake of fact, although both parties were innocent and free from fraud."

In Kyle v. Kavanagh, (4 Am. R., 560,) held an elementary law of contracts: that when there is a mistake as to the subject matter of sale the contract is not binding though there is no fraud.—Roberts v. Fisher, 3 Am. R., 680. The point cannot be more strongly put than Johnson, J., stated it in Means v. Brickwell, 2 Hill, 660. He said: "If any one principle can be regarded as definitely settled by the decisions of one of our Courts, it is that in actions on contracts the defendant at law may, in his defence, avail himself of the misrepresentations of the plaintiff in relation to the consideration of the contract, whether they were made through fraud or mistake." That case involved the right at law to defend because of a deficiency in quantity and character of land sold. This case concerns a defense for a deficiency in the quantity and character of the bond sold. "Mistake, misconception or misrepresentation are all good grounds of relief; and for the Court to interpose, and even to set aside contracts, it makes no difference that there was no intentional misrepresentation."—Glover v. Smith, 1 DeS., 433. This is a stronger case than that. It is hardly necessary to say that a defense is equally available whether it is legal or equitable.—Code, § 172.

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*From what has been said, it is inferable that caveat emptor has no place in an executory contract. Appellant was never fixed with the character of emptor.—Keele v. Wheeler, 49 E. C. L., 672. It is well to observe that at common law the rule applies to sales of real as well as personal property.—Bouv. Law Dic., caveat emptor. Where the contract remains in fieri the rule does not bind and mistake will be corrected.—Cripps v. Reade, 6 T. R., 606. When the flaw is discovered before the purchase is completed there is no pretense to say the rule shall operate.—Lord Alvanley in Johnson v. Johnson, 3 B. & P., 168, cited and approved in

Herbermont v. Sharp, 2 McC., 264; Judge Huger adding: "In no case can a sale of lands be regarded as completed until the purchaser has paid his money and the seller conveyed the land." There the purchaser stood as to the sale just as does the appellant here. He bid off the property, but, discovering the flaw before compliance with the terms, "he was not bound" to pay his bid. True enough, in Towles v. Turner, (3 Hill, 182,) Johnston, Ch., does say "that case is very questionable." Just before, in Murphy v. Higginbottom, (2 Hill, 398,) O'Neall, J., had referred to Herbermont v. Sharp, without disparaging comment, as forming an exception to the general rule. After search, we say, with some confidence, it has never been overruled. The dictum of one Judge cannot outweigh the decision of a Court, and that supported as we have shown it to be, nor does the fact that land was involved deprive us of its benefit. Cochran v. Roundtree (3 Strob. 219,) concerned a chattel. Judge Wardlaw says: "The power to enforce the compliance of the purchaser with the terms of sale by reselling at his risk, which the statute gives to a Sheriff, is not a power to rescind an executed contract, but a summary means of ascertaining the damages which have resulted from nonperformance of an executory one." This is high evidence that appellant's contract was only executory, and the difference between the two sales the measure of damages which appellant, not respondent, would sustain if the liability is held to attach, notwithstanding the mistake and Herbermont v. Sharp. Still later, (Lewis v. Brown, 4 Strob. 295, concerning the sale of a negro,) Judge Evans says: "If Langford had been the purchaser in fact, then no title ever vested in him, because, according to his own account, he never paid the money; and, of course, there was no sale; and the resale, if made consistent with the rules of law, should be regarded as

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a sale at his risk and *because he had not paid." One would be inclined to think it, "of course," that there was no complete sale or change of property unless the condition precedent required by law had been performed, to wit, payment in cash, or unless there had been delivery of the property. Mr. Benjamin (on Sales, 222,) says: "Where the buyer is by contract bound to do anything as a condition, either precedent or concurrent, on which the passage of the property depends, the property will not pass until the condition be fulfilled, even though the goods may have been actually delivered into the possession of the buyer."—Moaks v. Nicolson, 115 E. C. L., 290; Pickett v. Cloud, 1 Bail., 366; 2 Kent, 496.

Before Herbermont v. Sharp, Sheriffs could sue for deficiency on resale, and, indeed, Blanding contended such actions must be by the Sheriff and no one else.—Gardner v. Sanders, 2 Brev., 180. Surely the idea of the Circuit Judge that the statute fixes the character of emptor on a bidder for the purpose of recovering the difference cannot be law, if it is meant thereby that all bidders at the highest price are absolutely liable in any event. The only change, we submit, wrought by statute as to the bidder's liability since Gardner v. Sanders and Herbermont v. Sharp has been to restrict that liability by imposing additional conditions on Sheriffs. By Section 10, A. A. 1788, (5 Stat., 672,) the purchaser, as he is called, was made "liable" at the first ensuing Court, and judgment was not to be stayed by reason of any error in the proceeding against him, and he had only seven days of grace. By A. A. 1796, (Id., 252,) the purchaser to whom property was "knocked off" was required to pay ten per cent. of his purchase immediately; if not paid the property was to be resold "upon the spot." If, after payment of the percentage, there was a resale the money paid was forfeited and the former purchaser could not bid again. By Gen. Stat., 473, the Sheriff might resell on the day of the first or other sale day, at the option of the plaintiff in execution, making proclamation of the sale at the risk of the former purchaser, as was provided in Section 58, A. A. 1839, 11 Stat., 39. At common law, independently of statute, a Sheriff's vendee was, as a general rule, bound by his contract, and the Sheriff might recover against him, by way of damages, the amount bid, with interest thereon.—Boinest v. Leigniz, 2 Rich., 481; Elfe v. Gadsden, 1 Strob., 321. But when the Sheriff pursues the statutory remedy to recover the difference between two sales he must strictly comply with the pre-

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scribed conditions.—*Younge v. Cathcart, 2 Strob., 225. The liability of the vendee is the same at common law, and, under the statute, the effect of the latter being merely to afford "a summary means of ascertaining the damages which have resulted from nonperformance of an executory contract," and to require specific duties of the Sheriff. The test of liability is not statutory; a new remedy is given by statutes in the particular case, and extends no further to alter the common law by which the liability is to be determined than to fix the measure of damages.—Foster's case, 11 Rep., 59.

It is material to observe that, as to the point now under discussion, we do not insist that there was any implied warranty in the sale, but on this: that, as the sale was incomplete, the contract was open and free of caveat emptor, appellant not being fixed with that character; that he occupies middle ground, and is, in loco penitentiæ, just where the mistake finds room for play. The vendee will not be pushed to the wall. The case is an exception, resting on decisions and reason. The benefit of that exception we invoke, not against the rule, but against the application of a doctrine questionable "in its origin in point of morals or general conveni-

ence," as Story says, (1 Eq. Jur., § 212.) and which "seems rather calculated to encourage injustice than to inculcate correct principles of moral duty," as Judge Brevard said in Champneys v. Johnson (2 Brev., 273,) to appellant's case, the defect not being "within the reach of observation and judgment." The rule must yield, because, while there may have been no implied warranty of quality, there was, as in Strange v. Ellison, an implied term that the article was "what its appearance indicates," especially as it is in proof appellant "acted upon the appearances indicated." If no such proof existed, the law would presume the fact.

The propositions already submitted will be strengthened in discussing the case in other aspects.

The Judge rightly instructed the jury, as requested, that the advertisement of the Sheriff was part of the contract of sale, but wrongly refused the instructions following that up, to the effect that the particular description implied a term that the bond was what it was represented to be; that the reading the advertisement at the time of sale was equivalent to a positive representation of the character of the bond, and that, without reference to quality, the contract of sale can only be construed to mean a bond of $4,800. And this construction was for the Court and not the jury.

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*By law the Sheriff is required "to specify in an advertisement the property to be sold," and to sell by auction.—Gen. Stat., 472, 473.

Conceding that a Sheriff's sale may be valid without advertisement, still, where he does advertise, the particulars of it are incorporated and become a part of the contract of sale.

Chancellor Kent and our Courts concur in the "importance that sales at auction, and particularly on legal process, should be conducted with good faith and without prejudice to any party."—Hamilton v. Hamilton, 2 Rich. Eq., 381.

The instructions refused were as well warranted by law as that given; they were corollaries. Specifications in an advertisement enter so essentially into the contract of sale that parol evidence cannot vary them. Thus, in Gunnis v. Exhart, (1 H. Blk., 290,) where printed conditions of a copyhold estate stated it to be free from all encumbrances, defendant, who bought, finding an encumbrance, refused to go further, and was then sued for the price. At the trial plaintiff offered to prove that the auctioneer publicly declared, when the estate was put up, that there was a charge upon it. The Court held the evidence inadmissible, as it would open a door to fraud and inconvenience to admit verbal declarations contrary to the printed particulars. These then formed part of the contract. So in Limehouse v. Gray, (3 Brev., 231,) plaintiff sued to recover money paid for a slave sold at auction, under an advertisement stating all the negroes as "prime negroes." The defense was that the auctioneer, at the time of sale, declared that purchaser would buy subject to any defect except title. The evidence was admitted, but this was held error, as the contract, as advertised, could not be varied. In McLean v. Executors of Green, (2 McM., 18,) it seems to be assumed by Judge Earle that such is the law.

In Torrence v. Bolton, (3 Eng. R., 679,) it was argued "that it was the duty of the vendor to ascertain the correctness of the description of property put up for sale by him, and on a sale the description in the particulars is part of the contract, and the vendor cannot throw upon the purchaser the obligation of ascertaining its correctness or discovering mistakes in it. This rule holds good even in the case of sales under the Court." For this was cited in Martin v. Cotton, 3 Jones & Latouche, 496, decided in 1846 by Lord St. Leonards; Lachlan v. Reynolds, Kay, 52; White v. Cudden, 8 C. &. F., 766. The Vice-Chancellor, Mallins, observed:

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*"The proper office of the particulars is to describe the subject matter of the contract; that of the conditions, to state the terms on which it is sold."

In Dimmock v. Hallett (L. R., 2 Ch., 20,) a sale was ordered by Court. There were printed particulars describing the premises. These Turner and Cairns, L. JJ., distinctly called the contract. It thus appears that, both as to the title and quality of the subject matter of sale, there are restrictions and qualifications of the maxim caveat emptor. "In general, on the sale of goods by a particular description, whether the vendee is able to inspect them or not, it is an implied term of the contract that they shall reasonably answer such description; and if they do not, it is unnecessary to put any other question to the jury."—Judge Mellor in Jones v. Just, L. R., 3 Q. B., 203.

We are dealing with the advertisement,—the description of the subject matter, the specifications,—an act by law required of the Sheriff, and on his own responsibility or in conjunction with the plaintiff and defendant in execution, or with the one or other of them, and anterior to appellant's connection with the transaction. He acted on that printed statement, which was their contract, and in which was the implied term that the article sold should reasonably answer to the description of it; that it should be what its appearance indicated. On the accuracy of the specification he had the right to rely.

Omission of statement of what is true may be as fatal as positive statement of what is false. Dimmock v. Hallett (supra) is a good illustration. There, as here, the statements were not true, because of omission of truth, and were "calculated to materially increase the apparent value of the

property. The Court requires good faith in conditions (particulars) of sale and looks strictly at the statements contained in them." There, as here, the statements as made presented an apparent value, which could not have misled if the facts omitted had been known. There the purchaser had relief from the contract, though the failure was less than one-sixth of the whole consideration. There no willfulness was imputed because of the omissions; they were treated as accidental, yet as fraudulent, because calculated materially to mislead. This case (Dimmock v. Hallett) and Edwards v. Wicker (L. R., 1 Eq., 68,) teach the doctrine that "there is a misrepresentation if a statement is calcu-

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*lated to mislead or throw the person to whom it is made off his guard, though it may be literally true."—Kerr on F. and M., 92.

In Torrence v. Bolton, already cited, the Vice-Chancellor said he had been pressed to hold "that the Court never entertains a suit for the rescission of a contract unless it has been obtained by fraud." His reply is in these words: "I express my strong impression, derived from many years' experience in cases of vendor and purchaser, that mistake, when it is satisfactorily established,—as when a purchaser has been led by the conduct of the vendor to believe that he has been purchasing one thing when in fact he has been purchasing another,—is just as good a ground for rescuing persons from a contract as a fraud. A remarkable instance of this is Stanton v. Tattersall, which was a decision of Vice-Chancellor Stuart, never appealed from, but always acquiesced in and accepted as binding authority by Lord St. Leonards." That was a case of misdescription, not treated as fraudulent, and where, by a common act of prudence, the purchaser could have found out what he was buying. The house sold was described as situated in a fashionable street, but was not actually in that street, but was approached from it by a wooden passage. The relief was on the double ground of misrepresentation and failure in the description. On appeal Torrence v. Bolton was affirmed.—4 Eng. R., 800. "No man can be held to what he has done under circumstances which have been erroneously represented to him by the other party to the transaction, however innocently the representation may have been made."—Turner, L. J., in Rawlins v. Wickham, 3 DeGex & J., 317. In Daniel v. Mitchell, (1 Story, 172,) Judge Story said: "Nothing is clearer in equity than the doctrine that a bargain founded upon false representations made by the seller, although made by innocent mistake, will be avoided."

The case of Josling v. Kingford, (106 E. C. L., 447.) was this: Defendant sold oxalic acid to plaintiff; it had been inspected by plaintiff's agents and pronounced fit for use. Afterwards, on analysis, it was found to contain about ten per cent. of Epsom salts; this could not be detected by mere inspection. It was strenuously urged that caveat emptor applied, and specially as defendant was not the manufacturer, but an innocent vendor, and expressly refused any warranty. Lush, Q. C., arguendo, said the broad question was raised "which has never yet specifically been decided, viz., whether, upon a sale of goods, where the buyer has an opportunity of in-

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*specting them, and buys, relying on his own judgment, any warranty can be implied either as to quality or as to the thing being that which it is represented to be." The Court held "that however completely the defendant may have guarded himself against contracting that the thing was of any particular quality, it is not possible to construe the contract in any other way than that it was part of the agreement that the subject of the sale should be the thing described."

Changing the form, the proposition is thus strongly put by Chancellor Earle in Hawkins v. Pemberton, 10 Am. R., 599: "When a buyer purchases an article whose true character he cannot discover by an examination which it is practicable for him to make at the time, he may rely upon the positive representation of the seller as to its character." In this case is cited Henshaw v. Rollins, (9 Met., 83,) as holding the description of goods sold a warranty that they are what they are described to be, and that the rule holds good if their appearance is deceptive, even though they have been examined.

"The right to repudiate the purchase for nonconformity of the article delivered to the description under which it is sold is universally conceded. Substantially, the description is warranted."—Wolcott v. Mount, 13 Am. R., 442. When the vendor is also the grower or manufacturer of the article sold, more is exacted of him than of ordinary vendors.—Jones v. Just, supra; Josling v. Kingford, supra. Though a bond is neither grown nor manufactured literally, the analogy is good as to an obligee who vends it.

Sheriffs are as much bound by their representations as others; if what they do is calculated to make false impressions on the minds of bidders, the latter are not bound.—Reid v. Diven, 7 Ind., 189.

We submit, then, that the Sheriff's specifications are of the essence of his contract; that "without any particular warranty it is an implied term in every such contract" that the article shall answer the description; that when there is no opportunity to inspect it the maxim caveat emptor does not apply.—Gardner v. Gray, 4 Camp., 144; or, what is the same thing, when the true character of the thing sold cannot be discovered by any examination practicable at the time of sale. —Behn v. Burness, 113 E. C. L., 753; and specially in a case like this, where the ob-

ligee sells the bond taken by himself and suppresses evidence of payments.

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*The cases in our reports of Sheriffs against purchasers are of executed contracts, or raise questions of title or quality, "not of the thing being what it was represented."

The cases bearing on this point are numberless, and far from consistent. The language is not uniform, even when the same end is reached. Distinctions most astutely drawn and practically unimportant serve as impediments rather than as lights in search of just conclusions.

It makes no difference to appellant whether the advertisement contained a condition precedent or an implied warranty.—Bannerman v. White, 100 E. C. L., 850; or whether the description not being complete was a breach of contract or a non-compliance with it.—Chanter v. Hopkins, 4 M. & W., 404.

We have cited cases involving the right to rescind executed contracts, and to enforce the performance of those executory merely. The case before the Court is substantially a complaint for specific performance. On what principle does the Court proceed in this respect? We will not refer to cases, but to Mr. Kerr's statement of them, beginning at page 357. In such cases, "the principles of ethics have a more extensive sway than where a contract is sought to be rescinded. The Court is not bound to decree specific performance in every case where it will not set aside a contract, or to set aside every contract that it will not specifically perform. Misrepresentation of a material fact, although innocently made, will be a bar to the application. An agreement effected by misrepresentation is incapable of being the subject of the interference of a Court of equity in order to compel its specific performance. If a prospectus be issued containing material representations, and a person accepts shares on their faith, the party making them cannot, if they prove untrue, compel performance, although he believed what he stated to be true." This is enough to indicate the point. We resist a decree to force this bond upon us.

Upon the law, we insist that appellant was entitled to the fifth, sixth, seventh and eighth instructions prayed.

The ninth, tenth, eleventh and twelfth instructions asked will be considered together.

The Sheriff is agent of the parties to the execution—Towles v. Turner, 3 Hill, 180; Massey v. Thompson, 2 N. & McC., 108.

In Cornfoot v. Fouke, (6 M. & W., 385,) it was held by Rolfe, Parke and Alderson, BB., Lord Abinger dissenting, that material

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*representations made by an agent respecting property which he honestly believed to be true, though false in fact and to the knowledge of the principal, did not prevent recovery by the principal on a contract upon a plea of fraud and covin. Mr. Kerr (p. 113) says that case has caused much comment, and had been explained by Lord Cranworth (one of the Barons.) When cited in Barwick v. England, &c., Bank L. R., (2 Ex., 261,) Judge Willes said he would be sorry to have it supposed that Cornfoot v. Fouke turned upon anything but a point of pleading. That Lord St. Leonards said he would hold that, although the representation was not fraudulent, the agent not knowing it was false, yet that as it was in fact false, and false to the knowledge of the principal, the contract was vitiated. That Lord Campbell had said Westminster Hall was in favor of Lord Abinger. The case of Fitzsimmons v. Joslin, (21 Vt., 129,) pronounces Cornfoot v. Fouke to be bad law. So Lord Abinger is sustained in saying, "nothing is more certain than that the concealment or misrepresentation, whether by principal or agent, by design or by mistake, of a material fact, however innocently made, avoids the contract on the ground of a legal fraud. * * * I own that it never occurred to me to doubt, upon principle or upon the authority of decided cases, that the knowledge of the principal was the knowledge of the agent, and the knowledge of the agent the knowledge of the principal."

Gross negligence is treated as the equivalent of actual fraud. That the execution defendant was grossly negligent in omitting the credit on the bond before he suffered it to pass from his possession into market, is not a matter of argument but of statement only. It not merely tended to mislead; it actually misled; and if the verdict stands, just to its full extent does he derive a benefit, and through it his brother gets a large payment on the debt, which, if the fact had been known, he never could have realized. Does a Sheriff's sale sanctify such an end?

But it is said the execution plaintiff is innocent. So he may have been up to the time of sale; so he was not when the action was brought, nor has he been at any time since. He may press his brother as harshly as he may find will to do, and collect his debt out of that brother's property; as to that we have naught to say. We do object that through that brother's wrong his debt shall be paid by the appellant, the innocent victim of that wrong.

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*A party cannot avail himself of an advantage that has been obtained through the misrepresentation or other wrong of a third person, although such third person is not his agent.—Hunt v. Moore, 2 Barr., 105; Fitzsimmons v. Joslin, (supra.) "Indeed, the doctrine has been thus broadly stated, that where once a fraud has been committed, not only is the person who committed the fraud precluded from deriving any benefit from it, but every innocent person is so likewise, unless he has innocently acquired a subsequent

interest: for a third person, by seeking to derive any benefit from such a transaction, or to retain any benefit resulting therefrom, becomes particeps criminis, however innocent in the beginning."—Perry on Trusts, § 172, referring to numerous cases, English and American.

In Towles v. Turner, Johnston, C., said: "It is a maxim that no one shall be permitted to take a benefit under a contract infected with fraud, although the fraud be that of a third person."

"Fraud may consist as well in the suppression of what is true as in the representation of what is false."—Chambre, J., in Tapp v. Lee, 3 B. P., 371.

The general rule certainly is that mere silence, where there is no confidential relation, is not equivalent to a positive affirmation; but there are cases where silence would be a fraud, even though no relation of trust existed.—Perry, § 179. We find as to the facts no precedent for a case like this; it is unique. But here there was more than silence; there was an act grossly negligent in sending forth this article upon the market misleading on its face.

The obligor must have known of the levy and sale; he did know or ought to have known the purchaser would be under a mistake, and not to remove that mistake was equivalent to an express misrepresentation.—Id. And of that mistake advantage is sought by this action. Again, we ask, Is the Sheriff's office to become the sanctuary of injustice?

After diligent search, we have failed to find, as we have said, any case in its facts and circumstances closely resembling this; hence, we have sought to ascertain what is the rule, caveat emptor, with its qualifications and limits, and, if possible, a fixed principle upon which the defense may be founded. We conclude:

That whilst in this State upon the sale of all other ascertained specific chattels there is an implied warranty of soundness, yet as to unnegotiable securities there is not, but that as to those the maxim caveat emptor applies.

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*That still as to them there is upon their sale an implied term that they are what their appearance indicate.

That those appearances, if they are calculated to deceive, vitiate the contract of sale if they are the result of an act or omission on the vendor's part, even though such act or omission be not attributable to a wrong motive.

That at the root of the maxim caveat emptor is the supposition that the quality (character) of the article sold is within the reach of the vendee's observation and judgment.

That fides servanda is a rule equally enforced at law and in equity, and it requires the vendor to communicate those particulars and defects which cannot be supposed to be immediately within the reach of the vendee's attention.—2 Kent, 485.

That this last rule is without exception in the case of a sale by a grower or manufacturer of the article sold; the vendor of a bond taken by himself falling within the principle. —Jones v. Just, (L. R., 3 Q. B., 202.)

That mistake is good ground for relief from a contract executed, and a valid excuse even for non-compliance with one executory merely.

That the maxim caveat emptor does not apply to an executory contract.

That the maxim is one and indivisible, applying alike to all sales, (when it applies at all,) whether private or official, and its qualifications and limits are alike in all.

That a Sheriff's advertisement is a substantive part of his contract of sale, and, therefore, a warranty of the particulars of description it contains of the articles sold.

That if the article, as described, differs from that offered for delivery in character and condition, the contract of sale cannot be enforced.

That the knowledge of the principal is the knowledge of the agent, and the contract of the latter the contract of the former. If the principal cannot enforce it, the agent cannot.

That gross negligence is equal to positive misrepresentation.

That concealment which in a given case must mislead creates a delusion which a vendor must remove or lose any advantage gained.

That third parties can take nothing under a contract vitiated with fraud when their situation remains unaltered.

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*Finally, without specifying other and minor conclusions, the law was misapplied on the trial, and appellant's motion should be granted.

McIver, contra:

The terms of the bond showed the payment of the $800, or at least were sufficient to put appellant upon the inquiry. He made no such inquiry. In fact, he semed to be indifferent as to the credits. He made no inquiry as to solvency of obligor. If he had, would have found that he was insolvent. Defendant got all that he could have got—the land. He was not defrauded, for the land included in the mortgage given to secure the payment of the bond was, according to the testimony, worth his first bid.

The proposition that the rule of caveat emptor applies to sales by the Sheriff is too well established to be now shaken or modified, as sought in the appellant's exceptions, 2, 3, 5, 6–12, and that without proof of actual fraud, which in this case was distinctly disavowed. No representations made at such a sale will constitute a defense in an action against the purchaser.—Thayer v. Sheriff of Charleston, 2 Bay, 169; Davis v. Murray, 2

M. Con. Rep., 143; Yates v. Bond, 2 McC., 382; Davis v. Hunt, 2 Bail., 418; Minter v. Dent, 3 Rich., 205; Moore v. Aiken, 2 Hill, 403; Towles v. Turner, 3 Hill, 178; Perry v. Williams, Dud., 44; Jones & Hughson v. Burr, 5 Strob., 147; Kilgore v. Peden & Johnson, 1 Strob., 18; Wingo v. Brown, 14 Rich., 103.

The appellant's last exception raises the question as to whether Edwards was ever fixed with the character of emptor. We reply that, for the purposes of this action, the Act of 1839 invests him with that character.—§ 58 of Act of 1839, 11 Stat., 54-5; Chap. 95, § 10, Rev. Stat., 473; Moore v. Aiken, 2 Hill, 403; Towles v. Turner, 3 Hill, 178.

In this connection the cases of Herbemont v. Sharp (2 McC., 264.) and Lewis v. Brown (4 Strob., 293,) were commented on for the purpose of showing that they furnish no authority against his position.

May 8, 1876. The opinion of the Court was delivered by

MOSES, C. J. The argument for the motion proceeds upon the assumption that the advertisement of the Sheriff and his reference

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*to it at the time of the sale, not only implied that the whole sum expressed in the condition of the bond was due, but amounted to a positive representation that no portion of it had been paid. We do not concur in this conclusion. The condition stipulated for the payment of "eight hundred dollars at the signing and sealing of this bond." The instrument is found in the hands of the obligee, and a compliance with the condition on the performance of which his acceptance depended was properly inferable from his possession of the bond. It was at least enough to move the purchaser to inquiry, and he cannot complain if, with an intimation which was sufficient to induce further investigation, he refrained from making it. The same inference would not follow in regard to the installments due at the time of the sale. The delivery raised no implication as to their payment. The satisfaction of these was not a condition precedent to its delivery. They became payable after and by force of it, and not, like the eight hundred dollars, "at the signing and delivery."

But conceding that the appellant is not affected with notice of payment, and is right in supposing, as he contends, that the said sum is included in the condition as an unpaid portion due on the day of sale, he cannot prevail in his motion. The rule of caveat emptor has been too long applied in this State to sales by a Sheriff to be now questioned. In view of this well-recognized principle, his counsel claims that while it does extend to Sheriffs' sales it is only so far as the title and quality of the property are concerned, and that it cannot embrace the sale of a bond, whose "quality" must be limited to the solvency or insolvency of the obligor, without regard to the amount due upon it. The properties which belong or are incident to the article or commodity are component parts of its quality. They are of the elements which are necessary to its composition as a whole. The very idea of a bond implies a sum due, which is a "quality" as essential as "the solvency or insolvency of the obligor." What is there in the form or character of such an instrument which should subject it to a principle different from that which is applied to other articles, which may be of a kind and character altogether dissimilar from that which their appearance indicates? If one should purchase at Sheriff's sale a bond conditioned to pay a certain sum, and should afterwards ascertain that he would be restricted in his recovery against the obligor to

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an *amount far below it by reason of a want of consideration as to the whole, or some other legal objection availing against it, would it constitute a sufficient defense in a suit by the Sheriff against the bidder for the full amount at which the bond was knocked off? The rule contended for in the argument for the motion seeks support in the proposition which it submits "that at a Sheriff's sale there is an implied understanding that the articles are what their appearance indicates and that they are not disguised so as to appear what they are not." If an article was disguised so as to represent something of a greater value for the purpose of inducing a higher bid even at a Sheriff's sale this would amount to fraud, and any actual fraud would affect it to the same extent as if perpetrated at a sale between private parties. On the same principle, fraudulent representations by the defendant are held to vitiate a sale by a Sheriff.

Nor is there better foundation for the proposition of the appellant which interposes on his behalf the ground of mutual mistake. That doctrine, which is recognized as well in the Courts of law as of equity, in cases where is can be properly applied, has never been extended to sales by Sheriffs. The reasons to which it owes its origin are inconsistent with those which result in the principle of caveat emptor.

The appellant's last exception raises the question whether he was ever fixed with the character of emptor. It is not material here to inquire whether there was in fact any sale, the purchase money not having been paid, nor to consider whether the contract was executed or executory. In this connection it may be enough to say that it has been held in more than one case that a Sheriff is not bound to resell before he can maintain his action for the price agreed upon against a purchaser refusing to comply.—Moore v. Akin, 2 Hill, 403; Elfe v. Gadsden, 1 Strob., 225. It is true that where the sale is complete by the delivery of the article sold the

Sheriff cannot afterwards seize and resell because the price has not been paid.—Cochran v. Roundtree, 3 Strob., 217. His remedy there would be confined to an action for the purchase money. The right of the Sheriff to resell is by virtue of a statutory provision, which would fail to accomplish the very purpose it proposed if the defense here contended for could prevail, as is said by Judge Wardlaw in the case last above cited: "The power

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to enforce the *compliance of the purchaser with the terms of sale by reselling at his risk, which the statute gives to a Sheriff, is not a power to rescind an executed contract, but a summary means of ascertaining the damages which have resulted from non-performance of an executory one."

The course to be pursued by a Sheriff in the event of the non-compliance of the last bidder is directed by the 10th Section of the 55th Chapter of the General Statutes, 473. The liability, fixed by the Act, does not necessarily proceed upon the fact that a perfect and complete sale has been made, but follows from the non-compliance of the bid. It is that which gives the right to resell and the action to the Sheriff for any difference between the bids. It is because the sale has failed by the action of the last bidder to effect the object it was intended to accomplish, and to insure certainty in Sheriffs' sales, that this requisition of the statute has been interposed. The Act impressed upon the purchaser refusing to comply with the terms of sale the character of "emptor" for all the purposes and ends that it contemplates, and provides a mode for making him responsible for his bid at the first sale by requiring him to make it good by a liability to a resale at his risk. The whole design of the statute would fail if the defaulting bidder could claim exemption from the provisions on the ground that, as he had not paid his bid, he was no purchaser and therefore exempt from its operation. The statute itself designates him in terms "the purchaser."

The motion is dismissed.

WRIGHT, A. J., and WILLARD, A. J., concurred.

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8 S. C. *22

*CLARK v. PORCELAIN MANUFACTURING COMPANY.

(Columbia, April Term, 1876.)

[*Appeal and Error* ⇐770.]

When the court allows the submission of a case upon brief and printed argument, if an argument is not filed within the time fixed by the order the Court will render its decision without it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3104; Dec. Dig. ⇐770.

[*Corporations* ⇐507; *Judgment* ⇐138.]

A motion to set aside a judgment by default against a corporation, on the ground that the summons was addressed to the President and General Agent of the corporation, and stated that, on failure to answer, "judgment will be taken against you," refused, it appearing that the summons was properly entitled, that the complaint annexed to the summons, and which, with the summons, was served on the President, was regular and in proper form, and that the President knew, when served with the summons and complaint, that the action was against the corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1971; Dec. Dig. ⇐507; Judgment, Cent. Dig. § 250; Dec. Dig. ⇐138.]

[*Corporations* ⇐522; *Judgment* ⇐153.]

A motion made after the lapse of four years to set aside a judgment by default against a corporation, on the grounds that the officers who contracted the debt had no authority to contract it or to draw or accept the draft which was the subject matter of the action, and that the omission to defend the action was caused by accident and the neglect of the President of the corporation, refused.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2109; Dec. Dig. ⇐522; Judgment, Cent. Dig. § 300; Dec. Dig. ⇐153.]

[This case is also cited in Ex parte Carroll, 17 S. C. 446, and distinguished therefrom, and in Crocker v. Allen, 34 S. C. 461, 13 S. E. 650, 27 Am. St. Rep. 831, as to the proper mode of proceeding to set aside judgment.]

Before Carpenter, J., at Edgefield, July, 1875.

Motion to set aside a judgment by default, entered by J. M. Clark & Sons against the Southern Porcelain Manufacturing Company, on March 18, 1871.

The case is as follows:

The action of J. M. Clark & Sons was commenced by summons' with complaint annexed, on the 3d of February, 1871. It was served on James Hope, President, and George Schaub, General Agent of the company, on the 8th and 9th of February, 1871.

The title of the summons was "John M. Clark, Amos K. Clark and John W. Clark, partners in trade, under the name and style of J. M. Clark & Sons, plaintiffs," v. "The Southern Porcelain Manufacturing Company defendants." It was addressed to "James Hope, President, and George Schaub, General Agent of the Southern Porcelain Manufacturing Company, defendants in this action," and its conclusion was as follows:

"If you fail to answer this complaint within the time aforesaid, [twenty days] the plaintiffs will take judgment against you for the sum of $5,090.64, with interest at the rate of seven per cent. per annum from the third day of February, 1871, and costs."

The complaint, which was properly entitled, was as follows:

The complaint of the above named plaintiffs respectfully shows to this Court that the defendants, by G. Schaub, General Agent, and R. B. Bullock, President of the Southern

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Porcelain Manufac*turing Company, on the eighth day of January, one thousand eight hundred and sixty-eight, at Augusta, State of Georgia, made their certain draft in writ-

ing whereby they promised to pay, three months after date thereof, to J. M. Clark & Sons, plaintiffs, the sum of $4,254.56, and the said payee thereof endorsed the said draft to J. M. Clark & Sons, the plaintiffs; and they believe that when the said note became due and payable it was duly presented for payment to the said George Schaub, General Agent, and R. B. Bullock, President of said Southern Porcelain Manufacturing Company, at their office for payment, and payment thereof was duly demanded, but the same was not paid but was protested, and that due notice thereof was given to the defendants at their office.

And the plaintiffs further saith that they are now the lawful owners and holders of the said draft, and that the defendants are indebted to them thereupon in the sum of $5,090.64 principal, together with interest.

Wherefore the plaintiffs demand judgment against the said company, defendants, for the said principal sum and interest, and protest.

The following is a copy of the draft mentioned in the complaint, with the endorsements thereon:

Augusta, Ga., January 8, 1868, [Stamps.] $4,254.56.

[STAMPS.] Three months after date, pay to the order of J. M. Clark & Sons, $4,254.56, value received, and charge the same to account of G. Schaub, General Agent Southern Porcelain Manufacturing Company.

To Colonel R. B. Bullock, President Southern Porcelain Manufacturing Company, Augusta, Ga.

Endorsed on the face:

"Accepted. R. B. Bullock,
"President Southern Porcelain Manufacturing Company."

"Note protested for non-payment April 11, 1868. Adam C. Jones,
"Notary Public.

"Fee and Stamps, $3.25."

Endorsed on back:

"John M. Clark & Sons. Pay G. M. Thew, Cashier, or order."

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*Credited by proceeds of sale of clay 150 casks, January 29, 1869.....	$117 59
Credited by proceeds of sale of clay, 10 casks, August 22, 1870.....	29 58
	$148 17
Interest computed	17 42
	$165 59

On March 2, 1875, the defendants served notice on plaintiffs' attorney of a motion to vacate and set aside the judgment on the following grounds:

1. That in this action the only summons ever issued or served was not directed to the defendants, the Southern Porcelain Manufacturing Company, and did not require the said company (the defendants) to answer the complaint of the said plaintiffs and serve a copy of their (said defendants) answer as provided by law, but was directed to James Hope, President, and George Schaub, General Agent of said company, and required them (said Hope, President, and George Schaub, General Agent,) to answer said complaint and serve a copy of their answer to the same.

2. That R. B. Bullock, late President, and George Schaub, General Agent of said company, had not, nor had either of them, any authority to contract on behalf of the said company the debt sued for in this action.

3. That if the said R. B. Bullock, late president, and George Schaub, General Agent of said company, were ever authorized, on behalf of the said company, to contract the aforesaid debt to the said plaintiff, yet they were not, nor was either of them, ever authorized to secure such debt to the said plaintiffs by a draft drawn or accepted on behalf of said company.

4. That the omission of the said company to defend the action in this case against them was caused by accident and mistake on the part of their President, James Hope.

The motion was founded on copies of the summons and complaint and the following affidavits:

The undersigned, James Hope, being first duly sworn, deposes that he is the President of the Southern Porcelain Manufacturing Company, a body corporate under the law of

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the said State, and *having its place and seat of business within the portion of the said County of Aiken formerly comprised within and parcel of the County of Edgefield, in the said State; that during the month of February, A. D. 1871, seven several suits were instituted in the Court of Common Pleas for the said County of Edgefield against the said corporation the Southern Porcelain Manufacturing Company; that this deponent, after conferring with divers of the stockholders, and after advising with legal counsel, became fully convinced that there were valid and sufficient grounds of defense to each and all of the said several actions against the said company, and that thereupon this deponent determined that the copies of the summons and complaints in the said actions served upon this deponent as President of the said company should be forwarded to J. P. Carroll, Esq., a member of the bar in the said State, to appear to and defend the said actions on behalf of the said company as their attorney at law, and for that purpose the said copy summons and complaints in all the said several actions, as this deponent supposed and believed, were delivered by him to the Hon. Charles J. Jenkins, one of the stockholders in said company, to be forwarded by him to the said J.

P. Carroll, at his residence, in Columbia, in the said State; that among the actions brought as aforesaid against the said company was one at the suit of John M. Clark, Amos K. Clark and John W. Clark, partners in trade, under the name and style of J. M. Clark & Sons; that the summons and complaint in the action at the suit of J. M. Clark & Sons were served upon this deponent some ten days or more prior to the service upon him of the summons and complaints in the other actions against the said company, and thereby, as this deponent believes, became separated from the copy summons and complaints in the other actions against said company served upon this deponent; that through this deponent's oversight and mistake (thus caused as he believes) the copy summons and complaint served upon him in the action aforesaid, at the suit of J. M. Clark & Son, were not delivered to the said C. J. Jenkins nor forwarded by him to the said J. P. Carroll; that by reason thereof the said J. P. Carroll made no defense on behalf of the said company to the said action at the suit of J. M. Clark & Sons, and judgment by default therein was recovered by them in the Court of Common Pleas for the said County of Edgefield on the 1st day of March, A. D. 1871, against the said company, for the sum of $4,955.90, besides costs of suit; that this deponent was

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*wholly unaware that said judgment had been recovered against the said company by the said J. M. Clark & Sons until very recently, when the Sheriff of Aiken County, aforesaid, proceeded to levy upon the property of said company and advertise the same for sale, under the execution issued to enforce the said judgment; and this deponent believes that the stockholders of the said company were in like ignorance with himself as to the recovery of the said judgment, except perhaps one of them, Dr. George Schaub, the drawer of the draft hereinafter mentioned.

This deponent further says: That the draft upon which is founded the action at the suit of J. M. Clark & Sons against the said company was drawn upon R. B. Bullock, then President of the said company, by George Schaub, it General Agent, not under any authority, real or supposed, conferred upon him (Schaub) by said company, but at the instance and by the direction of said Bullock alone, as this deponent is informed and believes; that said Bullock was wholly unauthorized to accept or cause to be drawn such draft for or on behalf of said company; that at the last meeting of the stockholders of said company, with a lawful quorum, prior to January, 1868, to wit, on the 10th September, 1866, the said stockholders made an assessment of fifty per cent. upon their capital stock in order to raise the sum of $50,000 to be lent and advanced to the said company for the express purpose of satisfying all its indebtedness, and to furnish a working cash capital of $7,000 to meet current expenses in carrying on the operations of said company in the digging, manufacturing and sale of their clay; that the original book of minutes containing the proceedings referred to of the said stockholders has been lost or mislaid, and this deponent refers to a copy of the resolutions adopted by them on 10th September, 1866, to be found at pages 32 and 33 of the appeal brief in the case of the said company v. George M. Thew, Cashier of the National Bank of Augusta, of which brief a copy is already in the possession of J. L. Addison, the attorney of said J. M. Clark & Sons, as this deponent is informed and believes; and this deponent also says that he is advised by the said attorney of the said company, after being fully informed of all the material facts involved, that the said company have a fair, valid and effectual defense to the demand and claim of the said J. M. Clark & Sons, upon which their said judgment has been recovered: and that very recently this deponent has found among his

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papers the copy sum*mons and complaint served upon him in the aforesaid action at the suit of J. M. Clark & Sons, and copies of the same are hereto annexed.

And this deponent further says that the said R. B. Bullock was never in anywise authorized by the said company to contract on their behalf the debt secured by the said draft, and that the absence of all authority on the part of the said Bullock to contract such debt on behalf of said company is shown by the proceedings of the stockholders of the same on the 10th September, 1866, hereinabove mentioned and now again referred to.

The resolutions to which Mr. Hope refers in his affidavit are as follows:

"1. That an assessment of fifty (50) per cent. upon the capital stock of the company, as recommended by the President, be made, with the proviso that the amount paid by each stockholder be credited to him on the books of the company as a loan, with interest at two (2) per cent. per month; the said amount, principal and interest, to be secured by a resolution of the stockholders, pledging the property and profits of the concern for its payment; the entire net earnings of the works to be expended in liquidation of this debt before declaration of any dividend upon the original stock.

"2. That the shareholders be requested to notify the President of their acceptance of the terms proposed, and that he be authorized to take their notes at ninety days, without interest, bearing date October 1st, 1866.

"3. That if the shareholders do not respond to the above call by the 1st of October next, the President be, and is hereby, authorized to sell the property and works of the company to pay the debts of the concern;

and any balance arising from such sale, over and above the amount of said debts, be divided pro rata among the stockholders."

Affidavit of J. P. Carroll.

"The undersigned, J. P. Carroll, being first duly sworn, deposes: That in or about the month of February, 1871, the copy summons and complaints in six several actions brought against the Southern Porcelain Manufacturing Company, a body corporate under the

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*laws of this State, were sent to this deponent by express, with instructions to defend the said actions on behalf of said company; that the said papers were sent to this deponent by the Hon. Charles J. Jenkins, a stockholder in the said company; that this deponent, after examining into the said actions and the causes of the same, became fully satisfied that to each of them there were good and valid grounds of defense; that about the time of the commencement of the said actions another suit was also brought against the company—that is to say, the action at the suit of J. M. Clark & Sons, referred to in the affidavit of James Hope hereto annexed; that the grounds of defense to the other said actions are all of them applicable to the said action of J. M. Clark & Sons; and that, upon reference to the proceedings of said company, mentioned in the affidavit of James Hope aforesaid, this deponent is fully convinced that R. B. Bullock, then President of the said company, had no right to contract on behalf of the said company the debt which is set up against them by the said J. M. Clark & Sons, or to accept or cause to be drawn the draft by which said debt is evidenced, and a copy of which is endorsed upon the complaint in the said action at the suit of J. M. Clark & Sons; and that this deponent is informed by the General Agent of the said company, George Schaub, that he drew the said draft at the mere direction of the said R. B. Bullock and without any authority whatever to do so conferred upon him by the said company.

"And this deponent further says that at the request of the said George Schaub he addressed a letter to J. L. Addison, Esq., the attorney of J. M. Clark & Sons, asking on behalf of the stockholders of said company some forbearance on the part of J. M. Clark & Sons in the enforcement of their said judgment, and that when said letter was written this deponent was wholly unaware of the circumstances under which said judgment had been recovered, or of the grounds of defense to the demand upon which the same is founded."

A second affidavit of James Hope was also submitted; it is as follows:

James Hope, being first duly sworn, deposes that he is now the President of the said company and the successor in office of the former President, Rufus B. Bullock; that

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the indebtedness evi*denced by the draft upon which this action was brought arose out of certain transactions between the said plaintiffs and the said R. B. Bullock, then the President, and George Schaub, the General Agent of said company, the defendants; that this deponent had no personal knowledge whatever of these transactions, and all his information touching the same was derived from the said George Schaub; that when this deponent was served with process in this action he was informed and assured by the said George Schaub that the demand or claim of said plaintiffs against said company was fair, just and valid and could not be successfully opposed; that confiding in such information and assurance this deponent at first had determined to enter no appearance and make no defense to this action, and this deponent admits that he may have said so, and probably did say so, when conversing upon the subject with other persons. But this deponent further says that afterwards, and within a few days after the commencement of this action, he consulted with the Hon. Charles J. Jenkins, one of the stockholders of the said company, and had a full and free conference with him as to the plaintiffs' said demand, and as to other like demands upon which actions about the same time had been brought against the said company, and that this deponent was advised by the said C. J. Jenkins that the said demand of the plaintiffs and the other like demands sued upon about the same time were none of them legal or valid against the said company for want of authority on the part of the said R. B. Bullock, President, and George Schaub, General Agent, as aforesaid, or either of them, to contract such debts on behalf of the said company; and, thereupon, this deponent, with the concurrence and cooperation of the said C. J. Jenkins, determined that appearances should be entered and defenses made in each and all of the said several actions, and for that purpose that J. P. Carroll, a member of the bar of the said State, should be retained on behalf of the said company.

The motion was resisted on the following affidavits, submitted on behalf of plaintiffs:

Affidavit of John M. Clark, One of the Plaintiffs.

"Personally came before me John M. Clark, one of the partners in trade under the name and style of John M. Clark & Sons, who, upon being duly sworn, says that the

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Southern Porcelain Manufacturing *Company—being indebted to the firm of John M. Clark & Sons, the plaintiffs, for provisions furnished the hands working at the works of the Southern Porcelain Manufacturing Company, in Edgefield County, on the 8th day of January, A. D. 1868, purchased by Dr. G. Schaub, the Superintendent and General

Agent of said company, for the sum of $4,254.56,—made their note at Augusta, Georgia, January 8th, 1868, payable to J. M. Clark & Sons, three months after the date thereof, for the sum of $4,254.56, value received, and signed G. Schaub, General Agent Southern Porcelain Manufacturing Company, endorsed and accepted across the face by, and signed by, R. B. Bullock, President Southern Porcelain Manufacturing Company.

"And this deponent further swears that several drafts had been drawn, like the one above set forth, by G. R. Schaub, General Agent Southern Porcelain Manufacturing Company, and endorsed by R. B. Bullock, President of said company, previous to the time this was drawn, for provisions advanced to and for the use of said company, and all had been paid except this one, and before commencement of this suit.

"And this deponent further swears that said note being due and owing on the first day of January, 1871, this deponent placed the draft above mentioned for $4,254.56 in the hands of J. L. Addison, attorney at law, at Edgefield Court House for collection, with instructions to sue the note at once, which this deponent was informed was done; that shortly thereafter this deponent was informed by James Hope, then President of the said Southern Porcelain Manufacturing Company, that he had been served with the complaint and summons in this action and was not going to set up any defense to said cause of action; that the debt was justly due and should be paid first. That several conversations were had between James Hope, President of said company, and this deponent in the first part of the year 1871, in February and March; that James Hope asked this deponent to give him every assistance he could to have set aside the judgment the National Bank of Augusta, Georgia, held against the Southern Porcelain Company, which this deponent promised to do, and did do; that this deponent was informed, about March 1st, 1871, by the attorney of said John M. Clark & Sons, that no defense had been made and judgment had been obtained by default; that this deponent informed more than one of the Directors that judgment had been obtained,

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and this *deponent is satisfied most of the stockholders of the said company knew of said judgment, and expressed themselves satisfied that John M. Clark & Sons had taken steps to secure their debt for the provisions so advanced to said company, and desired that as soon as the debt of the National Bank of Augusta, Georgia, should be set aside that the debt of John M. Clark & Sons, the plaintiffs, should be first paid; and this deponent agreed with the officers of said company to wait until the bank debt was cleared up in some way before enforcing the judgment of plaintiffs; that in the month of November, 1874, this deponent was informed by his attorney that the judgment of the bank against said company had been set aside by the Supreme Court of South Carolina. This deponent then instructed his attorney to enforce the collection of said judgment of plaintiffs against defendants, and shortly thereafter the property of the Southern Porcelain Company was advertised to be sold to pay the debt of plaintiffs; that no objection was ever made, from the 1st day of January, 1871, until about the 10th January, 1875, by the President of the Southern Porcelain Manufacturing Company, the General Agent, Directors or stockholders of said company."

Affidavit of J. L. Addison, Plaintiff's Attorney.

J. L. Addison, being duly sworn in this action, deposeth: Says that in 1870 this deponent was retained as counsel in the cause of George M. Thew, Cashier of the National Bank of Augusta, Ga., v. The Southern Porcelain Manufacturing Company. That in January, 1871, this deponent was requested to take two notes which plaintiff held against the defendants. One of the notes, the larger one, is the one upon which this judgment is founded; the smaller note was sued upon, but as the defendants had claimed a discount said cause was discontinued in February, 1871.

And this deponent further deposeth: Says before receiving these two notes for collection this deponent was informed by the officers of said company there would be no defense; and after the complaint and summons was served upon James Hope, the President of the said Southern Porcelain Company, and George Schaub, the General Agent and Superintendent of said company, this deponent had a conversation with both of them in the office of W. H. Addison, at Edgefield Court House, in regard to the said cause of action, and this deponent was then assured by Dr.

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G. Schaub and James *Hope and W. H. Addison, then attorney for said company, that no defense would be set up and that no answer would be filed, as there was no valid defense could be made—that the notes were given for valuable consideration. James Hope did say in said conversation that Clark had not given the company credit for a small amount he ought to have done. This deponent then agreed to discontinue the suit on the small note, which was satisfactory to all parties; that this deponent further agreed to wait until the said James Hope and George Schaub returned to Augusta and to consult with the stockholders about the defense to this action, and did wait several days after the expiration of the usual time for answering before the judgment was entered up; that no answer or demurrer was filed up to the first of March, 1871, and said judgment was entered up regularly at Edgefield Court House. That said complaint, summons, judgment and execution, after being regularly en-

tered, remained in the office at Edgefield until in November, 1874, when all of said papers pertaining to said cause were transferred to Aiken, where they remained until the first of January, 1875, when this deponent was informed by J. P. Carroll, attorney for the defendants, that an application would be made before Judge Carpenter, at Columbia, to vacate and set aside said judgment in this cause. Upon this information, this deponent carried all the papers back to the Clerk's office at Edgefield, and said papers remained in said office until the 23d January, 1875, after this deponent was served with notice to appear at Barnwell C. H. on the 27th inst. That said papers were at Aiken when execution was issued, when levy was made, and were only removed to prepare the defense to said cause now being made. That this deponent requested the Clerk to give the defendants' counsel in this cause copies of all papers if called for, which has been done. That since said judgment was entered in March, 1871, there has never been any complaint made by the officers of said company or stockholders, or Directors, but this deponent has been repeatedly assured that as soon as the bank cause was disposed of this judgment would be paid first, and the first intimation this deponent ever had any attempt would be made to set aside was in this month. That no longer than the 14th December, 1874, the attorney for said company assured this deponent that said judgment would be paid within sixty days, or by the 1st of February, 1875. Upon this assurance the sale of the property of the Southern Porcelain Company was postponed. That

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this deponent *never has heard of any objections being made either by any of the stockholders, Directors or Agent, or President of said company from March, 1871, until 1st January, 1875, and believes they all knew of it; that the attempt now made is only to delay the collection of said debt; that there is not now, nor never has been, any valid defense to said note; that said debt was made by President Bullock, as this deponent is informed and believes, sued upon and judgment obtained regularly, and more than two years has expired since the judgment was entered up and no effort ever has been made to vacate or set the same aside by the officers of said company; that James Hope and George Schaub, who have been the only officers of the company since 1871, have known of the existence of said judgment since March, 1871, and H. W. Addison, one of the attorneys for said company, knew of the existence of said judgment; and this deponent believes J. P. Carroll, attorney for said company, knew of said judgment, and in many instances since 1871, in March some, the stockholders have promised if the bank judgment was set aside the plaintiffs should be paid at once, and this was the cause said judgment was not enforced before this time.

Affidavit of H. W. Addison.

H. W. Addison, being duly sworn, says on oath that early in the year 1871 James Hope, then President of the Southern Porcelain Manufacturing Company, came to him saying that said company had been sued in five or six cases, to wit: by Clark & Sons, by Mahony, by McArle, by Clark, trustee, and by Gardner Foster; that either there was no defense or that he knew of no defense against the claim of Clark & Sons; that he believed the claim just and desired no defense to be made; that, as to the others, he desired and requested that deponent should enter defense and have the claims sifted as he knew nothing of the consideration, and would, upon his return to Augusta, Ga., get all the facts necessary for deponent's putting in the answer. The deponent further says that he believes that the said James Hope exhibited the summons and complaint in each case at the time; that deponent suggested to the said James Hope that it would be well to join Chancellor Carroll with him in the defense as he had already been employed to assist J. L. Addison and himself in setting aside the confession of judgment against the Southern Porcelain Manufacturing Company

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in favor of *the National Bank of Augusta; to this Hope assented. Deponent then told him to get up the defense to each case as early as possible and send the complaints and facts of defense either to deponent or Chancellor Carroll. The deponent thinks that he obtained two extensions of time from J. L. Addison, the opposing counsel, to put in the answers in the name of himself and Chancellor Carroll—it may have been in the name of Chancellor Carroll and himself in consequence of not getting the facts from Mr. Hope; thinks he wrote Mr. Hope to send facts and complaints to Chancellor Carroll, at Columbia,—at least he insisted upon Chancellor Carroll's drawing the answer, not only on account of his ability but also from the fact that his brother, J. L. Addison, was the opposing counsel; that the claim of Clark & Sons, of course, passed into judgment, that of the almost multitudinous consultations with James Hope since that time in connection with the cases above named, i. e., those where defense was set up, and also the case of the bank above mentioned against the said company, he (Hope) never intimated in any manner that there ever existed any defense to the claim of J. M. Clark & Sons, or that any effort would be made to attack said judgment, but left the impression upon him at the time he was retained in the other cases that he desired John M. Clark & Sons paid; that he thinks it was some time during the past year that he heard for the first time of an attempt to upset the judgment of John M. Clark & Sons. Deponent knows nothing of the consideration of the claim of Clark & Sons.

The order of His Honor is as follows:

Carpenter, J. After hearing the motion of defendants to vacate and set aside the judgment recovered and entered in this action, the affidavits submitted in support of and in opposition thereto, and the arguments of Mr. Carroll and Mr. Bacon for defendants, and of Mr. J. L. Addison and Mr. Youmans for plaintiffs, I am of opinion that whatever of technical inaccuracy or irregularity there may be in the plaintiffs' proceedings has been fully cured by the subsequent laches and action of defendants, and, if necessary, would be allowed to be corrected nunc pro tunc; and that as to the merits the grounds of the motion should have been taken by answer. It would require a far stronger case than that made by the facts to induce the Court, after such a lapse of time, and the forbear-

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ance shown by the plain*tiffs to defendants, to vacate a judgment obtained and entered under the circumstances detailed in the affidavits. The plaintiffs furnished provisions, purchased by Schaub, the General Agent of the defendants, at the works of the defendants, at least as far back as January 8th, 1868, on which day the said General Agent gave their draft for the amount at three months to the plaintiffs, on the President of the defendant corporation, which was by said President accepted. Previous drafts drawn by the Agent on the President, for provisions advanced, were paid. This draft has never been paid; and whatever may have been the relative rights or liabilities of the parties to this action, and the drawer and acceptor of the draft, at the outset, on the views presented in favor of defendants, the subsequent action of the defendant corporation has ratified and confirmed the action of their General Agent and President and made it liable for the payment to plaintiffs.

As to whatever may be the rights of defendants against their Agent and President, it would not be, perhaps, pertinent to express an opinion; but it would not be either "stricti juris" or "ex equo et bono" to vacate the judgment. And it is therefore ordered that the motion be refused, with costs, and the plaintiffs be at liberty to enforce their execution, and that the papers and affidavits in regard to the motion, together with the motion and this order, be filed in the office of the Clerk of the Court for Edgefield County.

The defendants appealed.

Carroll, for appellants:

I. The only summons in this action ever issued or served was not directed to the defendants, the Southern Porcelain Manufacturing Company, and did not require the said company to answer the complaint of the said plaintiffs and serve a copy of their (said defendants') answer, as prescribed by law, but was directed to James Hope, President, and George Schaub, General Agent of said company, and required them (said Hope, President, and George Schaub, General Agent,) to answer said complaint and serve a copy of their answer to the same. Wherefore, it results that the said defendants have never been brought within the jurisdiction of the said Court, and that as against them all the proceedings in this action are absolutely null and void.

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*Section 151 of the new Code of Procedure (Rev. Stat., 599,) provides as follows: "The summons shall be subscribed by the plaintiff or his attorney and directed to the defendant and shall require him to answer the complaint and serve a copy of his answer." It is manifest that the summons herein wholly fails to conform to the requirements of the statute, and it follows that no legal summons in this action was served upon the defendants. The legal consequence seems to be indisputable. The Section of our Code of Procedure which has been cited is a literal transcript from the New York statute upon the same subject: "Where the summons in an action is not legally served, the Court has no jurisdiction of the defendant, and all proceedings based on the pretended service are void."—Voorh. A. C., 133, n. c., and 1 Abb. Forms, 99, n. a., citing Bulkely v. Id., 6 Abb., 307. But the authority of decided cases is superfluous here, for our Code of Procedure expounds itself in its subsequent Section 162, Rev. Stat., 603, by the provision that, "from the time of the service of the summons in a civil action, or the allowance of a provisional remedy, the Court is deemed to have acquired jurisdiction and to have control of all the subsequent proceedings."

II. Where the party defendant has neither appeared nor made defense to the action, and no lawful summons has been issued or served upon him, such defect in the proceedings can with no semblance of reason be regarded as a mere "technical inaccuracy or irregularity;" is incurable by mere laches or delay on the part of the defendant where the rights of third parties have not intervened, and is incapable of correction or amendment nunc pro tunc or otherwise,—for, under such circumstances, in legal contemplation, the action has no existence whatever.

Section 150 of the Code of Procedure, Rev. Stat., 599, is in these words: "Civil actions in the Courts of record in this State shall be commenced by service of a summons." In this action there was no lawful summons issued or served. Nor is it pretended that such defect in the proceedings has been cured by appearance, or by answer or other pleading on the part of the defendants. Certainly they stand in no worse position than they would had they been served with a different summons from that on which the subsequent proceedings were based. In such a case, Williams v. Lamneau, (4 Strob. L. R. 27,) it was ordered and adjudged that the execution, the judgment and all other pro-

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ceedings be set aside. *"Serving the respondent," says the Court, "with a copy of a different summons did not make him a party to the case." But if the defendants are not parties but strangers to the action, and have never been brought within the power or control of the Court, then by no conceivable amendment can the proceedings in the case already had be made binding and obligatory upon them.

III. No laches or unreasonable delay in assailing the judgment of the plaintiffs can be justly imputed to the defendants, for, if credence be given to the affidavit of James Hope, neither himself nor any of the stockholders of the said company, (except their General Agent, Schaub,) were aware of the existence of the said judgment until, under the execution for its enforcement, the levy was made by the Sheriff in December, 1874.

IV. The motion to set aside the judgment, because no lawful summons was served upon the defendants, is not barred by the lapse of time, though computed from the day of its rendition; and, it is respectfully submitted, may be made as between the parties themselves at any time within five years at least next succeeding that date.

There is no statutory limitation in this State of the time within which motions to set aside judgments may be made. In Mills & Co. v. Dickson & Mills, (6 Rich. L. R., 492,) such motions are said to be competent in all cases where "the writ of error would lie in England, (see Mooney v. Welsh, 1 Mills, 133,) in which case substitution of a motion here, in open Court, in place of the writ of error there, is fully considered and decided, and has been acted upon ever since." To the case of Barnes v. Branch, (3 McCd. L. R., 19,) is appended note (a) which well deserves consideration, and is in the following words: "In Mooney v. Welsh, (1 Mills Const. Rep., 133,) Judge Cheves suggests that five years might be the time after which a motion may not be made, but this rule could only have been suggested in analogy to the Statute of Limitations; and, indeed, as to lands, the Act of 1824 extends it to ten years, and quære whether that time would not be most proper during which these motions may be made." In Hickman v. Armstrong, (1 Brev. R. Pt., 1, vol. 2, 176,) the defendant had been served with process while attending a muster of militia. He made no defense, and judgment by default was entered against him. At the following Court he moved to set aside the whole proceedings, because of the illegal service of the writ. "The objection," says

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the Court, "was *taken in time. It may be made at any time before third persons acquire a right founded on the proceedings against him (the defendant.) As between the parties themselves, the proceedings may be set aside at any time." In the opinion of this Court, filed 9th November, 1874, in the case of Thew, Cashier, v. The Southern Porcelain Manufacturing Company, it is said: "According to the practice existing in this State, it would seem that if a motion to set aside a judgment was made in five years it would not be barred by lapse of time."

V. R. B. Bullock, late President, and George Schaub, General Agent of said company, had not, nor had either of them, any authority to contract, on behalf of the said company, the debt sued for in this action.

VI. If the said R. B. Bullock, late President, and G. Schaub, General Agent of said company, had authority, on behalf of the said company, to contract the aforesaid debt to the said plaintiffs, yet they were not, nor was either of them, authorized to secure such debt to the said plaintiffs by a negotiable draft drawn or accepted on behalf of said company.

(a). The utter absence of such authority is shown conclusively by the proceedings of the stockholders on the 10th September, 1866. In commenting upon these very proceedings this Court, in the case of Thew, Cashier, appellant, v. The Southern Porcelain Manufacturing Company, respondents, (decided in November, 1874,) thus speaks: "The action, too, of the stockholders, in raising the amount to meet the liabilities of the company by an assessment upon themselves, to be secured by a lien upon the property and profits of the concern for its payment, is a clear intimation that they preferred to be themselves creditors of their own company rather than to stand in that position either to their President or others. It is also not without significance in another regard, and that is the apparent intimation by their action of freeing their corporation from debt and so keeping it, and, if they failed to raise the money through themselves, to sell the property and wind up the company."

(b). In Ab. Dig. of the Law of Corporations, 117, citing Lawrence v. Gibbard, (41 Barb., 575,) it is said: "If the power of making and endorsing promissory notes for and in the name of a corporation is not expressly conferred upon its agents by the instrument by which he is appointed, general words at the conclusion thereof, authorizing him to do all

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other acts and things for and in *behalf of the said company that he may deem proper to further and protect its interests, cannot have that effect."—See also Fulton Bank v. New York and S. Canal Company, 4 Paig., 134.

It is further said in the work just cited (Abb. Dig., 9): "One who is proved to have been 'the agent' of a manufacturing corporation is not presumed to have been authorized to make a note on behalf of the company. To render such a note valid, as against the company, the powers of the agent must be shown."—Benedict v. Lanting, 5 Den., 283.

VII. The omission of the said company to

defend the action against them in this case was caused by accident, inadvertence and mistake, or, at least, by "excusable negligence," on the part of their President, James Hope.

Such is the purport of the affidavit of James Hope, and there is no sufficient evidence adduced to disprove it.

VIII. The plaintiffs' supposed forbearance towards the defendants in the enforcement of their judgment resulted solely from the fact of their well knowing that, even if the property of the defendants were permitted to be sold under that judgment, still the said plaintiffs could by no possibility receive actual payment out of the proceeds of such sale until the lien of the prior judgment at the suit of Thew, Cashier of the National Bank, of Augusta, had been removed.

The plaintiffs' supposed forbearance means, therefore, no more than their having refrained from an act vain and nugatory in respect of their own interests—a forbearance enforced upon them by circumstances and in no sense proceeding from their own free will.

IX. The affidavits of the said John M. Clark, adduced on behalf of the plaintiffs, ought not to be considered by the Court because of its having been sworn to before one of his attorneys engaged in this proceeding.

The rule of this Court, numbered 16, declares that "no affidavit will be considered by the Court which has been sworn to before an attorney engaged in the cause or motion or before any party interested therein."

X. The affidavits, on the part of the plaintiffs, furnish no sufficient evidence of any valid ratification or confirmation by the said company, or its stockholders, of the acts of

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the said Bullock and *Schaub in contracting and securing by draft, on behalf of said company, their alleged debt to the plaintiffs, because the statements of those affidavits are vague and indefinite and make no mention of the names of any of the said stockholders to whom such ratification is imputed, save only the name of James Hope, the present President of said company; because it is entirely consistent with those affidavits that the declarations of the unnamed stockholders importing such ratification were founded solely upon partial representations made to them by said John M. Clark, and without full knowledge of all the material facts necessary to an understanding of their rights in that behalf, and because such ratification is directly in conflict with the formal resolutions and the plan of conducting the operations of their said company, adopted by the stockholders deliberately on the 10th September, 1866.

No personal knowledge of the transactions out of which the plaintiffs' alleged debt arose is imputed to the stockholders who are supposed to have ratified and confirmed that debt. Whence did they derive their information respecting it? Most probably from the representations of the plaintiffs themselves, or some one of them; and as to the purport of such representations, we are wholly uninformed.

The stockholders of a corporation may ratify an unauthorized act of its agent or officer, "if they have full knowledge of all the circumstances of the case, but not otherwise."—Ang., 2 Ames, § 304; Abb. Dig., 674; Circuit decision of Judge Wardlaw in Bivingsville Manufacturing Co. v. Bobo, 11 Rich. L. R., 393. In Dabney v. Stevens, (40 N. Y. Pr. R., 350,) the law is thus announced: "It must be shown by the party asserting such ratification that the resolution or acts of the corporation, or of their Directors or Trustees, relied on as constituting the ratification, were performed with a full knowledge of all the material facts necessary to an understanding of their rights. I have been unable," (adds the Judge, who delivered the decision,) "to find a single case in which subsequent ratification has been inferred, without proof that the Board of Directors or Trustees had such knowledge."

No such proof has been adduced in regard to the unnamed stockholders who are alleged to have ratified the acts of their officers, Bullock and Schaub, in contracting on behalf of the defendants the debt set up by the plaintiffs, but if the stockholders referred to

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*were apprised of the material facts necessary to an understanding of their rights, then that they should ratify and confirm the unauthorized debt contracted with the plaintiffs is most strange and well nigh incredible. It would involve this much at least: that though aware of Bullock's having appropriated the "working cash capital of $7,000" furnished him, as also the $56,000 procured from the National Bank of Augusta on the credit of their company, yet they were content to submit to a further spoilation at his hands to the amount of more than five thousand dollars, the sum which the plaintiffs claim to be due them, and while resisting each and every other debt incurred by Bullock after 10th September, 1866, that they, without motive or reason, should carve out a special exception in favor of the plaintiffs' demand.

XI. The affidavit of James Hope adduced by the defendants, though conflicting in some particulars with the affidavits on the part of the plaintiffs, is strongly supported by corroborating circumstances; and it is respectfully submitted that as to the material facts in controversy between the parties, and affecting the validity of the said judgment, the Circuit Judge ought to have directed an issue to be joined and submitted to a jury for trial.

Among the circumstances which corroborate the affidavits of James Hope, are: the

proceedings referred to of the stockholders on the 10th September, 1866; the want of all original authority on the part of Bullock and Schaub, or either of them, to contract on behalf of the company the debt claimed by the plaintiffs; the fact that such want of authority is not denied or questioned by any of the affidavits on the part of the plaintiffs; and the fact that of the seven actions brought against them for debts contracted by Bullock since the 10th September, 1866, the defendants have contested six of them, and upon grounds directly applicable to the seventh, which was the action at the suit of these plaintiffs. In a proceeding like the present, the facts upon which the defendant relies for impeaching the judgment are not required to be established by full and plenary proof. It is sufficient if, by the evidence on the part of the defendant, they are made to appear prima facie or presumptively only. In Robinson v. Stewart, (1 Rich. L. R., 3,) upon a motion for leave to file a suggestion to try whether a confession of judgment was fraudulent or not, Judge Evans, as the organ of the Court, says: "The rule seems to me to

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be that the showing must *be such as to excite a reasonable ground of suspicion." The defendants have had no opportunity to reply to the evidence which has been adduced in opposition to their motion, and respectfully submit that the material facts in controversy should now be put in issue and be determined by a jury.

Youmans, contra:

Defendant being indebted to plaintiffs before January 8, 1868, for provisions furnished, the General Agent of defendant on that day gave his draft as such on the President in accordance with the course of business between the parties in this regard.

The successor of the President, the General Agent and the attorney of defendant all admitted the liability of defendant in the action brought, and informed plaintiffs and their attorney that there was no defense, and none would be made. After judgment and execution, at the request of defendant, and assurances of payment down to as late as December 14, 1874, defendant, on technical grounds, moved to vacate the judgment, and on this being refused, appeals.

The decision of the Circuit Judge, taken in connection with the affidavits, shows conclusively, it is submitted, that the motion should not prevail. As to alleged irregularity in the service, it need only be said that the service was regular.—Code, § 157. As to the irregularity in the direction of the summons, it was a mere irregularity and waived by the default. Defendant was plainly named in the title of the case as the only defendant, and the Court will allow amendment if necessary.—Code, § 196. As to the second and third grounds relied on in support of the motion as matters of fact, they are contradicted. As matters of law, they should have been set up by answer, were waived by default and active and passive acquiescence, and the delay is fatal.—Code, § 197. As to the fourth ground, the facts show that the omission of the company to defend the action was not caused by accident and mistake on the part of the President. The affidavits of Clark, J. L. Addison, attorney of plaintiffs, and H. W. Addison, attorney of defendant, all show that to grant this motion would not be in furtherance of justice (Code, § 197); but would allow defendant, after enjoying for years the indulgence which they craved from plaintiffs, to set up against a new action the Statute of Limitations and thus defeat a claim whose justice has been repeatedly admitted.

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*July 1, 1876. The opinion of the court was delivered by

MOSES, C. J. At November Term, 1875, this case, with leave of the Court, was to be submitted on the brief and argument. The points and authorities on the part of the respondents were not filed until the April session. Hence the delay in the decision. Whenever hereafter the Court allows the submission of a cause, if the printed argument on either side is not presented within the time fixed by the order, it will proceed to render judgment on the brief and papers.

In the case at bar it appears that one Schaub, styling himself, as he was, the General Agent of the Southern Porcelain Manufacturing Company, a corporation chartered by the State and carrying on business within its limits, on January 8, 1868, drew a draft for $4,254.56 on R. B. Bullock, addressed to him as President of the said Company, (which office he then filled,) payable to J. M. Clark & Sons, three months after date, which, on presentment, was duly accepted and afterwards protested for non-payment.

A summons was issued on the said draft, directed to James Hope, President, and George Schaub, General Agent, of the Southern Manufacturing Company, accompanied with a complaint, both dated February 3, 1871, and entitled "John M. Clark, Amos H. Clark and John W. Clark, copartners in trade, under the name and style of J. M. Clark & Sons, plaintiffs, v. The Southern Porcelain Manufacturing Company, defendants," which, on the 8th and 9th of the same month, were personally served on Hope and Schaub. The plaintiffs, in their complaint, set forth the said draft, made by its drawer in his official character, on the said Bullock as such President, its acceptance, non payment and protest, and "demand judgment against the company, defendants, for the said principal sum, interest and protest." The summons, addressed, as already stated, to Hope, President, and Schaub, General Agent of the said company, styling it by name, required them to answer the com-

plaint in the action within twenty days after service, and, on failure, "the plaintiffs will take judgment against you for the sum of $5,090.64, with interest at the rate of seven per centum from the third day of February, 1871, and costs." No notice of appearance having been given or answer filed, judgment by default was entered on 18th of March,

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1871, by the said plaintiffs, against the *said Southern Porcelain Manufacturing Company, for the sum demanded.

On March 2, 1875, notice was served on the respondents that the appellant, on a day named, would move before His Honor Judge Carpenter to set aside the judgment recovered and entered in the action, upon the following grounds:

1. That the only summons ever issued or served was not directed to the defendant, the Southern Porcelain Manufacturing Company, and did not require the said company (the defendants) to answer the complaint of the plaintiffs and serve a copy of their (defendants') answer as provided by law, but was directed to James Hope, President, and George Schaub, General Agent of said company, and required them to answer said complaint and serve a copy of their answer to the same.

2. That Bullock, late President, and Schaub, General Agent of said company, had not, nor had either of them, any authority to contract on behalf of the said company the debt sued for in the action.

3. That if they were even authorized to contract the said debt on behalf of the said company, yet they were not, nor was either of them, ever authorized to secure such debt to the plaintiffs by a draft drawn or accepted on behalf of said company.

4. That the omission of the company to defend the action in the case against them was caused by accident and mistake on the part of their President, James Hope.

After a full hearing, the motion was dismissed by the Judge below, and the argument here has failed to impress us with any error in his conclusion.

The judgment is entered up in proper form against the company, who, it was clear to the President, by the process served upon him, was the party against whom it issued, and of whom a recovery of the amount due on the draft was sought. If there could be any reasonable doubt that the language of the summons and complaint were not sufficient to impart a knowledge of what they proposed, it is removed by the affidavits of the President himself and those of Mr. J. L. Addison and Mr. H. W. Addison, which show beyond question that the President was well advised of the purpose designed by the summons. Both the summons and complaint were served on the person who by the 157th

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Section of the Code is *designated as the proper party to be served "if the suit be against a corporation." There was, then, at least, a formal and proper service, and the question really to be determined on this first ground is whether the want of technical form in the summons amounts to such a legal defect as could not be cured by the name of the company through its President? The summons was properly endorsed in the title of the cause, according to the thirteenth rule of the Circuit Court, and, besides, expressed on the face of it the parties, plaintiffs and defendant, referring by name to the company as defendant. The President, unless there be another head of a corporation, is recognized as the proper person on whom process intended to bring it into Court must be served. If he refrains, after his knowledge of the purpose of the process, to cause his company to be represented, that its defense, if any, may be duly made, the consequences of his neglect must fall upon those who constituted him their agent to act in their behalf.

In his affidavit of March 1, 1875, the President refers to the summons and complaint served upon him as the institution of a suit against the company. In that of the 22d day of the same month he says that, although he had no personal knowledge of the transactions between the plaintiffs and the said Bullock, President of the company, which resulted in the indebtedness evidenced by the draft, when he was served with the process, he was informed by Schaub that the claim was valid and could not be successfully opposed, on which he determined not to appear and make defense for the company; that afterwards he concluded to defend and employ Mr. Carroll as counsel for the company. His first affidavit alleges that by some oversight or neglect the papers in this case were not sent to his attorney, with process served in other causes against the company at the same time, and thus the default in appearance and answer occurred. Mr. J. L. Addison, in his affidavit of June 26, 1875, says that the draft and another paper of the said company, being in his hands for collection, before suit he was informed by its officers there would be no defense, and, after service of the summons and complaint, in a conversation with Mr. Hope, the President, Mr. Schaub, the General Agent and Superintendent, in regard to the case, he was assured by them, and also by Mr. H. W. Addison, the attorney for the company, that no answer would be filed, as no valid defense could be

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made, and that the *notes were given for a valuable consideration; that since the judgment he has been repeatedly assured by the officers of the company that the debt would be first paid after a certain cause of the National Bank of Augusta against the company was disposed of, and that as late as 14th December, 1874, he was assured by the attorney of the company that by the 1st of February ensuing the judgment would be satisfied. On this assurance the sale of the

property by the Sheriff was postponed. That Hope and Schaub knew of the judgment since March, 1871; that H. W. Addison, the counsel of the company, knew of it; and that in many instances, from its entry, some of the stockholders promised if the bank judgment was set aside the plaintiffs should be paid at once. The affidavit of Mr. H. W. Addison confirms that of Mr. J. L. Addison as to the knowledge of Hope of the character of the debt and its validity in the following expressive terms: "In the almost multitudinous consultations with James Hope in connection with the cases above named, (that is, those where defense was set up, and also the case of the bank above mentioned against the said company,) he (Hope) never intimated in any manner that there ever existed any defense to the claim of J. M. Clark & Sons, or that any attempt would be made to attack said judgment, but left the impression upon him at the time he was retained in the other cases that he desired J. M. Clark & Sons paid; that he thinks it was some time during the past year that he heard for the first time of an attempt to upset the judgment of J. M. Clark & Sons."

The circumstances detailed in the affidavit referred to exhibit the great laches of which the President was guilty in regard to the said suit. A forbearance to appear and answer could well consist with his duty if he believed at the time that the debt was valid and admitted of no defense; but how could he reconcile it with his duty to his company and the trust which his relation to it imposed, that, concluding there was a valid defense, he transmitted (as he supposed he had done) the papers to Mr. Carroll, in February, 1871, for the purpose of preparing it, and yet until a few days before 1st March, 1875, he instituted no inquiry as to the condition of the case, expressed no astonishment at not being called upon by his counsel for the facts on which it was to rest and the testimony to sustain it, and, above all, had never been consulted as to the character of his answer, which necessarily was to be made under oath? Must he not necessarily have known that no answer had been filed?

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*Stranger still, according to his statement, nearly four years had elapsed before he was aware that a judgment had been obtained against the company. In the face of these facts, can their omission to defend the action be attributed "to accident, inadvertence and mistake, or, at the least, to excusable negligence on the part of their President?"

If the exception now taken to the summons had been made on appearance and in regular form, leave would have been granted to amend, that it might be made to conform to the complaint and the intention of the plaintiffs as to the real party sought to be brought before the Court. The respondents are not to be placed in a worse condition because, by the neglect of the company, no appearance or defense was made. The letter and the spirit of the Code provide the fullest means for perfecting the pleadings, so that the true and real issues between the parties may be the more readily ascertained. Mr. Pomeroy, in his new and able treatise on civil remedies, (a work well worthy the careful attention and consideration of the profession,) in Section 565, says: "The new procedure, from its dread lest the proper requirements as to form should degenerate into mere technicalities, and from its opposition to the decision of controversies upon points not involving the merits, has made most ample and liberal provision for amendments."

By the 196th Section of the Code of this State, the Court has power to amend after judgment, in the same manner as it has before, any pleading, process or proceeding in the cause, to correct any mistake in the name of a party, or in any other respect. It would be certainly, if necessary, more in furtherance of justice now to permit an amendment of the summons to conform to its true intent rather than to set aside a judgment which has stood for four years without complaint, that the Statute of Limitations may be interposed to defeat a claim the justice of which has not been disputed until questioned by the motion in the Court below.

What we have said disposes of the first and fourth grounds on which the application is founded. The second and third comprise matters of fact, which would have been proper subjects for defense if submitted by way of answer, but into which we are forbidden to look for the purpose of vacating the judgment.

The motion is dismissed.

WRIGHT, A. J., and WILLARD, A. J., concurred.

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8 S. C. *48

*Ex parte MACKAY, in re BARRETT v. COCHRAN.

(Columbia. Nov. Term, 1875.)

[*Injunction* ⇐114.]

To an action by the trustee of a deceased married woman, whose estate in the trust fund was absolute, to restrain a mortgagee of the land held in trust from selling it under a power of sale contained in the mortgage, the heir of the married woman is a proper and necessary party.

[Ed. Note.—Cited in State ex rel. Nesbitt v. Marshall, 28 S. C. 561, 6 S. E. 564.

For other cases, see Injunction, Cent. Dig. § 202; Dec. Dig. ⇐114.]

[*Trusts* ⇐206.]

[Cited in Elliott v. Mackorell, 19 S. C. 238, 242, 246, to the point that there is no breach of trust by trustee in giving mortgage upon land

conveyed by deed executed simultaneously with mortgage.]

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 283–292; Dec. Dig. ⟸206.]

Before Cooke, J., at Abbeville, May, 1875.

This was a petition entitled Ex parte John M. Mackay, Jr., in re William C. Barrett, trustee, against James N. Cochran. The case is as follows:

On the 7th day of April, 1869, James N. Cochran and his wife Celestia conveyed a tract of land in Abbeville County to William C. Barrett, trustee, his heirs and assigns forever, and on the same day Barrett, the trustee, gave to Cochran a bond and mortgage of the tract of land to secure the payment of the sum of $7,603, part of the purchase money. No trusts were declared in the deed of conveyance of Cochran and wife to Barrett, but the bond recited that it was given to secure the payment of $7,250, "to be paid by William C. Barrett, trustee of Mrs. Jane M. Mackay in the State of New Jersey." The mortgage contained an absolute power of sale in default of payment.

Mrs. Jane M. Mackay afterwards departed this life, leaving as her only heir her son John M. Mackay, Jr.,—her husband, John M. Mackay, the elder, being an alien.

The bond above mentioned being due and unpaid, James N. Cochran, under the power contained in the mortgage, advertised the tract of land for sale. Barrett, the trustee, then commenced an action against Cochran praying for an injunction to restrain the sale and for other relief.

On the 7th of July, 1874, a decretal order was made in the case of Barrett v. Cochran for foreclosure and sale by the Sheriff of the mortgaged premises.

On March 30th, 1875, John M. Mackay, Jr., filed a petition entitled as above, setting forth the material facts, and praying that the Sheriff be enjoined from selling the mortgaged premises under the said decretal order, and that the petitioner be made a party defendant in the action of Barrett v. Cochran, with leave to file an answer therein. A rule was then issued and served up-

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on Cochran *requiring him to shew cause why the petitioner should not be made a party defendant in the said action and have leave to file an answer therein.

Cochran made a return to the rule, and thereupon, on the 19th day of May, 1875, His Honor the Circuit Judge made an order dismissing the petition and discharging the rule.

John M. Mackay, Jr., appealed from the order of the 19th of May, 1875, on the grounds:

1. That he, the petitioner, as the sole heir of his mother, was the owner of the legal and equitable fee in the mortgaged premises, and, as such, was a necessary party in the action of Barrett v. Cochran.

2. Because Barrett, the trustee, had no power to give the mortgage mentioned in the pleadings.

[For subsequent opinion, see 11 S. C. 29.]

Runkle & Northrop and Maxwell, for appellant.

McGowan, Parker & Noble, contra.

July 1, 1876. The opinion of the Court was delivered by

WILLARD, A. J. On the statements of fact set forth in the petition of J. M. Mackay, it is clear that he cannot succeed in setting aside the mortgage, or in having the portion of the purchase money that was paid, as alleged, out of the estate of his mother preferred in the payment over of the proceeds of the sale of the mortgaged property, as was done in Mathews v. Heyward, (2 S. C., 239.) In that case the trust existed prior to the purchase of the land, and the purchase itself was a breach of trust. In this present case it does not appear that the funds with which the land was purchased were trust funds. The allegation that the purchase was made with funds from the estate of Mrs. Mackay is not sufficient to support the proposition that the funds were trust funds. It was competent at that time, both in New York and in this State, for Mrs. Mackay to hold a separate estate in her own right without the intervention of a trustee. Nor is it alleged that the use of the funds for the purpose of the purchase was unauthorized, or that she ever refused to accept the benefits of the purchase.

The trust must be considered as created by the deed to Barrett, which must be construed together with the mortgage as contemporary acts. The burden on the trust

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estate was, under this view, *created by the very act calling the trust into existence, and its imposition must be deemed consistent with the purposes of the trust.

But it is clear that the petitioner, Mackay, should have been made a party, as it appears that the cestui que trust was deceased, leaving him as her heir-at-law. The objects of the trust being fully accomplished at her decease, the trustee had only a nominal interest, while the petitioner had the substantial interest. (Code, Section 134.) The question of the sufficiency of his defense will properly come up by answer; the mere allegation that the petitioner was the real owner of the equity of redemption, belonging directly to the mortgagor, as such, entitles him to be made a party. It is equally important for the plaintiff that he should be made a party, as otherwise any equity of redemption that he may have would not be cut off and barred.

The order should be set aside and the petitioner be allowed to come in and answer. For further disposition, the case is remanded to the Circuit Court, leave being now here

given to the said petitioner to file his answer to the said complaint within thirty days from the service, at the instance of the plaintiff, of a copy of this order on him or either of his attorneys.

MOSES, C. J., and WRIGHT, A. J., concurred.

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8 S. C. 50

GIBBES v. ELLIOTT.

(Columbia. April Term, 1876.)

[*Appeal and Error* ⇐87.]

An order upon the merits,—denying a motion to set aside a verdict and grant a new trial on the ground of surprise and newly-discovered evidence,—involves only questions of fact, and is not appealable to the Supreme Court.

[Ed. Note.—Cited in Brickman v. South Carolina R. Co., 8 S. C. 199; Steele v. C., C. & A. R. Co., 14 S. C. 331; Truett v. Rains, 17 S. C. 453; LeConte v. Irwin, 19 S. C. 557; Hubbard v. Camperdown Mills, 26 S. C. 589, 2 S. E. 576; Ex parte Roundtree, 51 S. C. 409, 29 S. E. 66.

For other cases, see Appeal and Error, Cent. Dig. § 588; Dec. Dig. ⇐87.]

Before Reed, J., at Charleston, November, 1875.

This was an action by Edmund A. Gibbes against Juliet G. Elliott to recover the value of a set of diamond jewelry, alleged in the complaint to belong to the plaintiff and to have been converted by the defendant to her own use and to be of the value of $10,000.

The answer denied each and every allegation of the complaint.

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*The case was referred to a Referee, by consent, to take testimony. It was tried at May Term, 1875, before the Circuit Judge and a jury, upon the testimony of A. H. Hayden, a jeweler, taken by consent of counsel. He testified that he had carefully examined the jewelry and he estimated their value to be about $5,500; and thereupon the jury, under the instructions of the court, found for the plaintiff the sum of $5,500.

Judgment was entered for the plaintiff and execution entered thereon but not enforced immediately, as the defendant, at her request, was allowed time to raise the money by a sale of the jewelry.

On the 28th day of July, 1875, a motion was made by the defendant, before the Circuit Judge at Anderson, to be relieved from the judgment "on the ground of mistake, inadvertence and excusable neglect." The motion was denied, and it was ordered that sale, under the execution, be suspended for twenty days.

The defendant's property being advertised for sale under the execution, she, at November Term, 1875, filed a petition to the Court, wherein she stated:

That an action was brought against her in this honorable Court by her nephew, Edmund A. Gibbes, in which he set up title to certain diamonds which had belonged to her family for very many years, and had descended through her mother and eldest sister to her possession, where they had been since about the year 1826.

That upon the trial of the cause she was unable to establish her title to the satisfaction of the jury, in consequence of the absence of witnesses, and being herself absent and prevented from testifying because of sickness.

That she understood the whole controversy to be on the title, and not over the value of the diamonds, as to which she called no witnesses, and upon the testimony of a single witness called by the plaintiff the value was assessed at $5,500 and a verdict rendered for that amount, her counsel not objecting, being under the mistake, as it turns out, that such amount could not differ very much from the true value. If she had been present she would have fallen into the same mistake.

That upon the verdict, a judgment was entered on the 2d day of May, 1875, and execution issued thereon.

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*The traditions of her family had always given great value to these jewels. She had never had cause to doubt the accuracy of this traditional estimate. She had never heard any particular sum stated as their original cost; nor had she ever known of any appraisement by experts or persons skilled in such things.

Her own effort and desire to defend her possession and establish her title rested on the sentiment that they were a family relic and heirloom. Their marketable value or any supposed sum of money they might be worth or sell for was not considered by her, though she never doubted they were of great value. It was, therefore, that she did not direct her attention or that of her counsel to any investigation as to what they were worth in money or to contradicting the opinion of a single witness of great respectability on that point produced by the plaintiff.

It was the title, not the value, which concerned her, and that being decided against her by the jury, and, by reason of her straightened circumstances, being utterly unable to retain possession and pay for them as a purchaser, she offered them to the plaintiff in satisfaction of his judgment, and, this offer having been refused, she was forced to offer them for sale in open market.

It was then that she first began to learn, to her great amazement and mortification, that there had been a great mistake, and that the family traditions as to the value of the jewels had been a family delusion, and that she was and is in great danger of being its chief victim.

That, in fact, a judgment has been taken against her by "mistake," "inadvertence," "surprise" and "excusable neglect."

That the best and extreme marketable value of the diamonds—the subject of controversy—does not exceed sixteen hundred dollars, thus inflicting upon her a ruinous loss, unless she may be relieved by the intervention of this honorable Court.

She is advised by her counsel that, by special provision of law, it is made competent for this Court to give relief in just such cases as her own. That her "inadvertence" and "neglect" to investigate and fully prove the marketable value of the jewels was "excusable" within the meaning of the law under the circumstances.

"That her mistake as to their value was not only natural, but also, under the circumstances, almost unavoidable."

"Your petitioner further shows unto your Honor that her whole estate has been seized on to satisfy the execution issued under the

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*aforesaid judgment, and is about to be sold by the Sheriff, inflicting not merely the loss of a fixed sum of money, but inevitable ruin, unless the same should be restrained by your Honor.

"Wherefore your petitioner prays that said judgment may be reopened, to the end that she be allowed to prove the allegations of this, her petition, and thereby show the mistake in the valuation of said diamonds and save her from the ruin consequent upon her excusable neglect, and that, in the meanwhile, that the present levy by the Sheriff of Charleston County be discharged, and that he be restrained and enjoined from levying said execution upon her property or selling the same till the further order of this Court."

The petition was verified by the petitioner and was supported by the following affidavits:

1st. Of Julius L. Moses, who stated:

That under the instructions of the attorneys of Miss Juliet G. Elliott he went to New York early in the month of October current for the purpose of selling a diamond cross and ear-rings, the subject matter of the suit between Miss Elliott and Dr. Edmund A. Gibbes, and that he took these articles with him. That, having, been instructed to use his best efforts to get the highest price for the jewels, he procured letters and means of introduction to persons who, from their position and business, would be best informed as to their value, and, as a first step, sought to ascertain what they should bring. That, pursuing this purpose, he submitted them to Mr. Marsh, the official appraiser of jewels of the United States in the custom house of New York, and he gave them a careful examination in every respect and assessed their value at $1,150, and that they would weigh between twenty-three and twenty-four carats. That this gentleman, in order to be certain as to the correctness of his appraisement, then sent deponent to Mr. McClure, of the house of Tiffany & Co., and both of them concurred in estimating them about twenty-four carats and assessed their value at $1,200. Mr. Marsh, the appraiser at the custom house, also recommended deponent to take the jewels to Mr. Hyman, a dealer and worker in diamonds, in 16th street, near Broadway, New York. Deponent went to Mr. Hyman and he calculated the weight of the diamonds at twenty-three carats and assessed their value at about fifteen hundred and sixty dollars, and said that he would give that

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*for them, leaving himself a small margin of profit. This deponent then called upon Messrs. Hessels, Ludeke & Co., whose appraisement had been obtained by Mr. Carrington, and they stated that Mr. Carrington had misunderstood their letter, and that they in fact had appraised the cross at $500, and in their opinion the whole set was worth $1,400, and that they would give this. That, anxious to fulfill his instructions, he was not satisfied with this, but diligently went about New York and sought a purchaser, using for this purpose all the means in his power, and that as an extreme price he got an offer of $1,650, which every dealer in diamonds informed him was more than their value. And this deponent swears that from his own knowledge of and dealing in jewels of this description, and from this experience in New York, he is satisfied that this last named sum is an extreme price, beyond the actual merchantable value of the articles.

That his efforts consumed fifteen days, and, the price offered being so much below the appraisement made here, he reached Charleston a few days ago, bringing back the diamonds unsold.

2d. Of C. H. Simonton, one of the counsel of defendant, who stated:

That he placed the diamonds, a cross and ear-rings, which had been the subject matter of the suit in Gibbes vs. Elliott, in the hands of Julius L. Moses, Esq., with instructions to take them to New York and to sell them there. That he had endeavored himself to do this before instructing Mr. Moses, but found it beyond his ability. That he employed Mr. Moses because he was a gentleman of character, energy, skill in business and experience in matters of this sort. That the price offered Mr. Moses was a surprise to him, especially as his client had always stated her opinion that they were of great value, and he himself was utterly ignorant of such matters. Had this not been the case he never would have given any assent to the verdict.

The plaintiff filed an affidavit of Mr. Hayden in opposition to the motion, wherein he stated that, in appraising the diamonds in controversy in Gibbes and Elliott, he did so at the joint request of Mr. Ingraham and Colonel Simonton; that he did not regard

himself as the witness or friend of either party: that he waited upon Miss Elliott by appointment, and she appeared in person and produced the jewels: that Miss Elliott stated

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a much higher figure as *the value of the jewels than he did, and stated that this deponent's brother several years previous had rated them at a much higher value. Deponent further states that he has heard read the affidavits of Mr. Julius L. Moses, and finds a great difference in the valuations by the persons consulted, and that the appraisements of dealers are higher than those of officials or experts. That diamonds are things which depend very much upon fancy and means, and in the last six months diamonds, like other fancy articles, have fallen greatly in value. The demand for such luxuries has greatly diminished. That these are unquestionably a beautiful lot of jewels, and, in his opinion, whoever should purchase them at the highest figure named in the affidavit of Mr. Moses would make a good deal of money out of them. And that he sees no reason to change his valuation, having reference to the times when the appraisement was made and when the verdict was given.

His Honor, on hearing the petition, ordered that it be dismissed.

The petitioner appealed.

Campbells & Whaley for the motion:

1. This is an appeal from the order of His Honor Judge Reed, refusing a motion to open a consent verdict and judgment upon the grounds of mistake, inadvertence, surprise and excusable neglect, brought to view and established by after-discovered evidence.

The respondent brought suit to recover possession of family heirlooms intended for female adornment. They were a part of the paraphernalia of his grandmother—a diamond set, consisting of ear-rings and a brooch, in form of a cross,—for many years in possession of his mother's sister, the appellant here.

The trial was forced on in the absence of her witnesses, and while she was sick, and for that reason unable to attend and testify.

The verdict was by consent as to the value of the jewels, under a mistake on her part and of her counsel, and, she believes, of all parties, as to their true value.

She neglected to have the value carefully ascertained, and, under the circumstances, the neglect was excusable. She was misled by the traditions of her family. The mistake was not only natural but also next to unavoidable. For particulars she refers to

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her *petition, the affidavits of Julius L. Moses, Charles H. Simonton and of A. H. Hayden.

Points and authorities:

1. The power and incumbent duty of the Circuit Courts to vacate or set aside judgments and decrees in such cases is ample. Section 2, Chapter CV, of General Statutes is as follows: "In case a judgment or decree has been or hereafter shall be rendered by a Court of Common Pleas, it shall be lawful for either party, plaintiff or defendant, to move before the presiding Judge of the Circuit in which said judgment was obtained to vacate or set aside said judgment, upon satisfactory proof being made to said Judge that said judgment is erroneous and ought to be set aside; and, upon such proof being made, the presiding Judge is hereby authorized to vacate and set aside said judgment and to order a trial de novo." The Code of Procedure, Section 197, also provides that the Court "may, within one year, relieve a party from a judgment taken against him through his mistake, inadvertence, surprise or excusable neglect, and may supply an omission in any proceeding."

2. The case made is within the provisions of the law.

The Courts of New York have gone much further than necessary to relief in this case. —Pettigrew v. Mayor of N. Y., 17 Howard, P. Reps., 492, cited in Freeman on Judgts., 107.

3. Without the special provisions of the statutes referred to, this case is relievable on general principles.

Equity relieves against judgment in cases of mistake, surprise and accident.

"Mistake of fact, whether by the Court or one of the parties, is ground for interposition of Courts of equity to relieve party injured by the mistake."—Freeman on Judgments, § 500a, and 1 Bland's Ch., 350.

It is also a power conceded by the common law to all its Courts.

4. The power to relieve in such a case as this is, it is said, in the discretion of the Court. But it is a discretion subject to review.

Such orders, whether granting or refusing the relief, are subject to appeal.—Freeman on Judgments, § 106, and cases there cited.

Porter & Brawley and Connor, contra:

The complaint in this action, filed January 12, 1872, claimed $10,000 damages for the unlawful conversion by defendant to her

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*own use of certain diamonds, the property of the plaintiff. It was a purely legal demand for money, whereby the defendant was fully advised that plaintiff sought not the specific delivery of personal property, but damages for its detention. Upon this issue was joined, both parties being represented by counsel, and, on the 2d of May, 1875, a verdict for the plaintiff was rendered. No motion for a new trial was made, and, on October 28, 1875, after the property of defendant had been sold, this petition is filed, and it is sought to have the judgment reopened on the ground of mistake, etc.

The application is under Section 197 of the Code, which provides as follows: "The Court

may likewise, in its discretion, and upon such terms as may be just, allow an answer or reply to be made, or other act to be done, after the time limited by this Act, or, by an order, enlarge such time; and may also in its discretion and upon such terms as may be just, at any time within one year after notice thereof, relieve a party from a judgment, order or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect, and may supply an omission in any proceeding."

First Proposition.—Section 197 of the Code is intended for the relief of parties in those cases only where, by reason of mistake, surprise, etc., they fail to be represented at the trial, and can have no application in a case where a party regularly appeared by attorney and defended.

"If they were represented at the trial, they can only obtain relief by an application made in conformity with the rules of procedure provided by law in reference to new trials. If they were not at the trial, or were not represented there on account of some mistake, or excusable neglect, then their remedy is not by application for a new trial, but by an application addressed to the discretion of the Court, and made under the Statutes," etc. --Freeman on Judgments, Chapter VII, § 105.

In the recent case of Ex parte G. W. Williams et al., in re F. Campbell vs. County of Charleston, this Court has recognized the true intent and meaning of this Section. It says, speaking of the cases then before the Court: "It is clear from the record in these cases that there was neither 'mistake, inadvertence or excusable neglect:' all the parties to the action were properly represented, hence Section 197 of the Code has no application to them."

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*This decision seems conclusive of the case before the Court. If it were an open question, reason and public policy alike require that it should be settled as it has been. Otherwise parties having two or more grounds of defense could make only one at the trial, trusting to the chance of reopening the judgment in case of an adverse decision and being let in then to make another defense; and judgments, instead of being, as they have been always regarded in this State, inviolate and enduring testimonials, would be mere "temporary structures, to be torn down, remodeled or rebuilt whenever the builders feel competent to improve the original workmanship and design."

Second Proposition.—If it were conceded that the Court below had the power, under the circumstances, to grant the relief prayed for, such relief could not be claimed as matter of right, but of favor, to be granted or withheld in the discretion of the Court, and that Court, having in the exercise of its discretion, refused it, that decision is not reviewable in the Supreme Court.

This proposition is sustained by the following authorities: Hazleton v. Wakeman, 3 How., 547; Wakeman v. Price, 3 Comstock, 334; Buffalo Savings Bank v. Newton, 23 N. Y., 160; Depew v. Dewey, 56 N. Y., 657.

By the very terms of the Act this is a motion within the "discretion" of the Court below. A matter of discretion never goes to the final Court; it begins and ends in the Circuit Court. It is thus expressly decided in Bolton v. McKinly, 22 Ill., 203.

In New York, it is true, there is an appeal from the special to the general term, but none to the final Court of Appeals. By our law this discretion is lodged exclusively in the Circuit Judge. It is a part of the general scheme of our jurisprudence, wherein the Judge, not being allowed on the trial of a cause to express any opinion on the facts, or to commit himself to any view thereof, is supposed to have a mind unbiased by any preconceived or previously expressed opinions, and, therefore, is the better able to render an impartial judgment whenever a verdict of a jury is before him for review. Whether or not this is the wisest and best provision is a matter for the consideration of the Legislature, and not for discussion here.

The Circuit Judge having twice refused this motion, it is respectfully submitted that this Court has no jurisdiction in the premises.

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*Third Proposition.—This being "a Court for the correction of errors at law," it has no revisory power in cases of a purely legal nature, unless it is shown that the Circuit Judge has erred in some matter of law, and the petitioner does not point out any such error.

The petitioner's case is simply this: The jury, taking the testimony of Mr. Hayden, an expert, and a man of integrity and good judgment, well known to them and to the Judge who tried the cause, has found that the diamonds were worth $5,500. The defendant, who had had them in her possession for years, speculating upon the chances that they were worth more, took no exceptions and made no motion for a new trial. Months after the trial, when she discovers that she has made a bad bargain, she repents of it, and, being unable, owing to the financial stringency, to sell them for $5,500, she asks to be allowed now to offer her proofs, which she might have offered at the trial. It is doubtful, even if it were in, whether a jury would allow it to countervail the testimony of Mr. Hayden, who was a witness of such character and competency that both parties agreed to rest the case upon his testimony alone. No question of law is involved; it is simply a question of fact of the value of the diamonds. A jury has already passed upon it, and the Judge is satisfied with the verdict. Our own cases are so numerous, and so recent, to the effect that no appeal lies to the Supreme Court to review the findings of fact in a judgment of the Circuit Court in cases of money

demand of a purely legal nature that it is unnecessary to do more than refer to them.—Byrd v. State, 2 S. C., 388; Sullivan v. Thomas, 3 id., 531; Whaley v. Bank of Charleston, 5 id., 201.

Fourth Proposition.—If petitioner had any case or right to appeal, it has been lost through her failure to appeal from the order of July 28th, 1875, which was duly entered in the Clerk's office on 31st July, 1875, whereby the Circuit Judge refused to grant precisely the same motion which was subsequently made and refused in November following.

No Court should sanction a practice whereby a party should be twice permitted to make the same question before the same tribunal, any more than it should permit a party who has once had an opportunity to have his cause fairly and fully tried and has neglected to do so to avail himself of his own negligence in order to set aside a judgment which ought to be held conclusive, not only of all facts actually tried, but of all which could have been tried.

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*July 12, 1876. The opinion of the Court was delivered by

WILLARD, A. J. A motion was made before the Circuit Court to set aside a judgment and verdict on the grounds of mistake, inadvertence, surprise and excusable neglect, which was denied by the Court, and, on appeal, is brought to this Court.

Defendant alleges that a mistake was made as to the value of diamond jewelry in controversy, and that a verdict was allowed to be taken by consent for a sum supposed to represent the value of the property, and which has since been discovered to be greatly in excess of its true value. It is alleged that the verdict is a consent verdict and relief is asked on the ground that such a verdict can only be regarded as the contract of the parties, and, as such, relief may be had of an equitable nature as in case of mutual mistake. The record does not, however, support the statement that the verdict is a consent verdict. A verdict by consent, properly speaking, is the act of the parties and not the proper act of the jury. In the present case, the understanding of the parties appears to have related to the character of the evidence to be submitted to the jury alone. The verdict appears to have been taken in ordinary course on the evidence submitted under the arrangement of counsel.

The motion cannot be regarded in any other light than as one for a new trial upon the ground of newly-discovered evidence. At the trial the defendant supposed that she was unable to procure testimony that would have the effect to reduce the verdict, believing the value of the property to be correctly represented by the agreed testimony. She now discovers that she can obtain testimony that ought to reduce the verdict.

But whether the motion below is to be considered as grounded on the fact of newly-discovered evidence or upon surprise, the result is the same as affected by the jurisdiction of this Court in such cases.

The Circuit Court has, by statute, authority to grant new trials, in cases where there has been a trial by jury, for reasons for which new trials have usually been granted in the Courts of law of the United States.—Gen. Stat., 497, § 4.

Relief is granted in the Courts of law of original jurisdiction of the United States in cases of surprise and of newly-discovered evidence.—Abbott's U. S. Practice, vol. 2, 198. Such motions are addressed to the sound dis-

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cretion of the Court, and are granted or *denied, not as matters of strict right, but as the substantial justice of the case may appear to require.—Ibid, 197. The constitutional authority of this Court, as it regards cases of legal cognizance, that is, of such as are properly cognizable in Courts of law as distinguishable from Courts of equity, is conferred by the declaration that the Supreme Court "shall constitute a Court for the correction of errors at law under such regulations as the General Assembly may by law prescribe."—Const., Art. IV, § 4; see Sullivan v. Thomas, 3 S. C. 531.

This jurisdiction has been in part defined by Section 11 of the Code of Procedure, as amended November 25, 1873.—15 Stat., 495.

This Section now reads as follows:

"The Supreme Court shall have exclusive jurisdiction to review on appeal:

"1. Any intermediate judgment, order or decree involving the merits in actions commenced in the Courts of Common Pleas and General Sessions, brought there by original process or removed there from any inferior Courts or jurisdiction, and final judgments in such actions: Provided, If no appeal shall be taken until final judgment is entered. The Court may, upon appeal from such final judgment, review any intermediate order or decree necessarily affecting the judgment not before appealed from.

"2. An order affecting a substantial right made in an action where such order in effect determines the action and prevents a judgment from which an appeal might be taken, or discontinues the action, and when such order grants or refuses a new trial, or when such order strikes out an answer, or any part thereof, or any pleading in an action; but no appeal to the Supreme Court from an order granting a new trial on a case made on a bill of exceptions shall be effectual for any purpose, unless the notice of appeal contain an assent on the part of the appellant that if the order be affirmed judgment absolute shall be rendered against the appellant, etc.

"3. A final order affecting a substantial right, made in a special proceeding or upon a summary application in action, after judgment, and upon such appeal to review any intermediate order involving the merits and

necessarily affecting the order appealed from."

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*The appeals allowed by subdivisions 1 and 2 are those arising in the course of actions, and are intended to affect the final judgment of the Court in such actions. Subdivision 3 covers two cases: first, appeals from orders in special proceedings, which are defined by the Code as being every remedy other than the ordinary proceeding in a Court of justice by which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense, (Code, § 2); and, second, appeals from orders made in summary applications in an action after judgment. In the last named class of cases the object of the proceeding is not to disturb or to affect the judgment, but to give it efficiency. In other words, the summary applications referred to are proceedings based upon the judgment and assuming its correctness. (See opinion Selden, J., in Selden v. Canal Company, 29 N. Y., 637.) It therefore appears that if the object of a motion is to affect a judgment by setting it aside, reversing or modifying it, either directly or indirectly, by affecting the verdict upon which it was rendered, the appeal must be authorized by the provisions of the first or second subdivisions of Section 11, as amended.

Subdivision second authorizes such an appeal as that before us in express terms, as it is an appeal from an order refusing a new trial. But we can only set aside the order on the ground that error of law has been committed by the Circuit Court. The action was one of legal cognizance alone, and involved no cause of action or defense proper for the consideration of a Court of equitable jurisdiction. We are, therefore, confined by the terms of the Constitution to reviewing the decision of the Court on the matters of law before it and cannot set the order aside on the ground that the Court did not give due weight to the matters of fact presented by the motion. We do not find that any error of law was committed. The court entertained the motion and looked into the questions of fact presented. Had the motion been denied on the ground that the Court had no authority in cases of that class, we might have set such conclusion aside and sent the case back to enable the Circuit Court to pass upon the facts involved. The questions upon such a motion are, whether the facts of which the party alleges that he has made recent discovery are new and material to the case, and whether the application is in good faith and the party making it has used due diligence both in preparing his case originally and in

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making his appli*cation after the discovery of the testimony. (See Abbott's U. S. P., v. 2, p. 198.) These are purely questions of fact. By their aid the Court inquires whether substantial justice has been done to the parties, upon which the conclusion of the Court ought to rest. From such an inquiry we are shut out in cases at law by the nature of our constitutional jurisdiction.

It was held in Selden v. Canal Co., (29 N. Y., 637,) that the Court of Appeals of New York could not review an order denying a motion to set aside a verdict on the ground of surprise. And in Scoville v. Landon, (50 N. Y., 686,) it was held that an order refusing a motion for a new trial on the ground of newly-discovered evidence was not appealable to the Court of Appeals. The Court of Appeals, is like this Court, a Court for the correction of errors at law, and the application of the rules of the Code of Procedure to the jurisdiction of that Court ought to yield the same results as the application of our Code to the jurisdiction of the Supreme Court.—See Abbotts' U. S. Prac., 228.

The record before us presents no ground upon which we are authorized to disturb the order of the Circuit Court, and the appeal should be dismissed.

MOSES, C. J., and WRIGHT, A. J., concurred.

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8 S. C. 63

HAIR v. BLEASE.

(Columbia, April Term, 1876.)

[*Agriculture* ⇨11.]

A laborer employed to make a crop in the year 1871, under a verbal contract to allow him a certain share of the crop as compensation for his services, was not entitled to a lien on the crop,—the Act of 1869, the only law then existing on the subject, providing that the contract should be reduced to writing.

[Ed. Note.—Cited in Nexsen v. Ward, 96 S. C. 315, 324, 80 S. E. 599.

For other cases, see Agriculture, Cent. Dig. § 27; Dec. Dig. ⇨11.]

[This case is also cited in State v. Lanier, 79 S. C. 103, 60 S. E. 225, and declared to have been practically overruled.]

Before Moses, J., at Newberry, July, 1875.

The case on which the appeal was heard is contained in the following statement agreed on by counsel:

"I. On the 20th day of March, A. D. 1871, the defendant, James H. Blease, rented a par-

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cel of land from the plaintiff, J. S. Hair, *and bargained with the plaintiff for plantation supplies necessary to the cultivation of the same; and to carry out the purposes of such agreements, they executed their instrument of writing, reciting the amount of land to be rented, the amount of cotton to be paid for such rent, and the amount of supplies to be furnished by the plaintiff, and giving to the plaintiff a lien on all the crops raised on the land for that year to secure both the rent

mency and the value of agricultural supplies, which agreement and lien was recorded in the office of the Register of Mesne Conveyances for Newberry County on the 21st day of March, 1871.

"II. The amount of cotton to be paid for that rent was 3,200 pounds of lint cotton, and the supplies to be advanced by Hair were to amount in value to $400.

"III. Blease farmed the said land for that year and received supplies from Hair to the value of four hundred and forty dollars ($440).

"IV. Blease delivered to Hair, in the month of November of the same year, 2,762 pounds of cotton, in six bales, which Hair applied to the payment of rent.

"V. Blease further delivered to Hair, on or about the 2d day of December, 1871, 2,253 pounds of cotton, packed in five bales; and a few days afterwards the further amount of 468 pounds of cotton, packed in one bale. These amounts of cotton, aggregating 5,493 pounds, constituted the whole cotton crop raised by Blease for that year.

"VI. Hair stored the lot of five bales just mentioned at Newberry Court House.

"VII. The defendant, McGrath, aided by his family, was the only laborer and farm hand of Blease during the year 1871, under a verbal contract, by which he was to receive one-third of the crop raised on the place, in which is embraced the twelve bales of cotton hereinbefore mentioned.

"VIII. After the storing of cotton by Hair, McGrath instituted a proceeding in the Trial Justice's Court for the recovery of his share of the crop grown by Blease, in which proceeding Blease was the only defendant.

"IX. The Trial Justice had the cotton stored by Hair attached by the Sheriff, to abide the events of McGrath's suit; gave a judgment in McGrath's favor for eighteen hundred and thirty-one (1,831) pounds of cotton, less the sum of one hundred and eleven

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*dollars and eighty-five cents, ($111.85,) and ordered satisfaction of the same out of the cotton so stored and attached.

"X. Thereupon Hair instituted this action for the purpose of enjoining the sale of the cotton under the Trial Justice's judgment, for the purpose of enforcing his lien for agricultural supplies against the five bales of cotton in store, to the exclusion of McGrath's claim, for the purpose of having an accounting between Blease and McGrath, so as to ascertain what was really due McGrath, for judgment against Blease for the sum of four hundred and thirty-six dollars, ($436.) and for general relief in the premises.

"XI. The defendant, Blease, admitted in his answer the contract with Hair above described, the verbal contract with McGrath, and the delivery of cotton to Hair, and contented himself with denying fraud or collusion with McGrath.

"XII. The defendant McGrath's answer was of the same character, and insisted upon the propriety of the judgment rendered in his favor by the Trial Justice and the superiority of his claim as laborer over that of the plaintiff, Hair.

"XIII. By an order of Judge M. Moses, in 1872, the five bales of cotton in store were sold by the Sheriff and the funds derived from such sale held for the further order of the Court. And subsequently that fund, less Sheriff's costs and fees, was ordered to be paid over by the Sheriff to all the attorneys in this action, jointly, who were ordered to deposit it in bank, to await the determination of the cause.

"XIV. No further orders were passed in this action until that of 29th May, 1874, which only provided that it be referred to Ira B. Jones, Esq., as Special Referee, 'to ascertain and report the state of accounts between the plaintiff John S. Hair and the defendant James H. Blease, and between the defendants James H. Blease and Benjamin McGrath,' and to report by the next term of the Court.

"XV. Under that order the Referee, after taking testimony, (which is filed with this report,) filed his report on 30th March, 1875.

"XVI. This report found that McGrath was entitled to 1,831 pounds of cotton in the crop; that McGrath was indebted to Blease in the sum of one hundred and ninety-four dollars and forty-five cents, ($194.45,) which was to

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be taken out of McGrath's share of *cotton; that Blease was indebted to Hair, if Hair be allowed to retain all the cotton, in the sum of fifty-seven 36-100 dollars, ($57.36,) and, if McGrath's claim have preference, in the sum of one hundred and sixty-eight 45-100 dollars ($168.45,) together with the balance of cotton left after satisfying McGrath.

"XVII. The account of Blease against McGrath was proved by Blease, who was the witness presented by Messrs. Baxter & Johnstone, the attorneys for both of the defendants, and was not contradicted by McGrath or by any other witness, or by any testimony.

"XVIII. The referee did not undertake to determine how the proceeds of the sale of cotton should be distributed, but confined himself to a statement of the above accounts and the suggestions that, upon the determination of the preference to be allowed to Hair or to McGrath, different sums would be found due them respectively, and he made no recommendation as to the amount that should be allowed to either of them out of the fund, nor in regard to costs.

"XIX. No exceptions to the report were ever made or filed by McGrath or his attorneys.

"XX. When the cause was called on the calendar at the July Term of the Court of Common Pleas, the attorneys for Hair moved to have the report confirmed, with the exception of correcting an error in the price of

cotton, which operated in McGrath's favor, to which correction no objection was made.

"XXI. A verbal motion was made by McGrath's attorneys to recommit the report unless the item of fifty dollars allowed in the report in Blease's account against McGrath for firewood and use of mules should be struck out.

"XXII. Thus the matter submitted to the Judge was the question whether the report of the Referee, to be corrected as proposed by the plaintiff, should be confirmed or recommitted.

"There was no argument on the question of the relative rank of the claims of Hair and McGrath respectively; there was no testimony offered before the Court; there was no charge made against the Referee; there was no allegation of evidence discovered since the hearing by the Referee.

"XXIII. In this state of the cause the Circuit Judge undertook to dispose of the whole case in all its issues, and decreed: That the item of fifty dollars above mentioned be

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stricken out of Blease's *account against McGrath as unreasonable, 'because it would be unjust and unprecedented in the history of contracts for labor for a part of the crop to charge the laborer for firewood and for the hire of mules to haul it;' that McGrath have judgment against Hair for the sum of two hundred and thirty and 90-100 dollars ($230.-90) and interest from 1st January, 1872, amounting in the whole to $290.40, with a lien on the fund derived from the sale of the said five bales; that Hair pay all the costs of the suit, because, as the decree alleges, 'the litigation has impressed the Court as uncalled-for and vexatious;' and that Hair have 462 pounds of the cotton applied to his demand against Blease and judgment against Blease for such sum of money as may after that be found due him from Blease,—thus disposing of the whole case upon motions to confirm or recommit the report upon accounts between the parties.

"XXIV. The cause was never noticed for trial by either of the defendants, but by the plaintiff."

The plaintiff appealed.

Moorman & Schumpert, Suber & Caldwell, for appellant.

Baxter & Johnstone, contra.

July 25, 1876. The opinion of the Court was delivered by

WRIGHT, A. J. On the 20th day of March, 1871, James Blease, one of the respondents in this case, rented a parcel of land from John L. Hair, appellant, for planting purposes, for which he agreed to pay 3,200 pounds of lint cotton. By the terms of the agreement Hair was also to advance to Blease supplies amounting in value to $400, which were furnished to the extent of $440.

The terms of the contract were reduced to writing, and fully expressed in an instrument duly recorded in the office of the Registrar of Mesne Conveyance for Newberry County, on 21st of March, 1871. For the rent and the supplies to be advanced it gave to Hair a lien on all the crops raised on the land for that year. Blease delivered to Hair more than enough cotton to pay the rent, and he also had in his hands five bales stored at Newberry Court House which he had received from Blease on account of their contract. It further appears that the whole of the crop raised on the land so rented for the said year was through the labor of one

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McGrath, *aided by his family. He had been hired by Blease under a verbal contract, by which he was to receive for his services one-third of the whole crop raised. After the storing of the crop by Hair, McGrath instituted suit against Blease before a Trial Justice for a recovery of his share of the crop. The Trial Justice attached the cotton stored by Hair to abide the event of McGrath's suit, gave judgment for a certain amount against Blease, and ordered satisfaction made out of the cotton so stored.

Thereupon Hair instituted this action to enjoin the sale made under the process of the Trial Justice, and for the enforcement of his lien for agricultural supplies against the said cotton, to the exclusion of McGrath's claim, for an account between Blease and McGrath, and for general relief. The five bales of cotton were ordered by the Circuit Judge to be sold and the proceeds deposited in bank to await the determination of the cause. An order was made referring the case to a Referee to ascertain the accounts between the parties, and a report was filed on the testimony heard before him. As, in the view of the Court, the material question to be determined is the priority of the respective liens asserted on the one hand by McGrath and on the other by Hair, it is entirely useless to pass now upon the state of the accounts referred to in the report, except to affirm the ruling of the Circuit Judge as to the rejection of the items in the account of Blease against McGrath for the firewood and use of mule to haul it and to sustain the exception of the appellant's counsel to the allowance of interest on the debt due to McGrath. As the cotton was sold by the order of the Court, no interest could accrue on the judgment when the property out of which it was to be paid was, in compliance with the order, converted into money, held subject to the disposition to be finally made of the cause. The decision of the material question between the parties is to be made alone in reference to the existing law as it stood in 1871 in reference to the subject matter, for the respective contracts were made in that year.

By the Act of 1866, (15 Statutes at Large,

380,) "persons making advance or advances in money or supplies to any person or persons engaged, or about to engage, in cultivating the soil shall be entitled to a lien on the crop which may be made during the year upon the lands in the cultivation of which the advances so made have been expended in preference to all other liens, existing or otherwise, to the extent of such ad-

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vance or advances, provided an *agreement in writing shall be entered into before any such advance is made to this effect, in which shall be specified the amount to be advanced, or in which a limit shall be fixed beyond which the advances, if made from time to time, shall not go, which agreement shall be recorded in the office of the Register of Mesne Conveyance in the District in which the person to whom the advances are made resides within thirty days from its date."

By the Act of 1869, (14 Statutes at Large, 227,) "all contracts made between owners of land, their agents or administrators or executors, and laborers shall be witnessed before one or more disinterested persons, and, at the request of either party, be duly executed before a Justice of the Peace or Magistrate, whose duty it shall be to read and explain the same to the parties. Such contracts shall clearly set forth conditions upon which the laborer or laborers engaged to work, embracing the length of time, the amount of money to be paid, and when: and if it be on shares of crops, what portion of the crop or crops." The third Section provides: "That whenever laborers are working on shares of crops, or for wages in money or other valuable consideration, they shall have a prior lien upon said crop or crops in whosesoever hands it may be. Such portion of the crop or crops to them belonging, or such amount of money or other valuable consideration due, shall be recoverable by an action in any Court of competent jurisdiction."

The sixth Section repeals all Acts and parts of Acts in any way conflicting with such Act.

These were the only Acts of force in 1871 in regard to the advance for the cultivation of crops or providing, by way of lien, for the security of laborers. The Acts are incorporated in the General Statutes; but as these were not adopted until February 10, 1872, they are to be regarded as existing at the time of their passage without modification and unaffected by any after provision in relation to them. We are spared the necessity of deciding on the preference of liens under the Acts between the parties supplying the advances for agricultural labor and the laborers themselves where the requisitions of the Acts have been fully complied with.

If their conditions had been strictly followed by each of the parties now asserting a priority it would have presented a question not easily solvable and certainly requiring on the part of the Court a very minute and nice examination to ascertain whether the Legislature intended by the Act of 1866 to

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extend the lien in favor of *the party advancing the money or supplies beyond the interest or share which the person "engaged or about to engage in the cultivation of the soil," the recipient of such advances, might have in the crop which may be made during the year. It is clear that the Act of 1869 referred to, and was intended to apply to and protect, by the preference under its third Section, only such contracts as were contemplated by its first Section. These, manifestly, were to be in writing, and it is impossible, looking to the language, to reach any other conclusion. They are to be "witnessed by one or more disinterested persons, and, at the request of either party, be duly executed before a Justice of the Peace or Magistrate, whose duty it shall be to read and explain the same to the parties. Such contract shall clearly set forth the conditions upon which the laborer or laborers engaged to work, embracing the length of time, the amount of money to be paid and when: and if it be on shares of crops, what portion of the crop or crops."

The requirement of their execution before a Justice of the Peace or Magistrate, when required by either party, necessarily implies the reduction of their terms to writing, and this is the more apparent from the requisition that they shall be read and explained by him, and the further fact that the conditions are to be clearly set forth in the contract. Where a statute divests a right it must be strictly construed, and the party claiming its benefit must bring himself within all the terms and conditions, through which an advantage, to the prejudice of another, is to be enjoyed by him.

It would thus seem that McGrath is not in a position to demand, under the Act of 1869, a preference of lien accorded to Hair by the Act of 1866. The loss of his labor is a matter to be regretted, but it is referable to his omission to comply with the provisions of the statute, which required his contract to be in writing before he could avail himself of its benefit.

The order made by the Circuit Court is set aside, and the case remanded to it, that any balance due Hair by Blease for supplies may be ascertained, and so much of the proceeds of the cotton first applied to it, and the remainder, if any, to the account, to be ascertained, between McGrath and Blease, the item of firewood, &c., to be disallowed in the discount offered by Blease against McGrath. Blease must pay all the costs, including those of McGrath.

MOSES, C. J., and WILLARD, A. J., concurred.

8 S. C. *71

*STATE, ex rel. McKINLAY, v. CARDOZO, State Treasurer.

(Columbia, May Term, 1876.)

[*States* ⇐127.]

Under an Act of the Legislature, bonds of the State were issued to raise money to be used in the purchase of lands to be sold to settlers thereon, and the interest on the purchase money of the lands, when sold, to be applied by the State Treasurer to the payment of the interest on the bonds issued under the Act: *Held*, That the Act constituted part of the contract with the holders of the bonds and that the State had no right to divert the fund arising from the interest on the purchase money of the land from the payment of the interest on such bonds.

[Ed. Note.—For other cases, see States, Cent. Dig. § 125; Dec. Dig. ⇐127.]

[*Constitutional Law* ⇐142.]

When the State borrows money on bonds issued by it for that purpose and pledges a certain fund for the payment of the interest to accrue thereon, such pledge is a part of the contract with the holders of the bonds, and the State has no right, under Article I, § 10, of the Constitution of the United States, to impair the obligation of the contract by diverting the fund to other purposes.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 321; Dec. Dig. ⇐142.]

This was an application to the Supreme Court by William J. McKinlay against F. L. Cardozo, State Treasurer, for a writ of mandamus.

The petition alleged:

1. That Francis L. Cardozo is the Treasurer of the State of South Carolina.

2. That by an Act of the Legislature of the State of South Carolina entitled "An Act to provide for the appointment of a Land Commissioner and to define his duties and powers," approved March 27, 1869, it is provided:

"Sec. 4. That it shall be the duty of the said Land Commissioner to purchase or cause to be purchased any lands in any portion of the State, improved or unimproved, at such prices as the said Advisory Board may determine, not to exceed in the aggregate amount in any one fiscal year the par value of the public stock of this State created by the General Assembly for this purpose.

"Sec. 5. The Treasurer of the State is hereby authorized and directed to issue to the Land Commissioner bonds of the State in the sum of two hundred thousand dollars, with coupons attached, if, in the opinion of the said Advisory Board, so much be necessary, bearing six per cent. interest, the principal payable in twenty years at the financial agency of the State in the city of New York; the bonds to be signed by the Governor, countersigned by the Comptroller General, and the coupons to be signed by the Treasurer of the State.

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*"The faith and credit of the State is hereby pledged to the payment of the principal and interest of such bonds; and a sufficient amount of taxes is hereby levied to pay the interest accruing on said bonds annually.

"Sec. 6. All lands purchased by said Land Commissioner shall be subdivided into sections containing not less than 25 nor more than 100 acres, to be sold to actual settlers, subject to the condition that one-half thereof shall be placed under cultivation within five years from the date of such purchase, and that the purchaser shall annually pay interest at the rate of six per cent. per annum upon any moneys remaining unpaid, and also all taxes imposed thereon by the authority of the United States or of this State; and in addition thereto shall, in every year after the third from the date of said purchase, pay one-fifth of the principal. The title to said land shall remain in the State until the amount of said purchase shall be paid, principal and interest; but a certificate of such purchase shall be assignable at three years from the date thereof: Provided, That in every case where a person purchases more than one section of 50 acres, they shall pay on such excess one-fourth cash, and the balance to be paid in equal annual installments of one-fourth the amount of purchase each year: Provided, That no person shall be entitled to purchase in his own name or for his own use more than 100 acres.

"Sec. 7. It shall be the duty of the said Land Commissioner to deposit with the Treasurer of the State all moneys collected by him as interest due upon the sale of said lands, which shall be used by the Treasurer of the State in the payment of the interest on the stocks and bonds of the State issued for the purchase of said lands, and to invest in bonds of this State all moneys received by the Land Commissioner in payment for said lands as principal; said State bonds to be deposited with the Treasurer of the State to constitute a sinking fund for the final payment and redemption of all stocks or bonds issued by the State for the purchase of said lands. The interest accruing on the bonds of the said sinking fund shall be applied to the payment of the interest upon the stocks or bonds of the State issued for the purchase of lands."

3. That by the further Act of the Legislature of the State of South Carolina entitled "An Act to amend an Act entitled 'An Act to provide for the appointment of a Land

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Commissioner and *to define his powers and duties, and for other purposes therein mentioned,'" approved March 1, 1870, it is provided:

"Section 1. Be it enacted by the Senate and House of Representatives of the State of South Carolina, now met and sitting in General Assembly, and by the authority of the same, The Treasurer of the State is hereby authorized and directed to issue to the Land Commissioner bonds of the State in the sum of $500,000, with coupons attached, if, in the opinion of the Advisory Board, so

much be necessary, bearing six per cent. interest, the principal payable within twenty years at the financial agency of this State in the city of New York, the bonds to be signed by the Governor and countersigned by the Treasurer of the State, and the coupons to be signed by the Treasurer of the State, which bonds shall be negotiated in such form and manner as the Advisory Board, by a majority of votes, shall determine.

"The faith and credit of the State is hereby pledged to the payment of the principal and interest of said bonds; and a sufficient amount of taxes is hereby levied to pay the interest accruing on said bonds annually."

4. That by virtue of the said Acts the Treasurer of the State of South Carolina issued to the Land Commissioner bonds of the State in the sum of ——— hundred thousand dollars, with coupons attached, which said bonds with coupons attached were, according to the provisions of said Acts and for the purposes therein mentioned, duly negotiated and sold.

5. That your petitioner is now the legal owner and holder of ten (10) coupons, each for the sum of thirty dollars, which matured on the first day of April, 1872; ten (10) coupons, each for the sum of thirty dollars, which matured on the first day of October, 1872; ten (10) coupons, each for the sum of thirty dollars, which matured on the first day of April, 1873; ten (10) coupons, each for the sum of thirty dollars, which matured on the first day of October, 1873; ten (10) coupons, each for the sum of thirty dollars, which matured on the first day of April, 1874; all of which are coupons of bonds issued under the provisions of said Acts and now past due, amounting in the aggregate to the sum of $1,500, a schedule of which said coupons is attached and made a part of this petition.

6. That by the seventh Section of the Act of March 27, 1869, a fund was created for the payment of the interest on the said bonds, and it was further made the duty of the

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State Treasurer so to use the *said funds. And your relator further showeth that there is now in the hands of the said Francis L. Cardozo, State Treasurer, a large sum of money accruing from the sales of lands held by the State for the purposes of the Land Commission and also from the interest accruing on the State bonds purchased by the said Land Commissioner with the proceeds of sales of land, which said fund is only applicable to the payment of the interest on the bonds issued under said Acts and ample for the payment of the coupons held by your relator.

7. That your relator has presented the said coupons at the Treasury of the State to the said Francis L. Cardozo and demanded payment thereof, and that the said Francis L. Cardozo, though required by law to apply the said funds in payment of said coupons, has refused so to do.

8. And your relator further shows that he has been informed and believes that the said Francis L. Cardozo, as State Treasurer, is about to apply the said fund to the payment of other claims against the State of South Carolina, and thus divert the same from its legitimate purpose, to the great wrong and injury of your relator.

Wherefore, inasmuch as the said Francis L. Cardozo, State Treasurer, refused and still refuses to pay the said coupons from the fund so applicable thereto, and as your relator has no other adequate remedy by law, your relator prays that the said Francis L. Cardozo, State Treasurer, may be required and commanded to pay to your relator the amount due on said coupons out of the fund in his hands arising under the provisions of said Acts; and that until the further hearing and final disposition of your relator's petition the said Francis L. Cardozo, State Treasurer, be enjoined and restrained from making any disposition whatsoever of the fund aforesaid; and for such other and further reliefs as may be proper.

A rule to shew cause was issued and a return thereto made by the State Treasurer, setting forth the grounds upon which he refused to pay the coupons held by the petitioner.

These grounds sufficiently appear in the opinion of the Court.

Clark, for petitioner:

No one of the causes shown is sufficient to withhold from this petitioner the benefit of the writ prayed.

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*I. The first objection to the granting of the writ, "that the relator has no right and there is no corresponding duty on the part of the respondent which the Court will enforce by the writ of mandamus," is fully met by an examination of the statutes under which the bonds in question were issued.—Ordinance of Convention, March 7, 1868; 14 Stat., 34; 14 Stat., 275; 14 Stat., 385; Gen. Stat., Chap. 17, § 68, 126.

If, therefore, we have shown that in the relator there is a clear legal right to demand of the respondent payment of the coupons out of the fund set forth in the petition, and that the law affords no other adequate or specific remedy to secure the enforcement of the right and the performance of the duty which it is sought to coerce, then the relator has brought himself within the rule which warrants the issuing of the writ.—High's Ex. Leg. Rem., §§ 9, 10; Moses on Mandamus, 16; Morton, Bliss & Co. v. Comptroller General, 4 S. C. 472.

The duty is one which the Court will enforce by its writ of mandamus. It is purely ministerial.

The authority by which the act is performed is the mandate of the superior, to wit, the Act of the Legislature.—14 Stat., 276, § 7; High's Ex. Leg. Rem., §§ 24, 34, 80.

A duty is ministerial when an individual has such a legal interest in its performance that neglect of performance becomes a wrong to such individual.—Morton, Bliss & Co. v. Comptroller General, 4 S. C., 474.

II. The defense of the fourth cause set forth in the return is met by the production into Court of the coupons described in the petition, which the relator now exhibits, and which, by consent of parties, shall be received as a sufficient proof of the fifth paragraph of the petition.

III. The defenses set forth in the second and third paragraphs of the return may properly be considered together; for if the operation of the Acts therein referred to be such as is contended for by the respondent, then are both of them repugnant to the Constitution of the State and of the United States, as laws "impairing the obligation of contracts," and null and void.—Constitution S. C., Art. I, § 21; Constitution U. S., Art. I, § 10.

Section 7 of the Act of March 27, 1869, is a part of the contract between the State and all holders of bonds (or coupons) issued in pursuance of said Act, and cannot be repeal-

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ed, or the revenue *arising from said source be diverted by future legislation, without impairing the obligation of the contract.

"When the authority under which a contract for borrowing is made proceeds wholly from the Legislature, the Act and the proceedings of that body in reference to it enter into and become part of such contract."—Morton, Bliss & Co. v. Comptroller General, 4 S. C., 449.

"Laws in existence when the contract is made are necessarily referred to and form part of the contract, and fix the rights and obligations growing out of it."—Sedgwick on Stat. and Const. Law, 640, 651.

Obligation of contracts.—Cooley Const. Lim., 285, et seq. (cases cited); Sedgwick Stat. and Const. Law, 616, et seq; Fletcher v. Peck, 6 Cranch, 87; Bronson v. Kinzie, 1 How., 297; McCracken v. Haywood, 2 How., 608; Dartmouth College v. Woodward, 4 Wheat., 518; Planters' Bank v. Sharp, 6 How., 327; McGee v. Mathis, 4 Wall., 143; Von Hoffman v. City of Quincy, 4 Wall., 535; Wabash and Erie Canal v. Beers, 2 Black, 448; Gunn v. Barry, 15 Wall., 610; Cochran v. Darcy, 5 S. C., 125.

Stone, Attorney General, contra:

The question really involved in this case is, whether the provisions of the seventh Section of the Act of March 27, 1869, (Vol. 14, p. 275, Stat. of S. C.,) entered into and formed a material part of the contract made by the State with the holders of the coupons in controversy.

There is no question but that the provisions of Section 5 of said Act did form a part of the contract, and that the taxes levied by said Act can be collected by means of a mandamus issued to the proper State officers.

The decision in the case of Morton, Bliss & Co. v. Comptroller General (4 S. C., 430,) settles this point.

But Section 7 of said Act is a present direction by the General Assembly to the Land Commissioner as to the disposition to be made by him of the moneys collected upon sales of land. He is told to pay this money into the State Treasury, and the State Treasurer—at the moment the Act is passed, and before any bonds are issued or lands sold, and before any money has come into his hands,—is directed to invest it in the mode therein prescribed.

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*There is nothing in the Act itself to indicate that the General Assembly intended by this merely administrative legislation to tie the hands of all subsequent Legislatures so that these funds might not be invested in some other way.

Thus, for instance, it would be clearly lawful for any General Assembly to order the investment of these funds in bonds of the United States instead of bonds of the State; or the State could lawfully extend the time within which purchasers might pay for lands; or it could even go further, and release the debt of the purchaser altogether. Now, while such legislation might lessen the ability of the State to pay its debts from this source of revenue, it could not be said to impair the obligation of the State's contract with the bondholder or impair the remedy given him to collect his debt.

The Act in question had some other purposes in view than merely to provide for the issuing of bonds and the giving of a remedy to the holders thereof to collect the interest and principal due them; and this seventh Section refers to some of the other purposes.

The real inducement held out to the purchasers of these bonds is the provision for their payment, found in Section 5, and not in the uncertain mode, provided by Section 7, of finally paying interest and principal out of the proceeds of sale of lands.

But even if the provisions of Section 7 be regarded as a part of the contract, they belong to the remedy, and do not form a part of the obligation of the contract.

And the decisions of the Supreme Court of the United States admit that laws affecting the remedy are not unconstitutional so long as there remains some efficient remedy to enforce the contract.—Sturges v. Crowninshield, 4 Wheat., 122; Gunn v. Barry, 15 Wall., 610.

Unless, then, the bondholder could compel the State Treasurer to invest the funds accruing under said Act in the manner directed thereby, even though subsequent legislation should direct another disposition of it, he cannot compel the State Treasurer to pay to him the interest due him out of such moneys.

We do not think such a power is contended for or that it would be recognized by the Courts.

If it be true, as contended for by the respondent, that the provisions of said Section 7 are merely a direction to the State Treasurer made by one Legislature, which another

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and subsequent Legis*lature could change, then it is clearly within the constitutional power of the General Assembly to make an appropriation of the moneys received by the State Treasurer from the Land Commission department to an object other and different from that at first contemplated. And the General Assembly having exercised such power, the Courts are powerless to review its action.

July 25, 1876. The opinion of the Court was delivered by

MOSES, C. J. It is admitted in the argument on the part of the respondent that the provisions of the fifth Section of the Act of 1869 (14 Statutes at Large, 385,) entered into and formed a material part of the contract made by the State with the holders of bonds issued under its direction and authority. Neither the genuineness of the coupons set out in the suggestion nor the title of the relator is disputed, and the only question left for our determination involves his right to demand their payment out of the fund provided and set apart, as he claims, for that purpose by the seventh Section of the said enactment.

Its language is as follows: "It shall be the duty of the said Land Commissioner to deposit with the Treasurer of the State all moneys collected by him as interest due upon the sale of lands, which shall be used by the Treasurer of the State in the payment of the interest on the stocks and bonds of the State issued for the purchase of said lands, and to invest in bonds of the State all moneys received by the Land Commissioner in payment for said lands as principal; said State bonds to be deposited with the Treasurer of the State to constitute a sinking fund for the final payment and redemption of all stocks or bonds issued by the State for the purchase of said lands. The interest accruing on the bonds of the said sinking fund shall be applied to the payment of the interest upon the stocks or bonds of the State issued for the purchase of lands."

The relator contends that the money in the hands of the Treasurer, collected as interest due upon the sales of said lands, is pledged for the payment of the interest on the stocks and bonds of the State issued for their purchase; that the provisions of said Section enter into and become part and parcel of the contract between the State and the holders of bonds and stocks, and any diversion by the State of such proceeds impairs the obligation of the contract, and is, therefore, void and of no effect, because repugnant to

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the *tenth Section of the first Article of the Constitution of the United States.

It is not denied that there is in the hands of the Treasurer, derived from the sources specified in the said seventh Section, a sum sufficient for the payment of the coupons held by the relator, and that it is only withheld because the General Assembly, by the Act approved March 3, 1876, to make appropriations to meet "the ordinary expenses of the State government for the fiscal year commencing November 1, 1875," (16 Stat. at Large, 97,) diverted it to other purposes.

The intent of the Act is too clear to admit of any doubt as to the purpose of the Legislature proposed, or the mode by which it was to be accomplished. The money for the purchase of the lands was to be raised on the bonds directed to be issued, and as to these certain terms and stipulations are expressed with no other possible view than to add to their worth and security. The greater the certainty of payment to the holder of the bond, the higher would be the market value. If the means of meeting the interest and of reducing the bonds were provided and assured in a fixed and permanent form, there would be a higher guaranty than that promised by the pledge of "the faith and credit of the State," which could not be practically enforced by the process of the legislative Acts in the conscience of those who chance, from time to time, to constitute the General Assembly.

As was said in Morton, Bliss & Co., v. the Comptroller General, (4 S. C., 448,) "when a sovereign State enters into a contract of borrowing with an individual, it assumes to be bound, in all particulars as an individual under like circumstances would be bound, by what is expressed or properly implied by the terms of such contract." If one agreed with another that, for the security of the punctual payment of the interest and principal of a loan, he would set apart, by delivery to a third person, certain securities, from the income of which, at fixed periods, it would be returned, would not his attempt to convert them from the use to which they had been appropriated by diverting them to another, entirely inconsistent with the one to which they had been before devoted, be good cause for the interposition of a preventive remedy through the Courts? As if to render certain the object proposed by the provisions of the said Section, "the Treasurer is required to invest in the bonds of the State all moneys received by the Land

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Commissioner in pay*ment for said lands as principal, said State bonds to be deposited with the Treasurer of the State to constitute a sinking fund for the final payment and

redemption of all stocks or bonds issued by the State for the purchase of said lands. The interest accruing on the bonds of the said sinking fund shall be applied to the payment of the interest upon the stocks or bonds of the State issued for the purchase of lands." A permanent mode of absorbing the whole loan is provided in the nature of a sinking fund, which promised as certain a security for the loan as the State could well supply in addition to that which it had at the same time furnished by the fifth Section.

In fact, the seventh Section afforded at least a more available security for the payment of the bonds issued under the Acts than did the fifth; for, while the Acts declared that "a sufficient amount of taxes is hereby levied to pay the interest accruing on said bonds annually," it made no provision for the redemption of the bonds, and even the tax to meet the interest could only be levied through the action of some future Legislature fixing the rate that would be necessary to ensure the "sufficient amount of taxes to pay the annual accruing interest." If, as is said at page 449, in Morton, Bliss & Co. v. Comptroller General, already cited, "when the lawmaking power makes a contract with an individual the legislation conferring authority upon its agent and limiting his powers is to be considered a part of the contract, of which one dealing with the State is bound to take notice," surely the State must stand bound to the terms and conditions which it imposes on itself as a security for the investment which it invites. In the same case the principle now invoked by the relator was thus announced: "When the authority under which the contract of borrowing is made proceeds wholly from the Legislature, the act and proceedings of that body in reference to it enter into and become a part of that contract."

It is claimed by the respondent that it is within the power of any General Assembly to order the investment of these funds in bonds of the United States instead of bonds of the State, or go further and release the debt of the purchaser altogether. As to the first, it is enough to say, if such a change diminished the security of the bondholder the obligation of the contract would necessarily be violated. As to the last, the State has pledged the proceeds of all the lands sold as a security to the bondholder, and devoted them, on valuable consideration, to the

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constitution of a fund for the pay*ment of a specific class of creditors. The security, though not in the form or language of a mortgage, attaches to it all the incidents and obligations of such an instrument, and the debtor can with no more propriety or right divert the funds from the purpose to which he has devoted it by his contract than could the mortgagor affect the priority and validity of his mortgage by converting the subject of it to some other and different use.

But it is said that "even if the provisions of Section 7 be regarded as a part of the contract they belong to the remedy and do not form a part of the obligation of the contract." Where an agreement is entered into by a State through an Act of its General Assembly, its terms are to be found in the provisions of the Act to which it owes its creation. Its intent can in no other way be ascertained; and whatever of the substance of the contract is therein expressed enters into the obligation, which is mutually binding. In no sense can the said Section be said to belong to the remedy. It sets forth the terms of the loan and provides a security for its payment; fixes a time for its redemption, and in and of itself constitutes one entire contract, imposing "the duty of performing it," which, following the eminent authorities cited, we have said in State v. The Bank of the State of South Carolina, (1 S. C., 78,) "constitute the obligation." Even if the respondent is right in assuming that the provisions of the said Section belong only to the remedy, the diversion of the fund proposed by the Act of 1876 so affected the mode of payment which they designated as entirely to destroy it. On this point it is enough to repeat here what we said in the case to which we last referred, quoting the language of Mr. Justice Washington in Green & Biddle, (8 Wheat., 1, [5 L. Ed. 547]) adopted by Dunkin, C. J., in State v. Carew, (13 Rich., 498 [91 Am. Dec. 245]). If the Act so change the nature and extent of existing remedies as materially to impair the "rights and interests of the owner, they are just as much a violation of the compact as if they directly overturned his rights and interests."

Let the writ issue requiring the Treasurer to pay the coupons described in the petition out of the funds applicable thereto in conformity to the opinion of the Court. The order will be considered as extending only to the coupons the subject of the proceeding.

WRIGHT, A. J., and WILLARD, A. J., concurred.

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8 S. C. *82

*WOLF v. HAMBERG.

(Columbia. April Term, 1876.)

[*Judgment* ⇐126.]

In an action on an unliquidated demand, as, for instance, an open account, the plaintiff was not entitled to enter judgment by default before the Clerk, under § 269 of the Code of Procedure.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 222, 223, 224, 228–230; Dec. Dig. ⇐126.]

Before Carpenter, J., at Richland, June, 1875.

This was an action by Elias Wolf and others, trading under the firm of Wolf, Mayer & Co., against C. Hamberg.

The case is sufficiently stated in the opinion of this Court.

Wingate, for appellant.

Barnwell, contra.

July 16, 1876. The opinion of the Court was delivered by

WRIGHT, A. J. This is an appeal from the refusal of His Honor the presiding Judge of the Fifth Circuit to grant a motion submitted by the appellant to set aside a judgment entered on February 23, 1875, as of default against him by the Clerk of the Court for the County of Richland on a summons and complaint issued on an open account, wherein the respondents are the plaintiffs. As the motion must prevail on the second ground, which denies the authority of the Clerk to enter a judgment on the cause of action set forth in the complaint, it is not necessary to consider the first ground, which involves the validity of the Act approved November 25, 1873, "to alter and amend the Code of Procedure, being Title V, Part III, of the General Statutes," (15 Statutes at Large, 495,) and which by its twenty-first Section declares "that no judgment shall be obtained in the Court of Common Pleas except during the term time and in open Court." The complaint was on an account for goods sold and delivered, a copy of which was filed, giving the dates and prices, and an enumeration of the articles which composed it, amounting to $2,211, with a demand for judgment for the said sum, with interest from the 13th January, 1874. The summons also notified the defendant that, on failure to answer the complaint, the plaintiff would take judgment for the sum mentioned with interest and costs.

The Clerk accordingly, at the expiration of the notice, on failure of answer, gave judgment for the amount demanded, and his

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right *to do so was charged as error, and so submitted to the Circuit Judge on the motion before him to vacate the judgment.

The 269th Section of the Code provides that "judgment may be had if the defendant fail to answer the complaint as follows: 1st. In any action arising on contract for the recovery of money only, the plaintiff may file with the Clerk proof of personal service of the summons and complaint on one or more of the defendants, or of the summons, according to the provisions of Section 153, and that no answer has been received. The Clerk shall thereupon enter judgment for the amount mentioned in the summons against the defendant or defendants, or against one or more of several defendants, in cases provided in Section 159." The remaining subdivision of the Section it is not necessary to repeat here.

While the New York cases in regard to the like provision of their Code agree that the said first subdivision above cited must be held to refer to an action arising under a contract for the payment of money, they are everything but harmonious as to the character of even such a contract to authorize a recovery in the mode designated, and more especially are they contradictory in relation to the nature of the debt which will sustain a recourse for judgment to the said modes. It may be safely said that the New York authorities agree that, to give jurisdiction under the said subdivision, the summons must refer only to a judgment to be taken on a liquidated demand. In Waite's Practice, (Vol. 1, p. 479,) it is said: "That the second subdivision of Section 120 of the Code (which corresponds with our 269th Section) contains the proper notice in all actions for unliquidated damages on contracts, express or implied, has been repeatedly asserted in nearly every case before cited in this Section. The same rule is still further sanctioned in the cases of Garrison v. Carr, 3 Abb., (N. S.) 266; S. C., 34 How., 187; Saltus v. Ralph, 15 Abb., 273; Johnson v. Paul, 14 How., 454; S. C., 6 Abb., 335, note."

Thus it would seem that in New York, in an action for money, where the defendant fails to appear and answer, a judgment could not be rendered by the Clerk if the amount sought to be recovered was not liquidated.

We must look, then, to the decisions of our State, and not to those of New York, to ascertain in what light a demand on an open account for goods sold and delivered is regard-

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ed,—whether it is *considered as a sum conceded and admitted to be due or depending on proof through which the sum really due is to be established.

In South Carolina, an open account is recognized as no more than a claim for unliquidated damages.—Skirving v. Executors of Stobo, 2 Bay, 233; Minott v. Elliott, 2 McC., 125; Bishop v. Ross, 1 Rice, 21.

It is not an interest-bearing claim, because not specific and certain as to the amount due, and which, in the absence of some written admission by the party to be charged, remains unliquidated until converted into a specific sum by the verdict of a jury.

The summons here, too, shows that the sum which the defendant may really owe cannot be ascertained without a resort to extrinsic evidence.

If an open account is not entitled to interest, and the summons claims it from a certain day, it implies that some memorandum, note or admission has been made by the defendant acknowledging the sum and at what time due. This must necessarily be maintained by testimony outside of the summons and complaint. The amount, then, as set forth in the summons is not liquidated so far as it therefrom appears, and cannot be properly converted into a judgment under

the subdivision of the Section of the Code already referred to.

It is ordered that the judgment be set aside with leave to the defendant within thirty days from the filing of this opinion to answer or demur, with leave also to the plaintiff within the same time to amend their summons and complaint if they so desire.

MOSES, C. J., and WILLARD, A. J., concurred.

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8 S. C. 84

THE STATE v. HORD.

(Columbia. April Term, 1876.)

[*Homicide* ⟸354.]

For an assault with intent to kill, the prisoner cannot be sentenced to confinement in the Penitentiary.

[Ed. Note.—Cited in Ex parte Bond, 9 S. C. 80, 30 Am. Rep. 20; State v. Welsh, 29 S. C. 8, 6 S. E. 894.

For other cases, see Homicide, Cent. Dig. § 731; Dec. Dig. ⟸354.]

[*Criminal Law* ⟸1208.]

A prisoner convicted of a misdemeanor cannot be sentenced to confinement in the State Penitentiary, unless such punishment is prescribed by some statute.

[Ed. Note.—Cited in State v. Turner, 18 S. C. 107; State v. Welsh, 29 S. C. 8, 6 S. E. 894; State v. Williams, 40 S. C. 381, 19 S. E. 5.

For other cases, see Criminal Law, Cent. Dig. § 3284; Dec. Dig. ⟸1208.]

[*Criminal Law* ⟸977.]

[Cited in State v. Knotts, 70 S. C. 402, 50 S. E. 9, to the point that a succeeding circuit judge presiding at a succeeding term of court may pass sentence on a defendant convicted at the previous term.]

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2482, 2483, 2488, 2489, 2492, 2499, 2502; Dec. Dig. ⟸977.]

Before Reed, J., at Charleston, June, 1875.

This was an indictment against William A. Hord for an assault with intent to kill. He was found guilty and sentenced by the

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*Court to confinement in the State Penitentiary at hard labor for one year. He appealed, on the ground that the sentence was contrary to law—because it directed the imprisonment to be in the State Penitentiary and not in the common jail of the County.

Seabrook, for appellant.

Stone, Attorney General, contra.

July 26, 1876. The opinion of the Court was delivered by

MOSES, C. J. The defendant Hord was indicted for an assault with intent to kill, and, on conviction, was sentenced to confinement in the State Penitentiary at hard labor for one year. His appeal to this Court contests so much of the sentence as appoints and fixes the Penitentiary as the place of his imprisonment, which he submits is without authority of law.

Wherever imprisonment was the punishment in whole or in part for a common law offense, or prescribed for the violation of some statutory enactment, it took effect by a commitment to and detention in the common jail or prison of the County. No change has been made in the common law punishment for an assault with intent to kill, by any Act of the General Assembly, and no authority has been given to the Circuit Court to substitute a mode different from the one always existing and enforced in this State.

Where the Legislature intended imprisonment in the Penitentiary (with or without hard labor) in whole or in part as the punishment for certain offenses, it has so declared in express terms, as may be seen by reference to the various Sections of the 128th Chapter of the General Statutes.

It is urged against the motion that the first Section of Chapter CXLV of the said statutes provides that "the Penitentiary at Columbia, in the County of Richland, shall be the general penitentiary and prison of the State for the reformation as well as the punishment of all offenders who shall have been convicted and sentenced according to law to the punishment of solitary imprisonment or confinement therein at hard labor." The very language of the Section shows that the Penitentiary was to be the place of confinement only of those "sentenced according to law to the punishment of solitary imprisonment or confinement therein at hard labor."

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*Imprisonment in a penitentiary, under a judicial sentence, is regarded as more ignominious and degrading than confinement in a County jail. The powers to commit to the Penitentiary, on a conviction by a jury, for some violation of the law must be authorized by a positive provision; and if none can be found sanctioning its exercise, it cannot be enforced with even the semblance of legal warrant.

The whole scope of the General Statutes in regard to the punishment of both crimes and misdemeanors implies the absence of any such right as was exercised in the sentence now under review. While the fifth Section of Chapter CXXXVII of said Statutes declares that "where no special punishment is provided for a felony it shall, at the discretion of the Court, be by one or more of the following rules, to wit: Confinement in a penitentiary or in a workhouse, or penal farm, (where such institutions shall exist,) for a period not less than three months, nor more than ten years, with such imposition of hard labor and solitary confinement as may be directed," no discretion is given to a Circuit Judge, where the punishment for a misdemeanor is not fixed by statute, to change the sentence from that which was imposed upon it at common law.

The motion to set aside the sentence must

prevail. The case is remanded to the Court of General Sessions for the County of Charleston, where, on the first day of the next term, the appellant must surrender himself to receive such sentence as the presiding Judge may impose, having regard to the principles announced in this opinion.

WRIGHT, A. J., and WILLARD, A. J., concurred.

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*CALMES v. McCRACKEN & KOON.

(Columbia. April Term, 1876.)

[*Homestead* ⇐96.]

A note given to a third person by the purchaser of land for money borrowed to pay the purchase money is not "an obligation contracted for the purchase" of the homestead within the meaning of the first proviso of Article II, Section 32, of the Constitution of the State.

[Ed. Note.—Cited in Amick v. Amick, 59 S. C. 76, 37 S. E. 39.

For other cases, see Homestead, Cent. Dig. § 149; Dec. Dig. ⇐96.]

[*Dower* ⇐15.]

Where one, being indebted by bond and mortgage to secure the purchase money of land, pays the debt with money borrowed from a third person, and gives his note to such third person expressing on its face that the money had been so paid, and also gives to the lender his mortgage of the land to secure the payment of the note, such new mortgage is not a substitute for the first, and does not debar the widow of her right of dower in the mortgaged premises.

[Ed. Note.—Cited in Glover v. Glover, 45 S. C. 55, 22 S. E. 739; Groce v. Ponder, 63 S. C. 167, 41 S. E. 83.

For other cases, see Dower, Cent. Dig. § 57; Dec. Dig. ⇐15.]

[*Homestead* ⇐139.]

A mortgage given by the husband precludes his widow from taking the homestead exemption, except as to any surplus that may remain after satisfying the mortgage debt.

[Ed. Note.—Cited in Glover v. Glover, 45 S. C. 55, 22 S. E. 739.

For other cases, see Homestead, Cent. Dig. § 256; Dec. Dig. ⇐139.]

Before Moses, J., at Newberry, September, 1874.

This was an appeal from the Probate to the Circuit Court. The case is so fully stated in the opinion of this Court as to render any further statement here unnecessary.

Moorman & Schumpert, for appellant, filed the following points and authorities:

1. The McCracken mortgage is no bar to appellant's right of entire dower in the land.

2. Being a new mortgage given by the vendee, appellant's husband, to secure the amount borrowed by him from a third and disinterested party, with which he paid his original mortgage given for the credit portion of the purchase money for the land more than a year before, it cannot be construed as operating to make the seizin of the appellant's husband in the land such a transitory seizin as to bar her right of entire dower therein. Although it is the "firmly and thoroughly established principle of law," that when the husband's seizin is for a transitory instant only, as when the same act which gives the husband the estate also conveys it out of him, or when he is the mere conduit employed to pass the title to a third person, no right of dower arises, yet in the case where a deed for lands is executed and purchaser gives back a mortgage on the land to secure any part of the purchase money, even the deed and mortgage, in order that the mortgage should bar dower, must be simultaneously executed and be regarded as part of the same

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contract, *take effect at the same time, and constitute a single act, and result in clothing the purchaser with seizin for a transitory instant only.—1 Scrib. on Dower, 259, § 36; id., 261, § 39.

The same author adds: "One important element of the rule above considered" (the rule making the seizin of the purchaser who gives a mortgage for the purchase money transitory) "should here be noticed. In order to deprive the wife of her dower the claim of the mortgagee must proceed from the same transaction that gave the husband his seizin. Therefore, when a mortgage was given by a vendee to the vendor to secure the purchase money of the lands mortgaged and afterwards a third person discharged the mortgage and took a new mortgage to himself from the vendee to secure the repayment of the money advanced for that purpose, it was held that the wife of the vendee was entitled to dower." Also, as showing the strictness with which this limitation of the rule is enforced: "When it is claimed in defense to an action for dower that a mortgage for the purchase money was executed by the husband simultaneously with the delivery to him of the deed, the onus rests upon the defendant of showing that the two instruments constituted but one transaction."—Id., pp. 264–5. § 47.

3. Nor can it operate as a substitution and continuance of the original mortgage to the executors.

It is but an incident of the note. The note is altogether different from the original bond. It is a contract between different parties, given to a different payee, of a different date, payable at a different time, bearing a different and larger interest, for a different and larger amount, and for an entirely new and different consideration, at least to amount used to pay expenses of papers. It cannot be substituted for the original bond, but overreaches and annuls it; and with the bond the original mortgage falls. To continue it would be to make it secure a larger and different indebtedness than it was intended or it is possible for it to secure.

To transfer its lien to the new mortgage is to enlarge its original force and effect.

The note and bond are so entirely different

in every respect that it is impossible to substitute one for the other, no matter if such had been the intention of the parties. So the new mortgage is totally distinct from the old one. To substitute the note for the bond to the amount necessary to pay the purchase money still due is to sever one obligation, ex-

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pressed in one set of words, into two *contracts of distinct considerations, attaching certain equities to one that are not pretended for the other.

4. Nor can it operate as an equitable assignment of the original mortgage, subrogating McCracken to the rights of the vendors thereunder and entitling him to any equity precedent to the appellant's right of entire dower.

1. All authorities on dower hold that subrogation will not avail against dower in behalf of a party paying off the purchase money encumbrance, who stands in such relation to the husband as in legal effect to make such party both mortgagor and debtor, whose duty it is to pay and discharge such encumbrance. Where the husband conveys land, and by the terms of the purchase the vendee is to satisfy the encumbrance for the purchase money over the land, such satisfaction is made by the husband and lets in dower.—Bolton v. Ballone, 13 Mass., 227; Carter v. Goodin, 3 Ohio, 75–78.

Where the grantee of the mortgagor subsequently purchases the mortgage, such purchase is an extinguishment.—Coates v. Cheever, 1 Cow., 460; James v. Morag, 2 Cow., 301; Forbes v. Maffett, 18 Ves., 390; Gardner v. Astor, 3 Johns. Ch., 53.

Payment of such encumbrance by administrator of the husband will let in dower.—Barker v. Parker, 17 Mass., 564; Eaton v. Simonds, 14 Pick., 98; Wedge v. Moore, 6 Cush., 8.

Executor or administrator is required to pay such encumbrance from personal assets for the benefit of widow's dower.—Keckley v. Keckley, 2 Hill Ch., 250; Henegan v. Harlee, 10 Rich. Eq., 285.

Even when such party, upon payment of such encumbrance, demands an assignment, and it is refused because deemed to be unnecessary, the encumbrance is extinguished.

2. Nor will it avail in behalf of a party who does not sustain such relation to the husband and who pays such an encumbrance for which he is not personally bound and which is not a charge upon his property.—Wilkes v. Harper, 1 Coms., 586; Gadsden ads. Brown and Wellsman, Speer Eq., 41.

And even where such party pays such an encumbrance and actually takes an assignment thereof, it will be construed to be an assignment or extinguishment of the encumbrance according to the intention of the parties.—Brown v. Lapham, 3 Cush., 551.

3. Subrogation avails alone in behalf of a party who was bound to pay the encumbrance solely for his own relief and did so.

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*When the purchaser of the equity redeems, the widow must contribute.—1 Scribner on Dower, 495, 68.

Where, one of two vendees having died, the survivor pays off their joint mortgage for the purchase money, he is subrogated to one-half of the mortgage, and his claim is paramount to dower of deceased vendee.—Id., 466, § 12.

Where one of several interested in an equity of redemption is willing to redeem, he must pay the whole mortgage debt, and in such case is considered assignee of the mortgage, and as standing in place of the mortgage as to the others interested.—Gibson v. Crehore.

These cases but enforce the general and established principle of subrogation and are fully sustained by all authorities on the subject. In our own case of Gadsden ads. Brown & Wellsman, (Speer's Eq., 41.) the principles governing the application of this equity are clearly set forth. In that case, the party paying the mortgage was a third and disinterested party, and did so upon the agreement that he should be refunded his advance out of the proceeds of the future sales of the negroes bound by the mortgage, and upon this payment the mortgagee released most of the negroes bound, and the party making the advance took a mortgage of the negroes to secure himself.

Yet he was held not to be entitled to be subrogated to the rights of the original mortgagee and take precedence of a subsisting mortgage over some of the negroes in it.

The following strong language is used by the Chancellor:

"The doctrine of subrogation is a pure unmixed equity, having its foundation in the principles of natural justice, and, from its very nature, never could have been intended for the relief of those who were in a condition in which they were at liberty to elect whether they would or would not be bound, and, as far as I have been enabled to learn its history, it never has been so applied. If one with perfect knowledge of the facts will part with his money, or bind himself by his contract in a sufficient consideration, any rule of law which would restore him his money or absolve him from his contract would subvert the rules of social order. It has been directed in its application exclusively to the relief of those that were already bound, who could not but choose to abide the penalty."

Again: "But I have seen no case, and none has been referred to in the argument, in which

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a stranger, who was in a condition to *make terms for himself and demand any security he might require, has been protected by the principle."

II. Neither the Koon note nor the McCracken mortgage is a bar to appellant's right of homestead.

1. Homestead prevails against "any debts

or liabilities, except such obligations as are provided for in the Constitution."—Con., Art. I, § 20.

The only obligations so provided are "obligations contracted for the purchase of the homestead or the erection of improvements thereon."—Con., Art. II, § 32.

There can be but one contract for the purchase of a homestead, and that is the original contract therefore between the vendor and vendee for the price agreed upon. The Koon note is not such a contract.

2. Koon cannot be subrogated to the rights of the executors for the cash portion of the purchase money.

See foregoing authorities as to McCracken's rights of subrogation.

Caldwell, contra, filed the following points and authorities:

I. The facts found by the Circuit decree must stand as the facts of the case, to which this Court is bound to restrict itself, and which it cannot permit to be contradicted, except by the record itself; for the appellant has neglected or declined to procure a statement of the case, either by the Circuit Judge or by consent of counsel. She must, therefore, abide by the statements of the decree, which she has not heretofore sought to alter or add to.

II. It is conceded by the respondents that the appellant is entitled to dower in the lands in question, subject only to the debt of her husband to the respondent, Langdon C. McCracken. It is denied that she is entitled to the homestead exemption as against either the demand of L. C. McCracken or that of Henry Koon.

III. As to the claim of Henry Koon barring the right of homestead. It is true that he did not sell the land to the deceased husband and head of the family, but he furnished the money which made the first payment on the purchase of the land,—the money without which, as far as we can see, the purchase could not have been effected,—the money which it was most strictly contracted should be applied to the payment for the land, and to no other purpose. If the note given by Calmes to Koon for that sum of

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*money is not one of the "obligations contracted for the purchase of said homestead," intended in the Constitution of 1868 and the Acts of the Assembly, it will be very difficult to say what kind of an obligation it is. It certainly comes within the terms of the Constitution and the Acts.

And it is submitted that the language of the Constitution and the Acts in regard to the homestead exemption should be liberally construed towards the creditor. The exemption is an innovation upon our system of laws and in opposition to the spirit of the laws of all nations. Men are by no means agreed upon the propriety of protecting even a debtor's body from the demands of his creditor. It is probable that property is exempt from debt nowhere in the world except in the United States, nor exempt in all of them. Such exemption is therefore peculiar and exceptional; and it therefore rests upon any one claiming it to establish, beyond a reasonable doubt, that the exemption claimed is provided for by the necessary construction of the law.

IV. In the absence of decisions expressly upon this point, we should be guided by the decisions upon the right of dower as affected by mortgages in connection with the purchase money; for as a mortgage of lands for the purchase money will defeat the claim of dower, so does a debt for the purchase of property defeat the claim of homestead in that property.

Now, it is held that if one party purchase land of a second party, and a third party advance the money to make the purchase and take a mortgage of the land from the first party, the widow of the first party shall have no dower as against that mortgage,—the mortgage being considered just the same as if it had been given to the vendor of the land.

In Kettle v. Van Dyck, (1 Sandf. N. Y. Ch. R., 76,) it is held that if A conveys a farm to B, who, on the same day, receives from C the amount of the purchase money, pays it to A and executes to C his bond and mortgage of the farm for the sum advanced by C, the mortgage is really given for the purchase money of the farm, and, therefore, that the widow of B is dowable only of the equity of redemption.

Such, also, is the ruling in McGowan v. Smith, (44 Barb., 232). B, who was in possession of land, under agreement to purchase, sold it to M, and an arrangement was made by which B's vendor, upon receiving what was due him from B, conveyed the

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property *to M, and M executed a mortgage to B for the balance due the latter: Held, a mortgage for the purchase money, which excluded dower.

In Clark v. Munroe, (14 Mass. R., 351,) where A purchased, with property or money, of B, a minor, a tract of land, and took a conveyance of the vendor and then mortgaged the land to C, B's guardian, to secure the payment of the money or property furnished him to effect the purchase, and C assigned the mortgage to B, who entered and forclosed, it was decided that A's widow had no dower.

In Jackson v. Austin, (15 Johns., 477,) the same principle is declared, it being there held that a mortgage executed by the purchaser of lands to the third party advancing money to make the purchase shall have the same preference over prior judgments and other claims against the purchaser as would attach to a mortgage executed by the purchaser to the vendor to secure the payment of the purchase money.

If such rights belong to a person advancing money to effect a purchase of lands in which dower is claimed, it is quite clear that

equally powerful ones attach to one advancing the purchase money of lands in which homestead is claimed; for, surely, the modern invention of homestead is no more elevated and sacred than that ancient right which is ranked with life and liberty.

V. It is submitted that the claim of the respondent, L. C. McCracken, excludes both the homestead exemption and the dower claimed by the appellant. And this position is based upon the ground that the mortgage upon the land, executed by the appellant's husband to McCracken, is a perfect and effectual substitute and continuation of that executed previously by the husband to the executors of Sondley for the credit portion of purchase money of the land.

It will not be denied that the claims both of homestead and dower were subject to the mortgage given to the executors of Sondley. It cannot be denied that McCracken insisted, as a condition of advancing the money to take up that mortgage, that he should be placed exactly in the position occupied by the executors of Sondley. It cannot be denied that he insisted upon having an assignment of the mortgage held by the executors, and it is equally undeniable that Calmes assented to such an assignment. It is also certain that the only thing which prevented such an

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assignment *was the advice of the counsel for all parties, who thought that the assignment by the one executor present would not be valid. It is just as clear that the money was advanced by McCracken and the new mortgage taken for the express purpose of transferring to McCracken all the rights formerly vested in Sondley's executors by their mortgage. It is beyond controversy that Calmes fully concurred in the effort to put McCracken entirely in the place occupied by the executors of Sondley. And it is ascertained that McCracken paid the money into the hands of Sondley's executors directly in order to receive from him the rights that he enjoyed.

If equity considers not the form but the substance of things; if it will reform and complete imperfectly executed instruments; if it will connect the separate, disconnected parts of agreements, so as to make of the most formal and absolute conveyance only a pledge; if it will set aside the most solemn acts upon grounds of fraud, accident or mistake; if it will substitute one instrument for another, as in case of new notes given in payment of old ones, and give to the new all the powers of the old, as in the case of a note secured by mortgage being substituted by a new note; it is quite clear that it may place in an obligation given to a new party who takes up an obligation held by another all the qualities and powers of the old obligation taken up.

The term subrogation is not technically applicable to this case for that is considered to apply to cases where the party is already bound; but it is insisted that it is a case of substitution of instruments. Certainly the executors of Sondley could have assigned their mortgage to McCracken and enabled him to sue upon it in his own name and enforce all the rights they had. It is also certain that Calmes could have substituted a new mortgage to those executors, in the place of the old one, and given it all the force of the old one. What, then, prevented him from executing a mortgage to McCracken which should entirely take the place of the one to the Sondleys?

In McDonald v. McDonald, (16 Vt., 630,) in Bolles v. Chauncey, (6 Conn., 389,) and in Burton v. Pressley, (Cheves' Eq., 1,) it is held that a new note given in substitution of an old note secured by mortgage shall have all the benefits of the mortgage. In Hinson v. Pickett, (1 Hill's Ch., 38,) it is held that a distributee advancing money to pay the debt of his ancestor shall, without any assignment of the debt, be subrogated to all the rights

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of the *creditor against the estate. In Wardlaw v. Grey, (2 Hill's Ch., 644,) it is held that where a guardian settled with his ward by giving him a promissory note, the promissory note shall rank as a specialty against the estate of the guardian, by reason of the guardianship bond, of which in equity it took the place. The note in that case was given before the majority of the ward, but it was retained, and the settlement upon which it was given affirmed by the ward after coming of age. In the United States v. Crookshanks, (1 Edw. Ch., 233,) it is held that where a mortgage has been canceled without payment, and, in pursuance of an agreement made at the time of cancellation, another mortgage has subsequently been substituted, either by the mortgagor or his heirs, it will be a continuation of the first mortgage, except, of course, as to intervening rights.

If the new mortgage in our case had been a subsequent arrangement, as in the case of Gage v. Ward, (25 Maine, 101,) we could not claim for it the status of a mortgage for the purchase money; but here the new mortgage was executed according to a previous arrangement that it should in all respects take the place of the first mortgage and operate as a mere transfer of the first mortgage to new hands. No time elapsed between the two instruments, for the satisfaction of the old one in itself created the new. The mortgagor never touched the money that changed hands. McCracken himself placed the money in the hands of Sondley's executors. No rights could possibly intervene between the two instruments. The encumbrance was never for an instant removed. Calmes was only the conduit by which a mortgage passed out of the hands of Sondley's executors into those of McCracken. And this is just the state of affairs stated in our case of Douglass v. Dickson (11 Rich.,

417.) as that which would effectually bar dower.

The case of Gadsden ads. Brown & Wellsman (Speer's Eq., 37.) is not parallel with ours; it lacked that ingredient which is the soul of McCracken's claim, viz., the purpose, agreement and attempt to put the new mortgagee in the shoes of the old. And Chancellor Dunkin, in delivering the opinion of the Court of Appeals, says: "There was no agreement that he (Gadsden) should be subrogated to their (the original mortgagees') rights as mortgagees." In our case there was that agreement; and upon that, and the instrument executed to carry it out, we stand.

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*If it be true, as stated in appellants' brief, that the new note bears a higher rate of interest than the old,—which, however, is not admitted,—the case is not materially affected. The new mortgage should stand good against both dower and homestead for the amount that would now be due on the original mortgage, which may be very easily ascertained.

Also, the following additional points:

VI. In addition to the positions heretofore taken by the respondents, it is submitted, in behalf of the mortgage held by the said L. C. McCracken, that that mortgage of the real estate here in question having been executed by G. W. Calmes, the husband of the appellant, in his lifetime, it must prevail, to the exclusion of the appellant's claim of homestead in the said land; or, rather, that the appellant's right of homestead is subject to the payment of the mortgage debt and can only be allowed in what shall remain of the land, or its proceeds, after the payment of the mortgage.—Homestead Association v. Enslow, 7 S. C., 1.

October 31, 1876. The opinion of the Court was delivered by

MOSES, C. J. The facts of the case may be thus briefly stated: In January, 1870, the land in question was sold by the executors of Sondley at public outcry and purchased by George W. Calmes, the husband of the appellant,—the terms being one-half cash and for the balance a credit of one year with interest, secured by bond and a mortgage of the premises.

The cash portion was paid to the vendors by Calmes with money borrowed from the said Henry Koon, to whom Calmes gave his note therefor, with two sureties. On this note judgment was obtained against the principal in 1871.

After the credit portion of the purchase money fell due, Calmes, on the 16th day of January, 1871, borrowed from the said S. C. McCracken the money with which it was paid. On offering payment, the latter said he wanted an assignment of the bond and mortgage, but, only one of the two mortgagees being present, his counsel advised that a valid assignment could not be executed by him alone, and suggested "that a mortgage of the premises after the payment, executed by Calmes, with a note at the same time specifying the consideration to be a loan made for the payment to the Sondleys of the balance of the purchase money, would be just

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*as good." Accordingly Calmes's note was taken by McCracken for the amount loaned, payable at twelve months, including cost of stamps and expense of mortgage, to bear interest at twelve per cent. per annum; that on the original bond was at the rate of seven per cent. Calmes departed this life on 23d February, 1872, leaving his widow, Frances Ann, the appellant, and an infant daughter.

Through proceedings in the Court of Probate for Newberry County, to which Koon and McCracken were parties, the said Frances Ann claimed, on behalf of herself, dower in the said land, and for herself and child a right of homestead, both of which were allowed by the said Court.

On appeal to the Circuit Court by the respondents here, the decree of the Probate Court was affirmed so far as it sustained the claim of the widow to dower as against the judgment of Koon, and modified as to the mortgage of McCracken by restricting such claim to the excess of the land, or the funds derived from its sale over and above the amount necessary for the satisfaction of the mortgage, and rejecting the claim of homestead, except as to such amount as may remain from the proceeds of the sale of the land after satisfying the debts of both Koon and McCracken. From the decision below, the said Frances Ann appeals to this Court.

We will first consider whether the judgment of Koon can prevail against the right of homestead claimed by the appellant as the head of a family. She occupies that relation, and, as was held in In re Kennedy, (2 S. C., 227,) and Bradley v. Rodelsperger, (3 S. C., 226,) may lawfully demand the provision conferred by the Constitution, unless the obligation through which it is proposed to debar her is of the class enumerated in that instrument as sufficient for the purpose. With this view, it is contended that the note given by Calmes to Koon for the money which paid the cash portion of the purchase money of the land was "an obligation contracted for the purchase of said homestead," which, under the Constitution, renders the land liable to the debt, and to that extent excludes the right of homesead.

In our view, the proposition is not supported either by the letter or the spirit of the Constitution. The contract here referred to and intended is that through which the land was purchased, and the obligation must arise from its force and effect. It was a provision for the benefit of the vendor, for without it, if the purchase money was not paid, or secured to be paid, a judgment which he might

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*afterwards recover on the debt so created might be defeated by the interposition of the right of homestead by the debtor. It was to secure the credit given on the purchase; but here, so far from there having been a credit as to this portion, the cash was actually paid to the vendors, and the only credit was as to the other half, for which they took a mortgage of the premises conveyed. If for the cash portion there was nothing due, there could be no "obligation contracted for the purchase." There was no privity between the executors of Sondley and Koon by virtue of which any contract arose for the money loaned by the latter to Calmes. There is no evidence that the executors even knew the source from which the money paid to them was obtained. Koon did not look to the land for the payment of his loan, but to the note with sureties which he took on making it. He is in no wise a creditor by reason of any contract for the purchase, and it is only in favor of such a creditor that the constitutional exemption can apply. In our judgment, the right of homestead, as claimed, is not affected by the judgment of Koon.

The next question to be considered involves the right of McCracken to bar the appellant of her dower in the land mortgaged to him by her husband. The respondent contends that his mortgage is to have the full force and effect of the one which was originally executed to the executors of Sondley so far as relates to the demand thus made; and as the right of dower in that could only have extended to any surplus remaining after the satisfaction of the whole debt due on the note which it was to secure, it can prevail only to the same extent as against the mortgage held by McCracken.

While it is admitted that the equity insisted upon is not enforceable on the principle of subrogation, it is contended that it must avail, and is sustainable through the rule which applies to the substitution of instruments. It might be enough to say that the application of the doctrine here fails in a very essential element, to wit, the fact of substitution. No new mortgage was executed to the executors of Sondley in the place of the one they held, and on which satisfaction in due form was entered. Substitution implies an act between the same parties, through which, by agreement, something is accepted in lieu of something given up,—and generally they are of equal value,—the one filling the place of the other. In the case at bar, the contract between the parties is made

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manifest *by the note which Calmes executed to McCracken. The consideration expressed on the face of it was the amount of money received by the maker of the payee as a loan, "which was applied to the payment of the purchase money due on lands purchased by me" [the maker] "of the estate of Richard Sondley, deceased." The time of payment was extended to twelve months. The amount was for a greater sum than that due on the original bond, and at a largely increased rate of interest. In regard to the case of Burton v. Pressly, (Chev. Eq., 1,) cited by the counsel of the respondents as confirming the rule for which he contended, it must be remembered that "another note of precisely the same tenor and date was executed in the place of the one given up." Here a note of a different date and for a different amount was given, not to the original mortgagees, but to a third person, who made the loan which satisfied the mortgage before the note on the new consideration was made to him.

It may have been understood by J. R. Sondley, the only one of the mortgagees present, and the said McCracken and Calmes, as it was supposed by the counsel of the former, that the course adopted continued the new mortgage as a subsisting lien on the land to the amount of the note which it was given to secure; but an equity so arising between the said parties cannot interfere to defeat intervening legal rights.

Whereas in the cases of Clark v. Monroe, (14 Mass., 351,) and Jackson v. Austin, (15 Johns., 447,) cited on the argument, the purchase money was paid by a third person, the title made to the purchaser and a mortgage by him at once given to the party advancing the money, it was properly held that the wife had no more claim to dower than if the conveyance being made to the husband he had at once executed a mortgage to the grantor for the purchase money. The seizin in him in the instance first stated was but transitory, to enable him effectually to do what by his contract he had undertaken and promised. But here, on the satisfaction of the mortgage to the executors, the seizin of the land was in him and the right of the wife to her dower vested. As is said by Parker, C. J., in Bolton v. Ballard, (13 Mass., 230,) "although in one view this might be considered a seizin for an instant, yet it is to be taken in connection with the former seizin, which, although affected by the rights of the mortgagee, was always in force against every other person, and when those rights ceased to exist the estate was as if

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it *had never been encumbered." To whatever extent the instrument may prevail as between McCracken and Calmes to secure the right it proposed to the latter, it cannot bar the dower of the widow, who was neither a party to it or either affected with notice of the transaction.

The mortgage, however, must be held to exclude the appellant from her claim of homestead in the premises which it covers, except as to what may remain of their proceeds on sale for foreclosure, after satisfying the amount due upon it.—Homestead Association v. Enslow, 7 S. C., 1.

It is ordered that the Clerk of this Court certify to the Probate Court for the County of Newberry the judgment of this Court, that such further orders may be there taken in conformity therewith, and any other orders necessary for matters in the case not disposed of.

WRIGHT, A. J., and WILLARD, A. J., concurred.

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8 S. C. 100

MORDECAI v. COUNTY OF CHARLESTON.

(Columbia, April Term, 1876.)

[*Attorney and Client* ⇐76.]

An assignment of a judgment for the plaintiff determines the authority of his attorney of record; and all the attorney's subsequent acts and proceedings as such attorney, if without the consent or knowledge of the assignee, are null and void.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 131; Dec. Dig. ⇐76.]

[*Attorney and Client* ⇐76.]

So, also, it seems that the entry of a judgment for the plaintiff puts an end to the authority of his attorney over the record.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 130; Dec. Dig. ⇐76.]

[*Attorney and Client* ⇐100.]

[An attorney at law by virtue of his general authority may receive the money due on the judgment, and satisfy the same.]

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 204; Dec. Dig. ⇐100.]

Before Reed, J., at Charleston, May, 1876.

The case was as follows:

Macon B. Allen brought an action in the Court of Common Pleas for Charleston County against the County of Charleston, and an answer, verified by one of the County Commissioners, was filed by the attorney of the defendant.

On the 25th January, 1875, an order was entered, by consent, that the plaintiff have judgment against the defendant for $403.72, and thereupon judgment was entered.

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*On the 31st March, 1875, the plaintiff, by writing endorsed on the record, assigned the judgment to T. M. Mordecai, in trust, to sell the judgment and apply the proceeds to the satisfaction of certain claims against the plaintiff. The assignee issued execution upon the judgment in his own name.

On the 13th day of April, 1875, an order was made by the Court setting aside this and other judgments against the County of Charleston, and referring them to a Referee for trial. No written notice of this order was served upon the plaintiff, his attorney or the assignee. [See the petition to set aside the judgments and the order of 13th April, 1875, in Ex parte Williams, in re Campbell v. County of Charleston, 7 S. C., 71.]

After the order of 13th April, 1875, was made, the plaintiff and his attorney on record, without the knowledge or consent of the assignee, submitted the case to the Referee for trial. Proofs were taken and argument heard by the Referee, who filed his report allowing the plaintiff $36.50.

No exceptions to the report were filed.

On the 4th May, 1876, T. M. Mordecai, the assignee, moved His Honor Judge Reed to rescind so much of the order of the 13th April, 1875, as applied to this case, alleging that the submission of the case to the Referee for trial by the attorney for the plaintiff on record, without the knowledge or consent of the assignee, was without authority,—his authority as attorney of record having been ended by the assignment of the judgment. The motion was refused, and the assignee appealed.

Mordecai, for appellant, cited Treasurers v. McDowell, 1 Hill, 185.

Miles, contra, contended that the motion to rescind the order of 13th April, 1875, was addressed to the discretion of the Circuit Judge, and his decision will not be reviewed upon appeal. He referred to Meek v. Richardson, 4 Rich., Eq., 91; 4 Waite's Pr., 245, 465; Voorhies' Code, 651, note k.

December 1, 1876. The opinion of the Court was delivered by

WRIGHT, A. J. On the 25th day of February, 1875, the presiding Judge signed an order that Macon B. Allen, plaintiff, have leave to enter judgment against the County of Charleston for $403.72 and costs. Judgment was entered.

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*On the 31st day of March, 1875, plaintiff assigned this judgment to T. M. Mordecai, trustee, to dispose of in a certain manner agreed upon.

On the same day the assignee issued an execution on this judgment in his own name as trustee and plaintiff's attorney, he being at the time one of the attorneys of the Court. It appears that the attorney who was the attorney on record previous to the assignment of the judgment to T. M. Mordecai subsequently to the assignment agreed to submit the case to a Special Referee for trial. The Referee reported, allowing $36.50, to which no exceptions were filed.

On the 4th day of May, 1876, T. M. Mordecai, assignee, moved His Honor Judge Reed to rescind so much of the order of April 13th, 1875, as applied to this case, alleging that the submission of the case to the Special Referee for trial by the original attorney of the plaintiff was without his knowledge or consent, and was without authority,—the right of the original attorney having ended with the assignment of the judgment.

This motion was refused, and an order made referring the case back to the Spe-

cial Referee for trial de novo, so as to allow the assignee an opportunity of proving his case. From this order, refusing to rescind the order of April 13th, 1875, the assignee appeals to this Court.

The trustee, though an attorney of the Court, may not have had authority to issue an execution on the judgment obtained for the plaintiff by the attorney who issued the summons and complaint, and was therefore the attorney on record, without first obtaining an order substituting himself as attorney thereon. While this may be true, the action of the attorney on record in consenting to submit the case to a Referee for trial was without authority. All the right and interest in the judgment had been legally transferred to the appellant, and without his sanction, and certainly without notice to him, no proceeding could be entertained which could affect the legal rights vested in him by the assignment. The authority of the attorney of record is determined by the judgment, though on actual receipt of the money he may acknowledge satisfaction.—Treasurer v. McDowell, 1 Hill, 185 [26 Am. Dec. 166].

The other questions in this case have been fully considered and determined in the case of Ex parte George W. Williams et al, in re

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*F. Campbell v. The County of Charleston, heard at the November Term, 1875.—See manuscript opinion.

So much of the order of April 13th, 1875, as applied to this case must, therefore, be rescinded, and it is so ordered.

The motion is granted.

MOSES, C. J., and WILLARD, A. J., concurred.

8 S. C. 103

MASON v. CARTER.

(Columbia. Nov. Term, 1876.)

[*Pleading* ⇐⇒59.]

In an action against a commission merchant for an account of the proceeds of goods sold by him, the complaint alleged that defendant had refused to account and pay over the proceeds of sale to the plaintiff: Held, On demurrer, that the allegation was sufficient; that it was unnecessary to state a demand for an account after stating a refusal to do so.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 126; Dec. Dig. ⇐⇒59.]

[*Pleading* ⇐⇒48.]

The facts alleged in a complaint, under the Code, need not be formulated with reference to the technical incidents of the right of action to which the plaintiff may suppose himself entitled. It is the Court that refers the facts to their appropriate form of action for the purposes of its judgment, and not the pleader, as at common law.

[Ed. Note.—Cited in Wallace v. Lark, 12 S. C. 579, 32 Am. Rep. 516; Jerkowski v. Marco & Lewenthal, 56 S. C. 245, 34 S. E. 386.

For other cases, see Pleading, Cent. Dig. §§ 105, 106; Dec. Dig. ⇐⇒48.]

[*Pleading* ⇐⇒34.]

Where a fact is pleaded, whatever inferences of law or conclusions of fact may properly arise from it are to be regarded as embraced in the allegation of such fact.

[Ed. Note.—Cited in McBrayer v. Mills, 62 S. C. 40, 39 S. E. 788; Parks v. Laurens Cotton Mills, 70 S. C. 277, 49 S. E. 871.

For other cases, see Pleading, Cent. Dig. §§ 5½, 66–74; Dec. Dig. ⇐⇒34.]

Before Reed, J., at Charleston, June Term, 1876.

This was an action by J. B. Mason against T. M. Carter. The allegations of the complaint are as follows:

I. That heretofore, on or about the nineteenth day of December, 1875, the plaintiff shipped from Providence, Rhode Island, consigned to the defendant, an auctioneer and commission agent, carrying on business in the city of Charleston, in the County of Charleston, and State aforesaid, to sell for cash, thirty boxes of rib bellies, (bacon,) weighing 15,000 pounds, of the value of $1,800; of which consignment the defendant had notice, and which agency for a valuable consideration he undertook and entered upon.

II. That he received said goods and thereafter sold the same on account of the plaintiff.

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*III. That although sufficient time has elapsed therefrom, he has neglected and refused, and still neglects and refuses, to tender to the said plaintiff a just and true account of said sale, and of the proceeds thereof, and has neglected and refused to pay over the proceeds of sale to the said plaintiff, saving and excepting the amount of $300, still neglecting and refusing to pay the balance, to the damage of the said plaintiff $1,500.

Wherefore the plaintiff demands judgment against the defendant for the sum of $1,500, with interest thereon from the twenty-sixth day of January, 1876, together with the costs and disbursements of this action.

The defendant demurred, on the ground that the complaint does not state facts sufficient to constitute a cause of action.

His Honor the presiding Judge overruled the demurrer and the defendant appealed.

Campbells & Whaley, for appellant.
Buist & Buist, contra.

February 1, 1877. The opinion of the Court was delivered by

WILLARD, A. J. The defendant is sued as an auctioneer and commission merchant, who has sold goods consigned to him for sale upon commission, for failing to account and pay over the proceeds of sale. The allegation of the complaint is that defendant had "neglected and refused" to account and pay over, &c. Defendant demurs, on the ground that the complaint does not allege a demand by

plaintiff of such account. We think that the allegation of a refusal to account and pay over is sufficient without a distinct averment of a demand. Pleadings, under the Code, are not required to formulate the state of facts with reference to the technical incidents of the right of action to which the plaintiff may suppose himself entitled. It is the Court that refers the facts to their appropriate form of action, for the purposes of its judgment, and not the pleader as at common law. The consequence is, that when a fact is pleaded, whatever inferences of law or conclusions of fact may properly arise from it are to be regarded as embraced in such averment. The allegation that the defendant refused to account is to be taken as covering an actual and not a technical refusal. After a refusal to account, a demand was unneccessary. The demurrer was properly overruled. The appeal should be dismissed.

MOSES, C. J., and WRIGHT, A. J., concurred.

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8 S. C *105

*JACOBS v. EARLE.

(Columbia. Nov. Term, 1876.)

[*Trusts* ⇨222.]

Where a trustee had a certain amount of trust funds in his hands, which, in 1861, he loaned out on the promissory notes of the borrowers, and afterwards, in an action by him on the notes against the borrowers, a jury, in 1871, acting under the assumed authority of an alleged custom, found a verdict for the plaintiff for half the amount due him, to which verdict he submitted: *Held*, That the trustee, although bound by the finding as between himself and the borrowers, was nevertheless liable to his cestuis que trust for the full amount of his trust fund.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 319; Dec. Dig. ⇨222.]

Before Cooke, J., at Greenville, 1871.

The only statement of the case which has reached the Reporter's hands is contained in the opinion of the Court.

Simpson & Moore, for appellant.

————, contra.

February 6, 1877. The opinion of the Court was delivered by

WRIGHT, A. J. William Jacobs, by his last will and testament, bequeathed to Edward O. Jacobs, in trust for Lemuel Jacobs, $500, the interest of which to be paid annually to Lemuel Jacobs during his natural life, and after his death to the children of said Lemuel Jacobs; and in the event that he should die without issue, then the said fund to revert to the estate of the testator for distribution.

Some time after the death of the testator, Edward O. Jacobs died and the trust fund passed into the hands of the appellant. The amount ($500) he loaned to T. C. Gower, L. B. Cline and others, taking their note for the same, which was dated February 15th, 1861. The interest on the said note was regularly collected and paid over to Lemuel Jacobs until 1866, when the makers refused further payment.

The trustee brought suit upon the note. The case was tried in September, 1871, and a verdict was rendered by the jury for $250. The trustee took no exception to such verdict, but took the note of the defendants for the amount rendered by the jury in settlement of the former note of five hundred dollars, and the case never went to judgment. The makers of the $500 note were solvent and could have paid the whole amount. The case were referred to T. Q. Donaldson as Special Referee to ascertain and report the amount of the trust funds in the hands of the trustee. The Referee re-

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ported *$250, the amount found to be due by the jury by reason of an alleged custom in the County where the case was tried.

The Referee, in his report says: "While the Referee is of the opinion that the action of the jury was not sustained by the law, he at the same time thinks it would be a hardship to make the trustee an exception to a rule which was practically of almost universal application at the time the verdict above mentioned was rendered."

The respondents excepted to the report of the Referee.

The presiding Judge sustained the exception, and ordered the trustee to account for $500 as the amount of the corpus of the trust fund.

From this order an appeal is taken to this Court. It is admitted that the amount of the trust fund under the will of William Jacobs, deceased, was $500. When the trustee acquiesced in the verdict of the jury, which sought to deprive his cestui que trust of one-half of the amount bequeathed by the testator for the use of Lemuel Jacobs, he knew that he acquiesced in a custom which was contrary to law, and he must be held to account for the amount of trust funds placed in his hands. It would be a dangerous practice and a mockery of justice for Courts to allow a custom which existed in a community to prevail against the established law of the land.

While the verdict of the jury in which the trustee acquiesced found only $250 as the corpus of the trust fund was an adjudication and settlement between him and the makers of the $500 note, such settlement did not in any wise relieve the trustee from the original amount of trust funds placed in his hands.

The motion is dismissed.

MOSES, C. J., and WILLARD, A. J., concurred.

8 S. C. *107

*COMMERCIAL INSURANCE AND BANKING COMPANY v. TURNER.

(Columbia. Nov. Term, 1876.)

[*Corporations* ⟸514, 672.]

Where the plaintiff alleges in its complaint that it is a banking corporation, doing business in another State, and created under the laws of that State, and of the "Congress of the United States of America," and the answer merely denies "each and every allegation of the complaint," setting forth no objection to the action on the grounds "that the plaintiff has not legal capacity to sue," or "that there is a defect of parties plaintiff" as required by § 167 of the Code, the plaintiff will not be required to prove at the trial its capacity to sue.

[Ed. Note.—Cited in Liberian Exodus Joint-Stock S. S. Co. v. Rodgers, 21 S. C. 28, 33, 35; Palmetto Lumber Co. v. Risley, 25 S. C. 315, 316; Kerr & Co. v. Cochran, 29 S. C. 63, 6 S. E. 905; Walpole v. City Council, 32 S. C. 553, 11 S. E. 391; Land Mortgage Investment & Agency Co. v. Williams, 35 S. C. 372, 14 S. E. 821; Hankinson v. Charlotte, C. & A. R. Co., 41 S. C. 16, 19 S. E. 206; Mickle v. Congaree Const. Co., 41 S. C. 397, 19 S. E. 725; Stoddard v. Aiken, 57 S. C. 137, 35 S. E. 501; Blackwell v. British American Mtg. Co., 65 S. C. 116, 43 S. E. 395; Montgomery v. Seaboard Air Line Ry., 73 S. C. 505, 53 S. E. 987.

For other cases, see Corporations, Cent. Dig. §§ 2057, 2648; Dec. Dig. ⟸514, 672.]

[This case is also cited in Kerr & Co. v. Cochran, 29 S. C. 61, 6 S. E. 905, and distinguished therefrom.]

Before Carpenter, J., at Edgefield, March, 1876.

This was an action by a plaintiff styling itself the Commercial Insurance and Banking Company against J. L. Turner.

The action was at first brought in the name of "J. C. Fargo, Cashier of the Commercial Insurance and Banking Company, Augusta, Ga.," plaintiff. The defendant demurred, and answered the complaint, and in June, 1875, the plaintiff obtained an order "that the pleadings be amended so as to make the Commercial Insurance and Banking Company plaintiff. An amended complaint was then filed by the plaintiffs, the Commercial Insurance and Banking Company, alleging: "1. That they are a banking corporation, doing business in the State of Georgia, and created under the laws of Georgia and of the Congress of the United States of America; and in other paragraphs setting forth a promissory note for $327.90, signed by the defendant, payable to the order of T. W. Carwile & Co., and endorsed by them in blank, and alleging that the note was the property of the plaintiffs; that it had been protested for nonpayment, and that no part thereof had been paid.

The answer of the defendant stated "that he denied each and every allegation of said amended complaint," and asked that said complaint be dismissed with costs.

At the trial T. W. Carwile was examined as a witness for the plaintiffs. He testified that he was a member of the late firm of T. W. Carwile & Co.; that the note sued upon was given to said firm and transferred by them to plaintiffs for value; that he knew the plaintiffs' place of business to be in Augusta, Georgia, and that he had had frequent business transactions with them for several years. The plaintiffs here closed, and defendant moved for a nonsuit upon the grounds that the plaintiffs had not made out their case, and that they had not proved that they were an incorporated banking company by introducing the statute of Georgia under which they claimed to be duly created, incorporated and doing business.

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*His Honor the presiding Judge overruled the motion, holding that as the defendant had not, in his answer, made the objection specifically, the plaintiffs were not bound to show that they were an incorporated company by introducing the statute.

The defendant's counsel excepted to the ruling, and, the case having been submitted to the jury, they found a verdict for the plaintiff.

The defendant afterwards appealed.

Abney, for appellant:

The respondent in this action failed to prove that it was duly incorporated, after alleging it in the amended complaint, which was denied. A motion by the appellant for nonsuit was made and refused by the court. The appellant now submits that the motion should have been granted, and asks this Court to reverse the judgment.

The answer may contain a general or specific denial.—Code, § 172.

The general denial allowed by the Code corresponds very nearly with the general issue in actions of assumpsit and of debt on simple contract at common law.—McKyring v. Bull, 16 N. Y., 297. "Its effect is to [illegible] the burden of proof on the plaintiff."—Texier v. Gonin, 5 Dwar., 389; Academy of Music v. Hackett.

"The established doctrine now is that no Court takes judicial notice of the laws of a foreign country, but they must be proved as facts."—Story on Conflict of Laws, § 637.

The best testimony of proof shall be produced which the nature of the thing admits of. This rule applies to the proof of foreign laws as well as other facts.—Ib., § 639.

"The United States Bank has been held to be a foreign corporation, so that an exemplification of its charter must be produced to prove its corporate character; for of the Acts of Congress creating corporations, a State Court has no judicial knowledge."—Angell & Ames on Corp., § 633, 8th edition.

"In an action by a corporation, it must be prepared to show its evidence of incorporation."—Ib., § 632.

If the respondent had been chartered under a private statute even of this State, the Courts would not take judicial notice of it unless it was referred to in the pleadings by

its title and the day of its passage.—Code, § 186.

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*In England, and in some States of this country, the rule is that when a body corporate institutes legal proceedings, either on contract or to recover real property, it must at the trial under the general issue prove the fact of incorporation, unless, indeed, the Act of incorporation be a public Act, which the Courts are bound to notice ex officio.—Angell & Ames on Corp., § 632.

In some of the other States, it is not required; but in those States, however, an exception is made in case of foreign corporations.—Ib., § 633; Society v. Young, 2 New Hamp., 310; Lord v. Bigelow, 8 Vermont, 445; Lewis v. Bank of Kentucky, 12 Ohio, 132; Throop v. Hatch, 3 Abb., 23; Phinney v. Phinney, 17 How., 197.

"Where a foreign corporation appears in Court it must establish its right to bring the suit and to make the contract it seeks to enforce."—Angell & Ames on Corp., § 633, n.

"A corporation in a foreign country may sue as such in the Courts of England, but they must prove that they are incorporated in that country; and it will be left to the jury to say whether the body so incorporated is the same which sues."—National Bank of St. Charles v. De Bernales, 1 Carr. & P., 569.

In one case in South Carolina it was held doubtful whether a foreign corporation could even sue in this State in their corporate character.—Vide Brown, Green & Co. v. Minis, 1 McC., 80. In a later case, however, upon a copy of the Act of the Legislature of North Carolina incorporating the plaintiffs, duly authenticated, being produced, the Court sustained the action.—Vide The Bank of Cape Fear, endorsee, v. Stinemetz, endorser, 1 Hill, 44.

If the respondents had introduced in evidence a printed copy of the statutes of Georgia containing the statute whereby it was created, the statutes would have been presumptive evidence of the fact of incorporation.—See Rev. Stat., p. 678, § 441.

Whenever it appears that the evidence is insufficient to make out the plaintiff's case, or where there is total failure of proof for that purpose, it is the duty of the Judge to order a nonsuit whether the plaintiffs consent or not.—Hopkins v. DeGraffenreid, 2 Bay., 441; Brown v. Frost, 2 Bay., 126.

Addison, contra:

The defense set up is the general issue,—no positive denial of any of the allegations in the complaint. Under a general denial the

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*defendant cannot deny the legal capacity of plaintiff to sue, nor that there is a defect of parties plaintiff, nor that the plaintiff is not the real party in interest.—Voorhies' Code, page 215, c. The rule is well established, that if in a suit brought by a corporation the defendant plead the general issue, it is an admission of the corporate existence of the plaintiff, which dispenses with all proof on their part to that point.—Proprietors of Monumoir Great Beach v. Rogers, 1 Mass. 159; Christian Society in Plymouth v. Macomber, 3 Metcalf, (Mass.,) 235; School District v. Blaisdell, 6 New Hamp.; Concord v. McIntire, 6 New Hamp., 527.

There is no rule of pleading, it has been said, more universal than that, by pleading to the merits, the defendant admits the capacity of the plaintiff to sue; and no reason can be shown why a corporation should be placed upon a different footing in this particular from a natural person.—Prince v. Commercial Bank of Columbus, 1 Alabama, 241.

If the defendant desires to avail himself of an objection to the corporate existence or character of the plaintiff, he must give notice of his objection or he cannot avail himself of it.—Proprietors of Monumoir Great Beach v. Rogers, 1 Mass., 159.

Though the fact of incorporation is to be proven, yet after a verdict in favor of the plaintiffs who sue as a corporation, the Court will presume that the fact of their being a corporation and capable of sueing in their aggregate capacity was conceded or proven at the trial.—British Land Co. v. Ames, 6 Met., (Mass.,) 391; Williams v. Bank of Michigan, 7 Wend., (N. Y.,) 539.

The testimony on the trial of this cause was given by Thomas W. Carwile: That he was one of the members of the late firm of T. W. Carwile & Co., who formerly did business in Augusta, Ga.; knows the Commercial Insurance and Banking Company's place of business; had frequent business transactions with said bank for several years; their place of business is still in Augusta, Ga.; the defendant made the note in suit; knows the note now in suit to be the same note given to the late firm of T. W. Carwile & Co., and endorsed by them, and traded to plaintiffs for valuable consideration; that defendant was a merchant at Johnston, S. C.; had frequent business transactions with defendant; witness usually endorsed the paper of defendant and got the money from this bank; the defendant at that time was considered solvent—now insolvent.

It is not necessary to prove on the trial of the cause the existence of an incorporation unless the defendant shall have pleaded in

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*abatement or in bar that the plaintiffs are not a corporation.—Proprietors Southhold v. Horton, 6 Hill, (N. Y.,) 501; 2 N. Y. Rev. Stat., 458.

February, 8, 1877. The opinion of the court was delivered by

WILLARD, A. J. The amended complaint alleges that the plaintiffs are a banking corporation doing business in the State of Georgia, created under the laws of Georgia and of the Congress of the United States; that the defendant is indebted to them on a promis-

sory note made by him. The defendant's answer is: "That he denies each and every allegation of said amended complaint" and demands a dismissal of the complaint. On the trial, a nonsuit was demanded, on the ground that the plaintiffs failed to introduce evidence showing that they possessed legal capacity to sue. The motion was refused, and this refusal is alleged to have been erroneous. Sections 170 and 171 of the Code require that certain matters of defense shall be set forth by demurrer or by answer, in order to be available to the defendant by way of defense. The matters thus referred to are embraced in Section 167, and are as follows: "That the plaintiff has not legal capacity to sue; or that there is a defect of parties plaintiff or defendant; or that several causes of action have been improperly united." If no such objection be taken, Section 171 declares that the defendant shall be deemed to have waived the same. The latter part of the Section allows the defenses of a want of jurisdiction and that the complaint does not state facts sufficient to constitute a cause of action to be raised by a general answer without being specifically pleaded. The clear intention of these Sections is that the defendant shall give, by his demurrer or answer, specific notice that he intends to rely on one or more of these specified defenses if he wishes to make them available. A general denial of all the facts alleged in the complaint is not a compliance with these requirements of the Code. The object of these provisions is to relieve the plaintiff from any necessity of preparing to meet such objections on the trial, unless notified by the pleadings that the defendant intends to rely on one or more of them.

The nonsuit was properly refused, and the appeal should be dismissed.

MOSES, C. J., and WRIGHT, A. J., concurred.

8 S. C. *112

*HENDERSON v. WYATT.(a)

(Columbia. Nov. Term, 1876.)

[*Appeal and Error* ⇐120.]

An order of the Circuit Court, allowing an appeal which had been denied by the Probate Court, upon the ground that it had not been taken in time, is not appealable.

[Ed. Note.—Cited in Allen v. Allen, 13 S. C. 523, 36 Am. Rep. 716.

For other cases, see Appeal and Error, Cent. Dig. §§ 840–862, 864, 865; Dec. Dig. ⇐120.]

[*Appeal and Error* ⇐120.]

An order of the Circuit Court, on an appeal from the decree of an inferior Court, must involve the merits or it is not appealable.

[Ed. Note.—Cited in Westfield v. Westfield, 13 S. C. 484; Lowndes v. Miller, 25 S. C. 122.

For other cases, see Appeal and Error, Cent. Dig. § 843; Dec. Dig. ⇐120.]

[*Appeal and Error* ⇐150.]

Ordinarily the Court will not interpose an objection to a proceeding which is not made by a party in interest, but there are exceptions to the rule, one of which is where great practical inconvenience is likely to arise from disregarding the objection.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 934–946; Dec. Dig. ⇐150.]

March 16, 1877. The opinion of the Court was delivered by

WILLARD, A. J. The order appealed from was made by the Circuit Court, and its whole object was to allow an appeal from a decree made by the Probate Court, said appeal having been denied by the Probate Court upon the ground that it had not been taken in time. The order is not appealable as it does not involve the merits of the case. The Code, Section 11, as amended November 25, 1873, (15 Stat., 495,) authorizes appeals to the Supreme Court from any "intermediate judgment, order or decree involving the merits in actions commenced in the Court of Common Pleas and General Sessions, brought there by original process, or removed there from any inferior Court or jurisdiction, and final judgments in such actions."

The word "actions," as here used, clearly embraces all proceedings of an ordinary character in the several Courts from which an appeal may be taken to the Circuit Court, (Code, Section 2,) and would embrace an order made by the Circuit Court involving the merits on an appeal from the Probate Court from a decree of that Court, such as that referred to in this case. An order to involve the merits must finally determine some substantial matter forming the whole or a part of some cause of action or defense in the case in which the order is entitled. In the present case the only matter determined was whether the appeal from the Probate Court was taken in time. Such an order cannot be said to involve the merits, but merely affects forms of procedure.

The objection to the appeal just stated is not raised by the respondent. Ordinarily in that case the Court will not interpose an objection to a proceeding not made by the par-

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ties in interest, *but this rule is subject to exceptions. When a question of jurisdiction is involved the Court may notice a defect of its jurisdiction such as ought to preclude a judgment on the rights involved, although not interposed by the party.—State, ex rel. Barker, v. Bowen, S. C. MS. Dec. [4 McCord, 254]. And where great practical inconven-

(a) The importance of the points of law involved in this case would seem to justify the publication of the opinion, although the Reporter is unable to give a statement of the facts, no brief having been furnished him.

ience is likely to arise from disregarding such objections the Court may with propriety notice it: as where an opposite course would tend to establish an irregular and inconvenient practice.

We regard the present case as one of the character just named. Appeals from orders of this class would ordinarily create unnecessary expense and delay, to which parties ought not to be subjected, and are especially objectionable where the matter in dispute can be fully considered by this Court under an appeal from a final judgment of the Circuit Court upon the case.

The appeal should be dismissed.

WRIGHT, A. J., concurred.

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8 S. C. 113

TINSLEY v. KIRBY.

(Columbia. Nov. Term, 1876.)

[*Extortion* ⟸9.]

To an action against a Constable under § 16, Chapter XXVI, of the General Statutes, to recover ten times the amount of fees improperly charged, it is no defense that the costs had been taxed by a Trial Justice and included in an execution by the plaintiff.

[Ed. Note.—Cited in Richland County v. Miller, 16 S. C. 255; Dean v. Todd, 49 S. C. 464, 27 S. E. 471.

For other cases, see Extortion, Cent. Dig. § 9; Dec. Dig. ⟸9.]

Before Northrop, J., at Spartanburg, August, 1876.

This was an action by Thomas A. Tinsley against Marcus Kirby, to recover ten times the amount of fees alleged to have been unlawfully charged by the defendant, as Constable, against the plaintiff.

The case was as follows:

The plaintiff had been prosecuted before a Trial Justice for assault and battery—had been convicted and sentenced to pay a fine of five dollars.

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*An execution was issued by the Trial Justice for the fine and thirty-seven dollars and eighty cents costs, of which amount fifteen dollars and ninety-five cents were taxed for the defendant as his costs.

The execution was issued in September, 1874, and shortly thereafter the defendant collected from the plaintiff the amount thereof, and also two dollars and seventy cents as costs of increase.

The case was referred to a Referee, who found that the defendant had collected from the plaintiff ten dollars and ninety-six cents in excess of the amount of Constables' costs to which he was rightfully entitled. No exception was taken to the report, but His Honor the presiding Judge ruled that the defendant was not responsible to the plaintiff in this action, on the ground that the costs had been taxed by the Trial Justice and included in an execution against the plaintiff. He accordingly made an order that the complaint be dismissed.

The plaintiff appealed.

[For subsequent opinion, see 17 S. C. 1.]

Thomson, for appellant.

Fleming, contra.

April 17, 1877. The opinion of the court was delivered by

WRIGHT, A. J. The appellant was convicted for assault and battery in the Court of a Trial Justice, and sentenced to pay a fine of five dollars and costs. The respondent, who was the Constable of the Trial Justice, stated to the Justice the amount of his fees, and the Justice issued his execution for the same, which amount respondent (as Constable) collected from appellant with the additional sum of two dollars and seventy cents more than the execution called for. The law clearly defines what the amount of Constables' fees shall be. Section 16 of Chapter XXVI, p. 208, of the General Statutes is as follows: "If any Constable shall charge any other fees, or for any other service, than herein allowed, such Constable shall be liable to forfeit to the party injured ten times the amount of excess of fees so improperly charged, to be recovered by suit in the Court of Common Pleas."

The appellant claimed that the respondent, as Constable, had collected from him unlawful fees, and charged for services not allowed by law, and brought this action in the Court

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of Common *Pleas for ten times the amount of the excess charged and collected of him by respondent. The issue was referred to a Referee, who found that the respondent had collected ten dollars and ninety-six cents ($10.96) in excess of what he was entitled to as Constable in the case. No exceptions being taken to the report of the Referee, the appellant was entitled to judgment for the amount claimed in his complaint, and the Court below should have so held. The object of the statute under which this action was brought is to prevent just such cases of extortion, oppression and injury as were perpetrated upon the appellant in this case. An execution issued by a Trial Justice cannot nullify a statute nor shield a Constable from the consequences of doing an act which the law plainly forbids. It was error to dismiss the complaint.

The motion must be granted.

WILLARD, A. J., concurred.

8 S. C. 115

HENNEMAN v. THOMSON.

(Columbia. Nov. Term, 1876.)

[*Justices of the Peace* ⇐82.]

Service of a summons in a Trial Justice's Court upon one who is a resident of this State, by leaving a copy at his "most notorious place of residence," he being absent from home at the time, is sufficient.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 263; Dec. Dig. ⇐82.]

[*Bills and Notes* ⇐496.]

The drawer of a draft in favor of a third person cannot maintain an action thereon against the acceptor without proof, by endorsement, transfer, assignment, or some other mode, that he is the owner.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 1669; Dec. Dig. ⇐496.]

Before Northrop, J., at Spartanburg, August, 1876.

This was an action by J. A. Henneman against W. W. Thompson, brought before a Trial Justice. The Trial Justice gave judgment for the plaintiff and the defendant appealed to the Circuit Court.

The case, as stated in the brief, is as follows:

On the 11th day of January, 1875, Henneman drew a draft on Thomson, payable at sight, to the order of George Cofield, Cashier. It was accepted by Thomson. The draft was for $108.52/100, and the following credits were endorsed upon it:

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*"1875—February 15.—By cash on within, $6.50. J. A. Henneman."

"1875—March 26.—By cash, $25. J. A. Henneman."

The action was to recover the balance due upon this draft. The Constable who was appointed to serve the summons made return thereto that he had served the same on the 20th of January, 1876, by leaving a copy thereof at defendant's "most notorious place of residence."

The defendant was a resident of the State, and it was admitted at the hearing that he was absent from home, but within the State, at the time the copy summons was left at his house.

The defendant failed to appear or make any defense, by answer or otherwise, to the action, and the Trial Justice gave judgment against him by default.

The grounds of appeal to the Circuit Court were:

I. Because the defendant was not served with summons in this action.

II. Because the judgment was contrary to law.

His Honor the Circuit Judge ruled that the service of the summons was sufficient, and that the plaintiff could maintain the action, although there was no protest of the draft, or assignment or endorsement of the same by the payee to the plaintiff, and he made an order that the appeal be dismissed.

The defendant appealed to this Court on the following grounds:

I. That His Honor erred in ruling that personal service of the summons was not necessary in Trial Justices' Courts.

II. That he erred in ruling that the plaintiff could recover on the draft, although there was no protest or assignment or endorsement of the same by Cofield.

J. S. R. Thomson, for appellant.

The personal service of a summons is necessary in Courts of Trial Justice as well as in other Courts.

The Act of 1839, (Rev. Stat., 207,) which allows service by a Constable to be sufficient if made by leaving a copy at the "most notorious place of residence" of the defendant, is repealed by Section 157 of the Code. (Rev. Stat., 601.) That Section, after providing for service of summons on corporations, minors and persons of unsound mind, enacts that the service shall be "in all other

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cases to the *defendant personally." This was amended by Act of 1875 (15 Stat., 869,) by adding "if the said defendant is a resident of this State, but is temporarily absent therefrom, to any person over twenty-one years of age residing at the residence or employed at the place of business of said absent person."

He cited Section 91, and contended that Section 157 does apply to the Courts of Trial Justice. He cited other authorities upon the first ground of appeal, and upon the second he contended that the plaintiff could not maintain the action.

The draft was payable to George Cofield or his order. It was payable at sight. There was no evidence that it had been protested, and none that it had been assigned, endorsed or transferred in any way to the plaintiff. He cited on this point 1 Pars. on Notes and Bills, *61, *438, 451; 2 Chit. Pl., 148; Nichols v. Gross, 2 Law and Eq. Rep., 275, and other authorities.

Bobo & Carlisle, contra.

April 19, 1877. The opinion of the Court was delivered by

WRIGHT, A. J. This action was brought in the Trial Justice's Court on a draft drawn by respondent and accepted by the appellant, and was payable to the order of George Cofield. The appellant is a resident of this State, but was not at his home at the time notice for his appearance at the Trial Justice's Court was served. The Constable made oath that he left the summons at the appellant's "most notorious place of residence." Two questions arise in this case for our consideration: First, was the service in this case, as proved by the Constable, sufficient to bring the appellant into Court? Second, could the respondent recover against the appellant upon this draft, which was not

protested, assigned or endorsed by George Cofield, the payee? Section 11 of Chapter XXVI, p. 207, of the General Statutes, is as follows: "The service by a Constable of all process in the nature of a notice for personal appearance shall be by delivering to the party a copy of the same, or by leaving the same at his most notorious place of residence." This Section is of force, and, the appellant being absent from his "most notorious place of residence," the service, as proved by the Constable, in this case was sufficient. The draft being drawn payable to the order of George Cofield, and he not having protested, endorsed or assigned and

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delivered the same to any person or per*sons, and there being no evidence that the plaintiff was the owner or holder, the payee (George Cofield) is the only party who has the lawful right of action.—Bank of United States v. Syman, 20 Va., 666. The judgment in the Trial Justice's Court should have been set aside.

WILLARD, A. J., concurred.

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8 S. C., 118

FAUST v. THE SOUTH CAROLINA RAILROAD COMPANY.

(Columbia. April Term, 1877.)

[*Carriers* ⇐92.]

Where goods delivered by "A" to a common carrier for shipment are seized by the Sheriff in the carrier's possession under an attachment against "B," and the attachment is afterwards released, he, the carrier, is liable under his original contract with "A," and cannot plead the seizure under the attachment as a defense to "A's" action for not having complied with the terms of his contract.

[Ed. Note.—Cited in Kohn v. Richmond & D. R. Co., 37 S. C. 4, 16 S. E. 376, 24 L. R. A. 100, 34 Am. St. Rep. 726.

For other cases, see Carriers, Cent. Dig. § 365; Dec. Dig. ⇐92.]

[*Trial* ⇐194.]

An appeal does not lie for the denial of the Circuit Court to charge that which is purely a matter of fact.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 413, 436, 439–441, 446–454, 456–466; Dec. Dig. ⇐194.]

Before Maher, J., at Barnwell, January, 1876.

This was an action by Angus A. Faust against the South Carolina Railroad Company, in which the plaintiff recovered judgment and the defendant appealed.

To understand the case, it is necessary to publish the whole brief, which is as follows:

"The complaint in this action, filed January, 1875, alleged a delivery of a bale of cotton weighing four hundred and fifty pounds, worth fourteen and a half cents per pound, to defendant about twenty-fifth day of October, 1874, and a negligent carriage by defendant, whereby it was lost.

"The answer filed 22d January, 1875, alleged a non-delivery of the cotton by the defendant, and the special matter stated in the evidence.

"The cause came on for trial before Judge Maher and a jury the 26th January, 1876, and the plaintiff, to maintain the issues on

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his *part, testified: That on the 21st day of September, 1874, he sent by one Thomas Dunbar to John S. Small, the agent of defendant at Graham's, a bale of cotton weighing about four hundred and fifty pounds, worth fourteen and a half cents per pound, and directed said agent to mark it F. & D., and ship to Wroton & Dowling, cotton factors, Charleston, S. C.; that, although the interest of Dunbar in the bale was one-half, said interest belonged to plaintiff under their contract for advances during the year, and that he had it marked F. & D. to distinguish it from his other cotton, that he might credit said Dunbar with his interest when they settled. That after said cotton was attached he procured an order from the Sheriff, which was proven, for its release, and that when he reached Graham's with the order directed to W. T. Rice, acting Deputy, not finding him there he left the order with John S. Small, agent of defendant, (in whose depot the cotton was awaiting a release,) and asked him when the Deputy came to give it to him, and when he released it to ship it for him. Small promised him to do so. This was on the 23d October, 1874.

"W. T. Rice testified that as special deputy for the Sheriff he attached the cotton at the depot at Graham's; cotton was marked F. & D. Attachment was a process of foreclosure of lien executed by said Dunbar to Steadman & Turner. Upon attaching the cotton he got permission of the agent to let same remain in defendant's warehouse at his (Rice's) risk, where it remained until the 25th day of October, 1874, at which time witness came to Graham's in the morning, when the agent handed him the Sheriff's order, and gave him the key of the depot to get it, at the same time telling him what Mr. Faust had said about it. Witness went, Mr. Small following on, and placed the cotton on the platform for Mr. Small, and told him he released the attachment, when Turner came up and took possession of it and obliterated plaintiff's mark, and substituted that of Steadman & Turner.

"E. C. Behling testified that he was present when Rice released the cotton from levy and placed it on the platform. Small and Turner were also present. Small received the cotton from Turner.

"For the defense it was shown by John S. Small that he received this cotton from Thomas Dunbar, with a written request from plaintiff to mark and ship for him.

"Witness marked the bale as requested,

and made an entry of same on his shipping book. This was on 21st September, 1874.

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*On the next day the cotton was attached by Rice, Deputy Sheriff, and at his request was placed in defendant's warehouse at his (Rice's) risk. Witness thereupon erased the above mentioned entry on his book. The cotton remained in the warehouse until 25th October, 1874, when witness gave Rice the order for the release of the cotton which the plaintiff had handed him, and the key to put the cotton on the platform for shipment in compliance with his promise. Rice placed the cotton on the platform, and told witness it was released from attachment, and G. W. Turner said he would take it by force if necessary.

"Witness said to Turner: 'I might get into trouble about it.' Turner replied: 'I will stand between you and damages,' and obliterated plaintiff's mark and substituted Steadman & Turner's, for whom witness shipped it.

"Witness upon receiving the cotton from Turner made an entry of same in his book and shipped to Charleston.

"After the attachment witness never received the cotton from plaintiff.

"The ordinary way of delivering cotton for shipment is for a person to place it on the platform, when witness weighs, if necessary, marks it, and makes an entry of same upon his shipping book. Until such entry witness does not consider the cotton in defendant's possession.

"Defendant then produced an agricultural lien from Thomas Dunbar to Steadman & Turner, executed 13th January, 1874, recorded 2d February. Affidavit of G. W. Turner of Dunbar's attempting to defeat the lien. Warrant of seizure by clerk 21st September, 1874. Letter of Rice to sheriff, showing levy to have been regularly made.

"G. W. Turner testified that at the time of release of said cotton from attachment he accompanied the Deputy to the warehouse, and, upon being informed of what he was going to do, laid claim to the cotton, and immediately after the Deputy took his hands off of it he seized it for himself, claiming it under his lien, and marked it for himself, and upon his threat to carry it away unless agent shipped for him he did so.

"Upon cross-examination it appeared that this lien was given for advances to Dunbar before he went on the plaintiff's place, and nothing was advanced by the lien holders in 1874, or at any time after its date. The consideration of the lien was corn Dunbar

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was *allowed to retain in a settlement of his lien of 1873, before the date of the lien.

"In reply the plaintiff showed that while the cotton was in the Sheriff's custody Small promised to ship it for him when the levy was lifted.

"Defendant requested the Court to charge the jury:

"1. That after the delivery of the cotton by Faust to the agent of the railroad company the seizure of the cotton under legal process relieved defendant from all liability to Faust on account of its delivery.

"2. That if afterwards the railroad agent received the cotton in the ordinary way from Turner, the defendant is not liable to Faust.

"3. That the railroad company is not liable to Faust in any event unless it received the cotton from him in the ordinary way.

"4. That the deputy Sheriff delivered the cotton to Turner instead of Faust.

"5. That if the railroad agent accepted a delivery of the cotton from Faust, knowing of the attachment, it is for the jury to consider whether or not it was a willful tort on Small's part, and, if so, defendant is not liable to Faust."

All the instructions were denied except the first.

Skinner, for appellant.
Gantt & Simms, contra.

June 15, 1877. The opinion of the Court was delivered by

WILLARD, C. J. Plaintiff, by his agent, Dunbar, delivered a bale of cotton to Smalls, the agent of defendants, for shipment to Charleston. Subsequently it was seized in the hands of defendants by the Sheriff, under an attachment, as the property of Dunbar. This attachment was subsequently released, the property being left at such release in the defendants' hands. Subsequently to this, defendants' agent permitted Turner to take possession of it as the property of Dunbar, claiming to have an agricultural lien upon it. Defendants' agent thereupon received it at the hands of Turner and shipped it on his account to Charleston. The jury found a verdict for plaintiff, and the defendants ask to have that verdict set aside on exceptions taken to the charge of the Court.

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*The first exception is to the second request to charge, namely, "that if afterwards the railroad agent received the cotton in the ordinary way from Turner, the defendant is not liable to Faust."

The meaning of this is, that upon the removal of the attachment, the goods being still in the defendants' hands, they were under no obligation to ship the cotton under the original delivery to them for that purpose. This is not correct. The acceptance of the cotton from the plaintiff's agent for the purpose of shipment bound them by the terms of a contract, which could not be dissolved by the act of the defendants alone. If the cotton had been taken entirely from their custody by the Sheriff, and if, after the attachment had been released, they had refused to receive or ship the cotton, the original contract to ship for account of the plaintiff might have been at an end. But, electing through their agent to retain the goods after

their release by the Sheriff, they remained bound by the original contract with the plaintiff. This precludes the correctness of the proposition under consideration.

The next request to charge refused was as follows: "That the railroad company is not liable to Faust in any event, unless it received the cotton from him in the ordinary way." The meaning of this request is not clear. It implies that there is only one way in which the defendants could have become bound to the plaintiff as carrier of goods, but does not disclose what that way is.

This request is indefinite and calculated to mislead the jury, and is, in point of fact, untrue, for the defendants may assume the obligation of carriers of goods in a variety of ways. The contract may be consummated by different words and different acts, and may be implied when not in form expressed.

The next request refused is as follows: "That the Deputy Sheriff delivered the cotton to Turner and not to Faust." The evidence would appear to be otherwise; but, at all events, that is purely a matter of fact, about which the Court could not be required to charge the jury.

The last request refused is as follows: "That if the railroad agent accepted a delivery of the cotton from Faust knowing of the attachment, it is for the jury to consider whether or not it was a willful act on Smalls' part; and, if so, defendant is not liable to Faust."

No foundation appears in the evidence warranting any request on this subject. It is not charged, and does not appear, that any

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*wrong was perpetrated by the original acceptance of the goods from plaintiff's agent; therefore, the effect of such a suppositious case need not be considered. The ground on which the verdict rests is the voluntary relinquishment of the cotton to Turner by the defendant's agent, while it was held as the property of Faust and under contract for shipment in his behalf, and it is not for the defendants to affirm any wrong that may have been done to Turner, if any there was, by the act of Faust in delivering the cotton to them for shipment.

The requests are properly refused and the appeal must be dismissed.

McIVER, A. J., concurred.

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8 S. C. 123

THE STATE, ex rel. DUNTON, v. COBB.

(Columbia. April Term. 1877.)

[*Schools and School Districts* ⟸109.]

The Legislature may constitutionally provide that the poll tax of any year shall be applied to the payment of past due school claims against the County.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. § 260; Dec. Dig. ⟸109.]

[*Schools and School Districts* ⟸109.]

There is nothing in § 3, Article 9, of the Constitution of the State which prohibits the General Assembly from providing for the payment of deficiencies out of other sources of income than a deficiency tax levied under that Section.

[Ed. Note.—For other cases, see Schools and School Districts. Cent. Dig. § 260; Dec. Dig. ⟸109.]

[*Schools and School Districts* ⟸109.]

The poll tax is imposed by the Constitution itself, and the limit within which it may be applied is to be found in the term "educational purposes," as used in that instrument.

[Ed. Note.—Cited in State ex rel. Coleman v. Smith, 8 S. C. 128; State ex rel. Brooks v. Smith, 9 S. C. 44, 45.

For other cases, see Schools and School Districts, Cent. Dig. § 260; Dec. Dig. ⟸109.]

This was a petition by L. M. Dunton as relator against A. L. Cobb, County Treasurer, for a writ of mandamus to compel the respondent to pay certain school claims held by the relator.

The points of law decided in the case sufficiently appear in the opinion of the Court.

Jones & Mower, for relator.

Suber & Caldwell, contra.

August 15, 1877. The opinion of the Court was delivered by

WILLARD, C. J. The only question in this case is as to the constitutionality of certain

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provisions of an Act entitled "An Act to *provide for the payment of past due school claims in the several Counties of this State," approved March 3, 1874, (15 Stat., 565). The Act provides for ascertaining the amounts due by the respective Counties for school claims up to November 1, 1873, and sets apart a fund, consisting in part of receipts in the offices of the County Treasurers on account of the poll tax, for the payment of such school claims. The clause to which objection on the ground of unconstitutionality is made is the following, at the close of Section 1 of the Act, viz.: "Provided, That all school claims issued prior to the first day of November, 1872, shall be first paid as prescribed by this Act." The point of objection is that the Act prefers in the order of payment out of funds derived from current poll taxes a class of school claims matured before November 1, 1873.

It is contended that the Constitution intended that current receipts from the poll tax shall be applied to current demands properly chargeable against it; at all events, that the fund derived from that source shall not be appropriated by the Legislature to past due claims so as to postpone the payment of more recent claims of that class. The only clauses of the Constitution pointed out as interfering with the effect claimed for this provision of the Act are Sections 2 and 3, Article IX, and Section 5, Article X. Section 2, Article IX, provides as follows: "The

General Assembly may provide annually for a poll tax not to exceed one dollar on each poll, which shall be applied exclusively to the public school fund." Section 5, Article X, provides that "the General Assembly shall levy at each regular session after the adoption of this Constitution an annual tax on all taxable property throughout the State for the support of the public schools, which tax shall be collected at the same time and by the same agents as the general State levy, and shall be paid into the Treasury of the State. There shall be assessed on all taxable polls in this State an annual tax of one dollar on each poll, the proceeds of which tax shall be applied solely to educational purposes."

It is clear that there is nothing contained in the provisions just recited limiting the appropriations made by the Legislature, provided the proceeds of the poll tax are not diverted from the object intended by the Constitution. This object is defined in Section 2, Article IX, by the declaration that such fund shall be applied exclusively to "the public school fund," and in Section 5, Article X, by the declaration that it shall be applied solely

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for "educational *purposes." Payment of past due claims is no less an application to educational purposes than of current demands. Nor is there any reason to be drawn from the above recited provisions why the public school fund should not be applied to debts incurred for educational purposes in the past as well as for current obligations. The duty of the State to pay its past indebtedness incurred for educational purposes rests on higher ground than its duty to maintain its schools in the present and future. The latter rests on benevolence and the former on justice.

It is argued that the intent of the Constitution was to maintain the school system as a means of education, and withdrawing the school funds from that application and devoting them to past indebtedness of the same class is a virtual defeat of that object of the Constitution. There are no expressions in the Constitution from which such a conclusion can be drawn. It is a mere speculative opinion, as apt to be derived from the peculiar tendencies of the mind attempting to construe the Constitution itself as from that instrument. We find no ground for such a conclusion. To hold that past indebtedness cannot be preferred is equivalent to holding that the Legislature can make no specified appropriation of the school fund, for, clearly, if they can give any specific direction whatever to that fund, they can prefer past indebtedness, for it is of the very essence of the right to make specific appropriations to prefer one legal demand to another in the order of payment.

It is also contended that the provisions of Section 3, Article IX, preclude the application by the Legislature to the payment of past indebtedness of any funds derived from the annual tax levy, and that the proceeds of the poll tax is to be classed in this respect with other sources of income derived from an annual tax. That Section provides that "the General Assembly shall provide for an annual tax sufficient to defray the estimated expenses of the State for each year; and whenever it shall happen that such ordinary expenses of the State for any year shall exceed the income of the State for such year, the General Assembly shall provide for levying a tax for the ensuing year sufficient, with other sources of income, to pay the deficiency of the preceding year, together with the estimated expenses of the ensuing year." It is contended, as the effect of this Section, that deficiencies of a past year can be paid from no other source than a deficiency tax levied

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under this Section; but *this is in conflict with the expressed intent of the Section. The deficiency tax is to be levied only where other sources of income are deficient, clearly implying power to provide for the payment of deficiencies from any source of income available within the control of the State.

A more serious question arises under the provisions of Section 3, Article IX. Assuming that the annual tax "to defray the estimated expenses of the State for each year" can only constitutionally be used to provide the means of meeting current expenditures, so that the proceeds of such tax received in any year cannot be applied to the indebtedness of a past year, at all events unless more than sufficient for the direct purpose for which it was raised, is the amount annually derived from the poll tax to be regarded as subject to the same limitation? In the first place, the poll tax is levied under a different Section than that just mentioned, namely, Section 2, Article IX, and Section 5, Article X. In the next place, the tax provided for in Section 3, Article IX, is a variable tax, to be fixed in amount according to estimates of what will be required for the current expenses of the government, while the poll tax is fixed by the Constitution and the laws passed under it at one dollar per poll, and can only vary from year to year in point of productiveness. They are, therefore, of different natures. Finally, if it be conceded that the annual tax under Section 3, Article IX, cannot be applied to deficiencies of a past year, it clearly results from the operation of Section 4, Article IX, which is as follows: "No tax shall be levied except in pursuance of a law which shall distinctly state the object of the same, to which object such tax shall be applied." A law passed under Section 3, Article IX, levying an annual tax to pay the estimated expenses should disclose that object of the tax to which Section 4 would at once apply, by way of devoting the proceeds of such tax to the particular purpose constituting

that object. On the other hand, Section 5, Article X, is to be regarded as in itself the actual levy of the poll tax, thus making it the duty of the officers charged with making out the assessment to insert therein the sum charged to each person as a poll tax who is liable to pay the same, and no further legislation was needed or contemplated for that purpose.

Thus it appears that while the provisions of Section 4 properly apply to and act upon all taxes imposed by the General Assembly, yet, as the poll tax is imposed by the Con-

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stitution itself, it cannot *be extended to reach to that case unless its construction is to be carried beyond its expression. There is no ground for so doing, for the reason on which Section 4 rests does not apply to the case where the Constitution has undertaken to define that object itself, and has left full liberty of appropriation to the Legislature within the limits of that defined object. That object is defined by the Constitution on the creation of a school fund, not for any limited purpose, such as the payment of the expenses of any one year, but for all purposes properly designated "educational."

The peremptory mandamus issued by the Circuit Court was allowed on the ground that the provisions of the Act under consideration were in conflict with the Constitution, and it must be set aside and the petition for mandamus dismissed.

McIVER, A. J., concurred.

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8 S. C. 127

THE STATE, ex rel. COLEMAN, v. SMITH.

(Columbia. July Term, 1877.)

[*Mandamus* ⇐168.]

Mandamus does not lie to compel a County Treasurer to pay a check unless there are funds in the Treasury applicable to its payment.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 372; Dec. Dig. ⇐168.]

[*Schools and School Districts* ⇐109; *States* ⇐123.]

The Act to provide for the payment of past due school claims, approved March 3d, 1874, was not repealed by the "Act to regulate the manner in which public funds shall be disbursed by public officers," approved March 17th, 1874.

[Ed. Note.—Cited in State ex rel. Brooks v. Smith, 9 S. C. 44, 45.

For other cases, see Schools and School Districts, Cent. Dig. §§ 217, 260; Dec. Dig. ⇐ 109; States, Cent. Dig. § 122; Dec. Dig. ⇐ 123.]

[*Schools and School Districts* ⇐109; *Taxation* ⇐906¾.]

[The legislature had power to enact that the poll tax of a given year shall be applied to the payment of past-due school claims against the county. The poll tax may be applied to any educational purposes.]

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. § 260; Dec. Dig. ⇐109; Taxation, Cent. Dig. § 1738; Dec. Dig. ⇐906¾.]

This was a petition by Wade H. Coleman as relator to the Supreme Court against Jesse C. Smith, County Treasurer of Newberry County, for a writ of mandamus.

The case was heard upon a statement of facts agreed upon by counsel, which is as follows:

"The respondent has in his hands, as Treasurer for Newberry County, $2,179 collected as poll tax for the fiscal year 1874–75, and a surplus, after paying pensions of widows and orphans of persons killed for political opinions, of $497.79 of the tax collected for that fiscal year for the support of such widows and orphans.

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*"The respondent has also in his hands, as such Treasurer, $1,989 of the poll tax of 1875–76, subject to abatement of fifty-eight or sixty dollars for polls improperly taxed, and a sum of money not yet ascertained—the surplus of the tax levied for that fiscal year for the support of widows and orphans of persons killed for their political opinions.

"The relator demands payment of his claims, which are school claims for the months of January, February and March, in the year 1876, out of the above described funds collected for the fiscal year 1875–76.

"The respondent declines, upon demand made, to pay the said claims out of the said funds until ordered by the Court so to do, for fear of violating the provisions of the Act of the Assembly of 3d March, 1874."

Baxter & Johnstone, for relator.
Suber & Caldwell, contra.

August 29, 1877. The opinion of the Court was delivered by

WILLARD, C. J. The relator, to establish his right to a peremptory mandamus to compel the defendant, as County Treasurer, to pay the demands in suit, must show affirmatively that there are funds in the treasury applicable to such payment. He has not done so, unless one of two propositions of law is established,—either, first, that the Act of March 3d, 1874, (15 Stat., 565,) is unconstitutional and void, or, second, that such Act was repealed by the Act entitled "An Act to regulate the manner in which public funds shall be disbursed by public officers," approved March 17th, 1874, (15 Stat., 692). The first of these questions has just been decided adversely to the relator in the case of The State ex rel. Dunton v. Cobb [8 S. C. 123]. It only remains to consider the last named. The Act provides that "it shall be unlawful for any public officer, State or County, to divert or appropriate the funds arising from any tax levied and collected for any one fiscal year to the payment of any indebtedness contracted or incurred for any previous fiscal year." The whole scope and effect of this Act was to prevent any such appropriation by executive officers without direct authority of law. It

cannot be assumed as a surrender by the Legislature of any right it might have to make any such appropriation, nor can it be

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re*garded as a virtual repeal of a statute already passed making such an appropriation in the absence of everything tending to show an intent to give to the Act repealing effect. Reading the two Acts together, as we are bound to do, they are perfectly reconcilable. The Legislature asserts for itself a power which it denies to the executive authority. It was competent for the defendant to comply with the former Act without incurring the penalties of the latter.

The petition must be dismissed.

McIVER, A. J., concurred.

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8 S. C. 129

THE STATE OF SOUTH CAROLINA v. THE SPARTANBURG AND UNION RAILROAD COMPANY.

(Columbia. Nov. Term, 1874.)

[*Corporations* ⇐473; *Railroads* ⇐171.]

Where a railroad company issued bonds, with coupons for interest attached, which were guaranteed by the State, and, to secure the payment thereof, gave to the State a statutory lien on all the franchises, rights and property of the company, and the company afterwards failed to pay the coupons and became insolvent, and before the bonds became due the statutory lien or mortgage was foreclosed in an action by the State and all the franchises, rights and property of the company were sold: *Held*, That the holders of the coupons past due at the time of the sale were not entitled to priority of payment over the owners of the principal debt, which was not then due, but that such proceeds were distributable pari passu between the holders of the coupons past due and the owners of the bonds.

[Ed. Note.—Cited in Walker v. State, 12 S. C. 271; Hand v. Savannah & C. R. Co., 12 S. C. 315, 342, 346, 349; Gibbes v. G. & C. R. Co., 13 S. C. 253; Hand v. Savannah & C. R. Co., 17 S. C. 244, 257.

For other cases, see Corporations, Cent. Dig. § 1852; Dec. Dig. ⇐473; Railroads, Cent. Dig. § 574; Dec. Dig. ⇐171.]

[*Railroads* ⇐171.]

In the distribution of equitable assets, the general rule is to treat all debts as standing upon the footing of equality and to be paid pari passu.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 554–576; Dec. Dig. ⇐171.]

[*Corporations* ⇐565; *Receivers* ⇐202.]

Creditors called in to present and establish their claims in an action for the settlement of the affairs of an insolvent corporation have the same right of exception, appeal and objection to the report, orders and decrees in the case as creditors who were parties to the action by name.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2281; Dec. Dig. ⇐565; Receivers, Cent. Dig. § 403; Dec. Dig. ⇐202.]

[*Corporations* ⇐557; *Estoppel* ⇐91.]

In an action for the settlement of the affairs of an insolvent corporation, a creditor who has been called in under a general notice to creditors to present their claims, and who stands by and silently acquiesces in the orders and proceedings that are taken in the cause, will not afterwards be allowed to come in as a party defendant and file an answer contesting the validity of the proceedings that have been already had in the cause.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2231; Dec. Dig. ⇐557; Estoppel, Cent. Dig. § 257; Dec. Dig. ⇐91.]

[*Jury* ⇐12.]

The actions referred to in § 290 of the Code of Procedure—requiring issues of fact to be made up to be determined by a jury,—are such actions as before the adoption of the Code were recognized as actions at common law.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 27–34, 82, 99, 101, 103; Dec. Dig. ⇐12.]

[*Principal and Agent* ⇐126.]

Where an agent made a written contract for his principal and also for himself in his individual right, purporting to be a contract under seal, and affixed the seal opposite his own signature: *Held*, That such seal might be regarded as the seal of the principal as well as of himself.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 430; Dec. Dig. ⇐126.]

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[*Principal and Agent* ⇐167.]

*A contract by an agent, under seal, but which does not require a seal to make it valid, may be ratified by the principal by any writing, acts or words which would be sufficient to confirm a simple contract.

[Ed. Note.—Cited in Stroman v. Varn, 19 S. C. 315; Sibley & Co. v. Young & Napier, 26 S. C. 419, 2 S. E. 314.

For other cases, see Principal and Agent, Cent. Dig. § 635; Dec. Dig. ⇐167.]

[*Principal and Agent* ⇐170.]

A contract by one assuming to act as an agent, but not authorized so to act: *Held*, To have been ratified by the subsequent acts, conduct and acquiescence of the principal.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 638–643; Dec. Dig. ⇐170.]

[*Reference* ⇐101.]

Where exceptions are taken to the report of a Referee because of the omission of facts alleged to have been proved, the proper course is to move the Circuit Court to recommit the report on the exceptions thus taken.

[Ed. Note.—Cited in Griffin v. Griffin, 20 S. C. 491.

For other cases, see Reference, Cent. Dig. § 171; Dec. Dig. ⇐101.]

[*Insolvency* ⇐113.]

Where a creditor fails to submit his claim within the time fixed by an order calling in creditors, he is not debarred from coming in and proving his claim as long as the fund remains under the control of the Court.

[Ed. Note.—For other cases, see Insolvency, Cent. Dig. § 176; Dec. Dig. ⇐113.]

Before Mackey, J., at Fairfield, February, 1874.

This was an action by the State of South Carolina, plaintiff, against the Spartanburg and Union Railroad Company, Rufus Y. McAden "and all other creditors of the same whose interest may require an answer to this complaint," defendants.

The summons and complaint were signed "D. H. Chamberlain, Attorney General of the State of South Carolina, plaintiff, J. M. Bax-

ter, James H. Rion, William Munro, Robert W. Shand, attorneys of counsel," and were dated 23d September, 1871.

The complaint alleged:

I. That the said Spartanburg and Union Railroad Company are a corporation duly chartered under and by the laws of the State of South Carolina, and pursuant to an Act of the General Assembly of the said State entitled "An Act to authorize the formation of the Spartanburg and Union Railroad Company," passed on the 17th day of December, A. D. 1847, and the Acts amending the same.

II. That by an Act of the said General Assembly of the said State entitled "An Act to afford aid in completing the Spartanburg and Union Railroad," passed on the 21st day of December, A. D. 1857, it was enacted in words as follows: That whenever satisfactory evidence shall be given to the Comptroller General that all liens on the property of the Spartanburg and Union Railroad Company have been removed, he shall be authorized and required to endorse upon bonds of the said company to an amount not exceeding one hundred and fifty thousand dollars the guarantee of the State of South Carolina, thereby pledging the faith and funds of the State for the payment of the said bonds and the interest to accrue thereon, which bonds shall be payable at such place as the President of the company may designate, and shall bear interest not exceeding the rate of seven

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per centum per annum, payable *semi-annually, and shall not have more than twenty years to run: Provided, That none of the bonds so endorsed, as aforesaid, shall be sold by the company or used for the purpose of paying or satisfying any debt due and owing by them at less than their par value; and in case such bonds, or any of them, should be sold or used, as aforesaid, at less than their par value, the endorsement hereinbefore provided for shall be absolutely null as to the bonds so sold or used. And the Comptroller General shall also be authorized and required to endorse upon other bonds of the said company to an amount not exceeding sixty thousand dollars the like guarantee of the State, which said last mentioned bonds shall bear interest and be payable in like manner as the bonds first above mentioned, but shall not be subject to the proviso hereinbefore contained as to the said first mentioned bonds. And from and after the first day of January, which will be in the year one thousand eight hundred and fifty-nine, whenever satisfactory evidence shall have been produced to the Comptroller General that thirty miles of the Spartanburg and Union Railroad are finished and in working order, and that the rest of the said railroad had been graded, bridged, and in all respects made ready for the superstructure, the Comptroller General shall be authorized and required to endorse on other bonds of the said company to an amount not exceeding one hundred and forty thousand dollars the like guarantee of the State, which said last mentioned bonds shall bear interest and be payable in like manner as the bonds first above mentioned, but shall not be subject to the proviso hereinbefore contained as to the said first mentioned bonds.

That the said last mentioned bonds, to be endorsed, as aforesaid, after the first day of January, one thousand eight hundred and fifty-nine, shall not be used by the said company for any other purpose than for procuring the iron rails, chairs, spikes and equipments for the said railroad and for putting down the same; and the said bonds shall not be endorsed unless upon a resolution of the President and Directors of the company, for the time being, pledging the said company that the same shall be used for the purpose of procuring the said iron rails, chairs, spikes and equipments, and for putting down the said rails, and for no other purpose.

That so soon as any of the said bonds hereinbefore mentioned shall have been endorsed, as aforesaid, and as they may thereafter be endorsed, they shall constitute a lien or a mortgage upon the whole of the said railroad, including the road bed, right of way,

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*grading, bridges, masonry and superstructure upon all the stock subscribed for in said company, and upon the chartered rights and privileges thereof, and upon said iron rails, chairs, spikes and equipments, when purchased and delivered; and the State of South Carolina, upon the endorsement of the said bonds, and by virtue thereof, shall be invested with the said lien or mortgage without any deed from the said company to secure the payment of the said bonds and the interest thereon by the said company as the same shall become due. And the said lien or mortgage, besides the stock, right of way, grading, bridges, masonry, superstructure, iron rails, spikes, chairs, equipments, chartered rights and privileges, shall include all the property owned by the said company as incident to or necessary for its business. And after the Comptroller General shall have endorsed any of the bonds of the said company, as hereinbefore provided for, it shall not be lawful for the said company to give or grant to any person or persons whomsoever, or to any corporation whatsoever, any lien, mortgage or encumbrance of any kind which shall have priority over or come in conflict with the lien of the State hereby secured; and every such lien, mortgage or encumbrance shall be null and void as against the said lien or mortgage of the State; and the said lien or mortgage of the State shall have priority over all other claims existing or to exist against the said company.

That the State expressly reserves the right to enact all such laws as may be deemed necessary to protect the interest of the State, and to secure it against any loss in conse-

quence of the endorsements of bonds under the provisions of this Act, but in such manner as not to impair the just rights of the stockholders of the company.

III. That all said bonds were issued by said company, and that the Comptroller General, satisfactory evidence having been given him that all liens upon the property of the Spartanburg and Union Railroad Company had been removed, and that all the requirements of said Act had been complied with, endorsed upon said bonds the guarantee of the State of South Carolina, thereby pledging the faith and funds of said State for the payment of said bonds in the manner required by said Act.

IV. That in pursuance of the right reserved to the State, as hereinbefore set forth, to enact such laws as might be deemed necessary to protect the interest of the State and to secure it against any loss in consequence of the endorsement of bonds as aforesaid, the

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*General Assembly of the said State, by an Act entitled "An Act to protect the interest of the State whenever payment of interest now due remains unpaid on bonds issued by any railroad company, and whenever the guaranty of the State is endorsed," approved March the 7th, 1871, enacted in words as follows: That the Attorney General be, and is hereby, required and authorized to cause to be instituted immediately after the expiration of thirty days after the final passage of this Act, for, on behalf of, and in the name of this State, an action, suit or other legal proceeding in any Court of this State, or of the United States, against each railroad company which has heretofore issued bonds, upon which the guaranty of the State is endorsed, and on which interest is now due and unpaid, unless within thirty days after the final passage of this Act such railroad company or railroad companies shall fully pay and discharge such interest, for the purpose of enforcing the payment of all interest due on the bonds of such railroad company, and protecting and securing the State against loss or damage by reason of such guaranty; and to this end to enforce the rights of the State by virtue of the statutory or other liens or mortgages held by the State, or held to secure the payment of said bond or bonds on all or any of the property, assets or effects of such company or companies.

That if the property included in the statutory or other lien or mortgage held to secure the payment of the bond or bonds named in the first Section of this Act shall not realize enough upon any sale or sales of all the property, assets and effects under and in pursuance of any order, judgment or decree in such action, suit or proceeding, to pay the principal and interest of such bond or bonds, the deficiency shall be, and is hereby, made a debt of this State, and shall be and is made payable as such.

V. That a large amount of the interest coupons of said bonds are now due and unpaid, and were due before the passage of said Act, and were not paid within thirty days thereafter, and are now unpaid.

VI. That the defendant, Rufus Y. McAden, has obtained judgment in this Court upon certain of said past due coupons, said judgment being for the sum of twenty-nine thousand seven hundred and thirty-three and $^{71}/_{100}$ dollars, and entered on the 5th day of November, A. D. 1870, and threatens to enforce his judgment against the property of said company.

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*VII. That divers other creditors have obtained judgments for large amounts against the said company, some of said judgments being for past due coupons, any of which creditors may, at any time, proceed to enforce their judgments against the property of said company.

VIII. That the said company is indebted to divers other persons on past due coupons of the said bonds.

IX. That the said company is indebted to divers other persons for other causes of indebtedness incurred by the said company prior to the 5th day of May, A. D. 1865, the payment of which debts would be detrimental to the interest of the said State as guarantor of the bonds aforesaid.

X. That the said company is, however, indebted by obligation secured by mortgage upon two "road steamers" purchased prior to the 5th day of May, A. D. 1865, which obligation and mortgage were given to secure the payment of the purchase money of said steamers, and which obligation ought, in law and justice, to be paid.

XI. That the said company is indebted to divers other persons in amounts of no considerable magnitude for materials, repairs and operating expenses, which indebtedness has been incurred since the said 5th day of May, A. D. 1865, and ought, in justice, to be paid.

Wherefore, the plaintiff prays judgment against the defendants:

1st. That Rufus Y. McAden, and all other creditors of the said company who have recovered judgment against the same, be restrained by an order of this Court from enforcing their judgments against the property of the said company.

2d. That all other creditors of said company be restrained by an order of this Court from instituting suit against the said company, or, where they have already instituted suits, from further prosecuting the same.

3d. That all officers and agents of the said company be restrained by an order of this Court from paying any indebtedness incurred by the said company prior to the said 5th day of May, A. D. 1865, except the balance of the mortgage debts due for the said two road steamers; and be also restrained from paying any debts except those incurred for materials, repairs and operating expenses

since the said 5th day of May, A. D. 1865, and from making any expenditures except such as are absolutely necessary for keeping the said railroad in running order and defraying the operating expenses thereof.

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*4th. That the Treasurer of the said company be required to account to such Special Referee or Referees as may be appointed by this Court for the surplus funds that may be in his hands on the 1st day of January, A. D. 1872.

5th. That all the property of the said company, and the chartered rights and privileges thereof, be sold to foreclose the aforesaid statutory lien and mortgage and bar the equity of redemption of all persons whomsoever, by such Special Referee or Referees as may be appointed by the Court, on Monday, the first day of January, A. D. 1872, at such place, and upon such terms, as may appear to this Court to be best calculated to protect the interest of the State, with a due regard to the rights of creditors and said company.

6th. That all the creditors of the said company be required to prove and establish their demands before the aforesaid Special Referee or Referees on or before a day to be named by this Court.

7th. That a suitable person or persons be appointed Special Referee or Referees to receive proofs of the demands of the creditors of the said company, make such sales as may be ordered, and perform such other duties as may be prescribed by this Court.

8th. That this Court will make such other and further orders in the premises as may be necessary to protect the interest of the State, preserve the rights of creditors and carry out the provisions of the aforesaid Act of the General Assembly, approved March 7, 1871.

On September 23d, 1871, the following order for injunction was made by His Honor, Rutland, J.:

"For the causes stated in the annexed complaint, verified on oath:

"You, the President, Treasurer and agents of the Spartanburg and Union Railroad Company are commanded to refrain from paying any debts incurred by the said company prior to the 5th day of May, A. D. 1865, except the balance of the mortgage debt due for two road steamers, and also to refrain from paying any debts except those incurred for materials, repairs and operating expenses since the said 5th day of May, A. D. 1865, and from making any expenditures except such as are absolutely necessary for keeping the said railroad in repair and running order and defraying the operating expenses thereof.

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* "And you, Rufus Y. McAden, and all other creditors of the said company, are commanded to refrain from enforcing judgment against the property of the said company, from instituting suit against the said company, and from further prosecuting such suits in cases where the same have already been instituted."

On September 28th, 1871, the Spartanburg and Union Railroad Company filed an answer, stating "that they neither affirm or deny the allegations contained in said complaint, but are satisfied to submit the rights and interests of the corporation they herein represent to the judgment and protection of the Court."

The defendant, McAden, also filed an answer, in which he admitted "all and singular the allegations" of the complaint, and alleged that he, as an individual, has obtained a judgment against the defendant (company) for the sum of $29,733.11, with interest thereon from November 5, 1870, on a large number of past due coupons of the bonds of said company, secured by the guaranty of the plaintiff; and, also, as President of the First National Bank of Charlotte, N. C., has recovered a judgment against the same company for the sum of $27,666.97, bearing interest from November 5, 1870, on a large number of the like past due coupons, and that both of said judgments are still wholly due and unpaid.

That the defendant holds forty of the bonds of the said company, each for $1,000, and also ninety-seven bonds of said company, each for $500; and that he interposes no objection to the sale of the said property of said company as prayed for in the complaint.

This answer was verified on October 26, 1871, by James H. Rion, as attorney of the defendant.

On the 15th day of November, 1871, His Honor Judge Rutland made the following decree in the case:

The issues in this action having been brought on for trial before the Honorable James M. Rutland, Judge, without a jury, at a Circuit Court held in and for Fairfield County, at Fairfield Court House, on the 15th day of November, A. D. 1871, and the pleadings in the above entitled action having been read, on motion of Mr. Attorney General:

It is ordered that the order of injunction made on the 23d day of September, A. D. 1871, be continued and made perpetual.

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*It is further ordered that the whole of the Spartanburg and Union Railroad Company, including the road bed, right of way, grading, bridges, masonry and superstructure lying and situate in the Counties of Fairfield, Union and Spartanburg, all the stock subscribed for in the Spartanburg and Union Railroad Company, the chartered rights and privileges thereof, the iron rails, spikes, chairs and equipments, and all the property owned by said company as incident or necessary for its business, be sold by James M. Baxter and Thomas B. Jeter, as Special Referees, on Monday, the 1st day of January, A. D. 1872, or some convenient sale day thereafter, before the court house door at Union-

ville, between the hours of 11 o'clock A. M. and 3 o'clock P. M., at public outcry, to the highest bidder, after the usual notice by public advertisement in the Fairfield Herald, the Unionville Times, the Carolina Spartan, the Columbia Phœnix and the Columbia Union, upon the following terms, to wit: $25,000 to be paid in cash and the balance in three equal annual installments, with interest on said balance from the day of sale, the purchaser to give his bond with a mortgage of the property sold, to pay for all necessary papers and revenue stamps.

It is further ordered that if, upon such sale, the purchaser fail to immediately pay said sum of $25,000 in cash, the said Referees do proceed at once to resell the above mentioned property, which they shall do as often as may be necessary until the terms of sale are complied with.

It is further ordered that the stockholders of the said company and the defendants, creditors of the same, and all persons claiming under them, be bound and foreclosed of all right, title and interest and equity of redemption in the property so sold or any part thereof.

It is further ordered that all the creditors of the Spartanburg and Union Railroad Company be required, by public advertisement in the papers heretofore named, to prove and establish their demands against the said company before the said James M. Baxter and Thomas B. Jeter, as Special Referees as aforesaid, at the law office of James H. Rion, Esq., in Winnsboro, South Carolina, on the 26th, 27th, 28th, 29th and 30th days of December, A. D. 1871, and on the 23d, 24th, 25th, 26th, 27th, and 28th days of January, A. D. 1872.

It is further ordered that the said James M. Baxter and Thomas B. Jeter be, and they

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hereby are, appointed Special Referees to *receive the proof and make the sale as aforesaid, and to perform such other duties as may be required of them as such Special Referees.

It is further ordered that the Treasurer of the said Spartanburg and Union Railroad Company do account to the said Special Referees for whatever surplus fund that may be in his hands on the 1st day of January, A. D. 1870.

It is further ordered that said Special Referees do report upon the sale made by them and upon all the matters herein referred to them at the next term of Court.

It is further ordered that the said Referees, before entering upon the discharge of their duties, do give their several bonds to the State of South Carolina, each in the penal sum of $10,000, each bond to have two good sureties thereto, and to be conditioned for the faithful discharge of their duties as such Referees, said bonds to be approved by the Attorney General.

It is further ordered that it be referred to W. K. Bachman, Esq., as Special Referee, to inquire and report as to what would be a suitable fee to be paid to the Attorney General and to the attorneys of counsel on the part of the State as a compensation for their services herein, and also what would be a suitable fee to be paid to James M. Baxter, Esq., as a compensation for his services in the case of Alexander G. Brown v. The Spartanburg and Union Railroad Company, in the Circuit Court of the United States for the District of South Carolina, by the discontinuance of which case this action has been furthered; and also what would be a suitable fee to be paid to Henry Buist, Esq., and John H. Evans, Esq., attorneys for the Spartanburg and Union Railroad Company, and to Wm. Munroe and Robert W. Shand, Esqs., attorneys for creditors of the said company, for their services in proceedings in the United States Court for involuntary bankruptcy against said company, by the discontinuance of which proceedings this action has been furthered, and that said Referee have leave to make his report thereon to a Judge of this Court at chambers.

It is further ordered that said cash payment of $25,000 be applied to the payment of the costs of these proceedings and the expenses of said sale, then to the payment of such fees as may be ordered, and that the balance be deposited in the national banks of Spartanburg, subject to the further order of this Court.

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*On May 9th, 1873, the following order was made by His Honor Judge Mackey:

On motion of Mr. Rion, of counsel for the plaintiff, it is ordered:

1. That the Special Referees, James M. Baxter and Thomas B. Jeter, have further time until the 1st day of October next to file their report in the above entitled action.

2. That the Special Referees do hold a reference, for the purposes heretofore indicated in former orders of reference passed herein, at Unionville, on the 19th and 20th days of June, A. D. 1873, and do hold a final reference at Winnsboro, for said purposes, on the 3d and 4th days of September, A. D. 1873; that said Referees do give notice of said references by publication, to be made in the Carolina New Era, the Unionville Times, the Yorkville Herald, the Columbia Carolinian and Columbia Union, once a week for three weeks, the first publication to be made without delay after the rising of this Court.

3. That on the said 1st day of October next the said Special Referees do file with the Clerk of this Court their report upon the bonds, coupons and other demands against the said Spartanburg and Union Railroad Company that have been proven before them; and that they do also report the order of priority in which said bonds, coupons and other demands shall be paid out of the as-

sets and the proceeds of the sale of the property of said Spartanburg and Union Railroad Company.

4. That any bond, coupon or claim not proven before the closing of the final references herein ordered shall be held to be debarred from receiving any dividend out of the aforesaid assets and proceeds of sale.

On November 6th, 1873, the Referees, James M. Baxter and Thomas B. Jeter, submitted their report as follows:

The undersigned, Special Referees, beg leave to submit the following report in the above stated case:

That they have, as directed, held various references to ascertain the indebtedness of the defendant, the Spartanburg and Union Railroad Company, secured by liens upon the property heretofore sold under the order of this honorable Court in the above stated case, but from the difficulties in establishing one

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of the claims presented *the Referees found it impracticable to file their report on the first day of October, 1873, as directed by order dated 9th May, 1873.

In the following statement the amount of bonds, coupons and interest on coupons is separately exhibited, and interest is counted on coupons to the 10th January, 1872. It was necessary to fix some uniform period, and that time was found most convenient and fair.

No notice has been taken of any claims except for bonds guaranteed by the State, (Statutes at Large, Vol. XII, page 612,) the coupons of such bonds, the interest on the coupons and a judgment claiming a lien on the property mortgaged to the State by the Act of the Legislature referred to. The bonds were all sold at par except $100,000, which were sold for $95,000, whereby the railroad company was enabled to save, as was proved, the net amount of $20,000. So that the proviso contained in Section 1 of the said Act, making the endorsement by the Comptroller General null and void if any of the bonds referred to in said proviso should be sold for less than par, has been substantially complied with and no exception has been taken by the counsel representing the State: and, besides, the Referees cannot see how the proviso could prevail against the innocent holders of such bonds and coupons of the same, who could have had no notice of the price paid.

The First National Bank of Charlotte, Rufus Y. McAden and John Edmunds Brown had each obtained judgment against the Spartanburg and Union Railroad Company in the Court of Common Pleas for Fairfield County on the past due coupons of the guaranteed bonds, but as these judgments gave no liens on the mortgaged property the coupons were received and treated as if no judgments had been rendered.

The claim of Gertrude A. Barnaby, administratrix, No. 72, is for bonds guaranteed by the State, "lost or destroyed during the occupation of Columbia by the army of the United States under General Sherman in 1865," as the claimant sets forth in her affidavit, of which bonds the number of one is unknown, and the other four are numbered respectively 580, 428, 427, 2. These bonds were of the denomination of $500. By reference to claim No. 10, established by the First National Bank of Charlotte, N. C., it will be seen that four bonds, each of the denomination of $500, Nos. 580, 428, 427 and 2, form part of that claim and are certainly identical

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*with four of the bonds set up as lost bonds by the claimant Gertrude A. Barnaby.

From the direction of General Sherman's march, after leaving Columbia, and the significant fact that the four bonds, 580, 428, 427 and 2, are found again in the hands of the same claimant in juxtaposition, although in a large package of bonds, leaves the impression that the fifth bond, the bond whose number is unknown to Mrs. Barnaby, is also embraced in claim No. 10.

The Bank of Charlotte has produced full evidence of its claim, and the same, it is respectfully submitted, should be allowed without any inquiry in this proceeding as to how it acquired possession of the bonds, all of which are payable to bearer, and the claim of Gertrude A. Barnaby, both for bonds and coupons, should be disallowed without embarrassing this case, now much encumbered by the great number of parties and unadjusted interest. The claimant Gertrude A. Barnaby can pursue her missing bonds and coupons in the hands of the First National Bank of Charlotte, or elsewhere, as she may find them.

The question of priority of payment between the bonds and coupons has been raised and pressed by argument of counsel upon the consideration of the Referees.

Upon behalf of the bondholders it is insisted that the bonds, none of which fall due before 1879, must share pro rata with the coupons now past due in the fund arising from the sale of the mortgaged property. It will be borne in mind that no coupons have been considered except those past due on or before the 10th January, 1872. The Act creating the lien (Statutes, Vol. XII, page 612,) provides "that upon the endorsement of said bonds, and by virtue thereof, the State of South Carolina shall be invested with the said lien to secure the payment of said bonds and the interest thereon by the said company as they shall become due." And the Act (Statutes, Vol. XII, page 613,) under which this suit was brought provides for a suit "to enforce the payment of all interest due," making no mention of bonds then known not to be due. These Acts, though not declared in terms public Acts, are to be so construed, and their terms and provisions are notified to the world, and all parties claiming under said Acts are certainly bound thereby.

Both the Acts referred to go far to establish by express terms the right of the holders of coupons due at the time of foreclosure to

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*priority of payment over the holders of bonds not yet due. A different mode of payment would violate the Acts both in their terms and evident intention.

This construction is consistent with the authorities, both elementary and judicial, so far as the Referees have been able to ascertain. They have not been referred by the able and industrious counsel representing the bondholders to any case in which different debts were secured by the same mortgage, some not due at the time of foreclosure, and in which those not due at the foreclosure were admitted to a pro rata participation in the assets arising from the sale of the mortgaged property.

In some States a condition is engrafted on railroad bonds which makes the principal become due upon a failure on the part of the company to pay the accruing interest, and in such cases if the bonds and coupons are both secured by the same mortgage, as in this case, a foreclosure for payment of coupons must be also for the payment of the bonds as well, because both are due. Such was the state of facts in Dunham v. Railroad Company, (1 Wall., 258, 265, 268 [17 L. Ed. 584],) and the bonds and coupons were paid pro rata.

Suppose the bonds of the Spartanburg and Union Railroad Company were a very superior investment, because of a high rate of interest paid with regularity, and the company were anxious to pay off their bond debt in advance of its maturity,—could a bondholder be forced to accept payment thus prematurely offered? Certainly not, because thereby the contract would be violated. The coupon holder has right to insist that the contract between the company and bondholder be strictly adhered to when its variation would impair the contract between him and the company under the mortgage, which, as set forth in the Act, (Statutes, Vol. XII, page 612,) which Act is the mortgage, that bonds and coupons are to be paid as they become due.

The Referees on the question of priority of payment between the coupons and bonds find as matter of fact:

1. That in the foregoing statement of claims proved and established, no coupons not past due on or before the 10th January, 1872, are embraced, which date, by agreement, stands as the day of foreclosure.

2. That none of the bonds of the Spartanburg and Union Railroad Company, secured by the mortgage aforesaid, were due at the time of the foreclosure thereof, and are not due now. The Referees hold as a legal conclusion—

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*1. That the bonds not due cannot share pro rata with coupons past due in the assets arising from the sale of the mortgaged property, but that such coupons must be first paid therefrom.

2. That if the bonds not yet due are allowed to share pro rata with the coupons past due at the time of foreclosure, coupons since maturing, and to mature, must be included in such participation.

N. W. Woodfin and Thomas W. Patton, as executors of the last will and testament of James W. Patton, late of Asheville, North Carolina, presented, on their oaths, a claim in favor of the estate of their testator, the said James W. Patton, for $16,313.53, with interest thereon from the 14th day of January, 1859, (which interest should be counted, if the claim is allowed, until the 10th of January, 1872,) the balance of a judgment rendered, as is alleged, at Spartanburg Court House, in the Court of Common Pleas, for $23,104.79, in favor of the said James W. Patton, against the Spartanburg and Union Railroad Company, credited by $9,680 on the 14th January, 1859. The claimants introduced, by way of further proof, an exemplification of the case of James W. Patton v. The Spartanburg and Union Railroad Company, certified to by the Clerk of the Court of Common Pleas for Spartanburg County, F. M. Trimmier, Esq.

The Referees would state that they feel sure of the entire correctness of the exemplification despite the very imperfect way in which the case has been exemplified. It is composed of fifteen attached but unlocked pages, with the impression of the official seal on the last page, and ten loose detached papers enclosed, one of which is the judgment. Accompanying the exemplification there is the original execution.

At the hearing on this branch of the case, to which considerable time was given, the exemplification was offered in evidence but was not examined by the Referees or by the counsel for either side, and there seemed to be no question as to rendition of the judgment in proper form, and that it is yet unsatisfied except by the payment hereinbefore stated.

Creditors under the mortgage join in resisting the claimant's right to any portion of the assets arising from the sale of the mortgaged property in satisfaction of the balance of this judgment, because, as they allege, the lien of the judgment has been released.

The credit of the company had gone down very low,—so low that further progress in the completion of the road, then imperfectly

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*finished to Shelton, twenty miles, was suspended. Creditors were suing, and, to prevent undue advantage to some creditors over others equally meritorious and more forbearing, John L. Young, President, on the ——— day of ———, confessed judgment to Davis Goudelock, trustee, for all the creditors in

the sum of $200,000, then supposed to be sufficient to cover all the debts of the company.

This judgment was confessed at Union Court House, as the Referees are impressed, before the judgment was rendered at Spartanburg Court House in favor of James W. Patton; but if this point should be material the Referees hope the record may be produced as promised by Mr. Rion. The Referees, however, do not deem the point of time important.

Other judgments had been obtained about that time.

The General Assembly had, on the 21st day of December, 1857, passed the Act "to afford aid in completing the Spartanburg and Union Railroad," and the company desired to render compliance with the conditions of that Act.

A meeting of creditors of the company was convened at Union Court House on the 14th January, 1858, to procure the release of all liens as required by the Act. John E. Patton attended that meeting and released for himself and also for his brother.

It may be proper to here remark that the claim for estate of James W. Patton is the only one by judgment rendered in this case.

If James W. Patton had done in person what his brother John E. did for him, the Referees have no hesitation in saying that this claim would be groundless.

No proof has been adduced to show that John E. Patton acted under any express authority from his brother, James W. Patton, but it was shown that their relations were very fraternal, and that they acted each for the other in their extensive contracts on the Spartanburg and Union Railroad; but if James W. Patton had died on the 15th day of January, 1858, it can hardly be contended that the release, signed as it was, would have waived the lien of James W. Patton as between him and the company. To make the release binding we must look to subsequent circumstances and subsequent acts. Soon others became parties to this transaction. At the time of the meeting of creditors James W. Patton was on a tour through Georgia, Alabama and Florida, but on his return, which was about one month after the meet-

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ing, John E. informed James W. of what *he had done touching the release. James W. objected. Proof was admitted of James W.'s objection without regard to whom made. The Referees were fully impressed with the incompetency of the testimony but admitted it subject to objection. In the wide latitude allowed for the proof of James W.'s objections, none were proved to have been made to any one beyond his brother John E., his family and his legal adviser, Mr. Woodfin. He made no objection to President Young when he explained the financial condition of the company, and spoke to James W. of the release, with all which he expressed himself satisfied and hoped the road would soon be completed to Asheville, and upon the credit of the company, restored by the endorsement of bonds produced by the release, he took and executed a large contract for the completion of the road, for which he was paid in whole, or in part, by the endorsed bonds. He made no objection, so far as has been shown, to the authorities of the State or company touching the release; made no assertion of his rights now claimed under his judgment by levy, or otherwise, accepted a credit of $9,680 paid in the very bonds at par, raised to par by the endorsement founded on the release now objected to. These bonds would have been worthless without the endorsement, and without the release that endorsement would not have been given.

After the meeting at Union, 14th January, 1858, President Young applied to the Comptroller General, and, as the sequel shows, satisfied that officer of the sufficiency of the release, and procured his promise to endorse the bonds. President Young then sent to New York, had the bonds lithographed and returned, when they were endorsed. The date on the bonds was adapted to meet the arrangments of the company, and, as shown, does not show the exact time of their execution, but they were certainly not ready for issue when John E. informed James W. of John E.'s action in the matter of the release. James W. then had time and opportunity to protest efficiently against the issue of the bonds with an endorsement procured by the release made in part by his brother on his behalf. He did not so protest, and even objected to none but his own family, his brother and legal adviser.

Attention is called to the Act before referred to, by which other parties in interest are introduced, to wit, the State and holders of bonds and coupons.

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*The first Section makes the Comptroller General the sole judge of the evidence showing a release of liens. His act in endorsing the bonds was publication to the world of his satisfaction with the evidence of release offered.

In the third Section we find: "The State of South Carolina, upon endorsement of said bonds, and by virtue thereof, shall be invested with the said lien * * * * to secure the payment of said bonds and the interest thereon by the said company as the same may become due."

The holders of bonds and coupons purchased for value with this Act in their hands, so that they are not merely purchased for valuable consideration without notice of prior encumbrance on the property mortgaged for their security, but with positive notice from the Legislature and her officer, the Comptroller General, that there were no prior liens. Suppose that in the release of the lien James W. Patton's judgment had been entirely overlooked, and he had acted precisely as he has done,—would he be allowed now

to interfere with the vested rights of the holders of bonds and coupons? There can certainly be no fault attributed to the holders of the bonds and coupons; but has not James W. Patton, if he ever intended to assert his judgment, not been guilty of failure to speak when opportunity and duty alike required him to speak, and should not now his representatives be required to keep silence?

The Referees find, as conclusions of fact, that—

1st. James W. Patton obtained judgment against the Spartanburg and Union Railroad Company, at Spartanburg Court House, in the Court of Common Pleas for Spartanburg County, for $23,104.79, with interest from the 1st of April, 1857,

Credited by 11th January, 1859....	$ 9,680 00
Balance due 14th January, 1859..	16,313 53

with interest from 14th January, 1859, to 10th January, 1872, now amounting to $31,146.15.

2d. That John E. Patton signed release of lien for James W. Patton without his authority, but upon the supposition that James W. Patton would sanction such act; but James W. Patton objected to the action of John E. Patton in the premises, to him, to James W. Patton's family and his legal adviser, but expressed his satisfaction to John L. Young, President Spartanburg and Union Railroad Company, and made no objection to the Comptroller General; but that James W. Patton had ample time after notice in which

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to ex*press his objection to John L. Young, President, and to protest to the Comptroller General against the action of John E. Patton in signing the release for James W. Patton before the bonds were issued and passed into the hands of innocent holders.

3d. That James W. Patton, by his conduct after notice of the action of his brother on his behalf touching said release, acquiesced in the release of his lien and approved thereof by profit and advantage therefrom.

The referees find the following as conclusions of law:

1. That so far as the lien of the judgment aforesaid affects the property mortgaged by the Act of the Legislature, that lien is released until the bonds and coupons secured by the statutory mortgage are paid.

To the foregoing report the following exceptions were taken by the executors of James W. Patton, deceased:

1. Because the Referees report as a conclusion of law that the lien of the judgment of James W. Patton is released until the bonds and coupons secured by the statutory mortgage are paid. When, by such finding, they announce as a conclusion of law that which is wholly unsupported, to wit, that James W. Patton agreed not to discharge the judgment he had against the Spartanburg and Union Railroad Company, but only to waive the lien of the same in favor of the State.

In thus setting up a special agreement, concerning which there was no proof, that the judgment should not be satisfied, but the lien only thereof waived, when the waiver of such lien made the judgment valueless, and for such waiver there was no consideration alleged or proved to the said James W. Patton.

2. Because the only testimony upon which the Referees rest their conclusion that James W. Patton released the lien of his judgment is that of John L. Young.

When such testimony was, when introduced, incompetent, under the 415th Section, Chapter VII, of the Code of Procedure, and not made competent because of the necessity it produced to examine the executors of James W. Patton and other parties. When such testimony was moreover, incompetent, because it was produced to validate by parol the execution of a sealed instrument, for the signing and sealing of which there was ad-

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mitted to have *been no authority given by the party who was affected by the same; and because the testimony so produced was, as it is reported, general in its character, without special details, and, if it could mean anything, was produced as meaning that James W. Patton had assented to the discharge of his judgment, not to any special waiver of its lien.

3. Because the Referees, while they declare themselves "fully impressed with the incompetency of the testimony" offered to show that James W. Patton never did at any time, or to any person, speak otherwise of the signing and sealing of the release by his brother, John E. Patton, than as wholly unauthorized by him, accept for the basis of their conclusion as to the discharge of this judgment a casual conversation between James W. Patton and Mr. Young, the President of this corporation, making the reported declarations of James W. Patton at that time outweigh the consistent and connected and continued declarations of James W. Patton in opposition to what Mr. Young recollects to have passed between them.

4. Because when the Referees report that James W. Patton "made no assertion of his rights now claimed under his said judgment," and add to this "by levy or otherwise," they assume in such statement that a judgment creditor must do some act in addition to the judgment, as it appears unsatisfied, that the lien it has ceased to exist or be of force.

5. Because to all that part of the report of the Referees which relies upon the alleged want of notice to the Comptroller General of the State that he claimed the lien of his judgment, the executors of James W. Patton respectfully submit that no obligation rested on the said James W. Patton to give such notice, because the fact that the judgment, being matter of record, was unsatisfied, of itself was the fullest notice to the Comptroller General; while as to Mr.

Young, President of the company, the testimony was positive and not contradicted that John E. Patton, when he was induced to sign the release for James W. Patton, plainly and positively stated to Mr. Young that he was not authorized to do so by his brother, James W. Patton.

6. Because the Referees have not reported, as one of the circumstances presented to them in proof, that James W. Patton did not release, nor signify to any one his purpose or intention to release, the lien of his judgment, this, that when he endorsed on his ex-

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ecu*tion the credit for $5,000, he styled himself, in the receipt he gave to the Spartanburg and Union Railroad Company, as a purchaser of the bonds he received; in that clearly distinguishing between the bonds and the credit he was willing to endorse on the execution.

7. Because the proposition set forth in the report, and which implies that it was the duty of James W. Patton "to protest efficiently against an issue of bonds procured by the release in part by his brother in his behalf," composes and compounds the duty of James W. Patton, who had no right to interfere with whatever passed between the Comptroller General and the Spartanburg and Union Railroad Company—with that of the President of the road and of the Comptroller General. And if the Comptroller General was content to be less satisfied than he should have been with the proof of the release of liens, that cannot affect the right of one who holds a lien, and of which he cannot be divested, because of want of proper care on the part of a public officer in satisfying himself as to whether it is of force or not.

8. Because the Referees make the following admission in their report: "If James W. Patton had died on the 15th January, 1858, it can hardly be contended that the release, signed as it was, would have waived the lien of James W. Patton as between him and the company; "and which necessarily involves the admission that the act done by John E. Patton had no binding force or legal obligation so far as James W. Patton was concerned. And, with such an admission, and with cumulative proof before them that James W. Patton never expressed to any one his purpose to ratify the act of his brother, upon the recollection of Mr. Young as to a conversation he had with James W. Patton, and which conversation Mr. Young nowhere says had any effect upon him in concluding his arrangement with the Comptroller General; when, indeed, it may be fairly inferred that if Mr. Young had not met James W. Patton the arrangement with the State would have been concluded, (as well it might, for it was to the interest of the company to settle the claim of James W. Patton, if otherwise the endorsement of the State could not be obtained,) and so, upon this proof, the Referees recommend the discharge of a matter of record.

9. Because the Referees submit as an equity, to the benefit of which the holders of their bonds are entitled, that they are pur-

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*chasers, for value, of these bonds, without notice of prior encumbrances, when such holders have no specific or general lien whatever on the property of the Spartanburg and Union Railroad Company; none which they can enforce; but are simply the creditors of the State and of the said railroad company, without power or right on their part to assert any special claim on the property of the said company. And that the question in the case is, whether the State can claim the extinguishment of a lien in the hands of a bona fide creditor of the said company, because the officer of the State has accepted, as matter of fact, that a lien has been extinguished when it was not.

10. Because, if all possible effect is given to Mr. Young's recollection of the conversation between himself and John E. Patton, it cannot discharge, if it did ratify, the act of John E. Patton; and John E. Patton testifies, and is not therein contradicted, that the inducement held out to him was that, if he signed the release, James W. Patton would be paid in full the amount of his judgment. And if a release was so obtained by him, and the judgment itself remained unsatisfied, and so unsatisfied notice to the world that it was a lien and unpaid, no equity can arise either to the State or to any creditor of the Spartanburg and Union Railroad Company to override the legal right of James W. Patton.

11. Because the testimony does not support the conclusions of facts reported by the Referees; and in their conclusions of law there is manifest error.

12. Because the Referees omitted to include in their findings the fact, proved by J. L. Young, that William Kelly, and perhaps other creditors, did not sign the release.

13. Because the Referees omitted to include in their findings the fact that all the signatures to the release of liens were not proved.

14. Because the Referees omitted to include in their findings the facts that said release was signed by several administrators representing estates, by persons representing themselves as attorneys at law for creditors, and by J. H. Dogan reserving his right "as a preferred creditor in the judgment to D. Goudelock, trustee."

15. Because the Referees omitted to include in their findings the fact, proved by J. L. Young, that the conversation which he first had with J. W. Patton, after the release was signed, in which it was spoken of, was after it had been deposited in the Comptroller

General's office, and during the Spring of 1858, and before the 7th June, 1858.

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*16. Because the Referees omitted to include in their findings the fact, proved by J. L. Young, that the whole $350,000 of bonds were endorsed on the 30th January, 1858.

17. Because the Referees omitted to include in their findings the fact, proved by an exemplification from Comptroller's office, that a statement of the judgment of J. W. Patton v. Spartanburg and Union Railroad Company, with a certificate of the Clerk of the Court for Spartanburg County, dated 4th February, 1858, attached, in which he certifies to the correctness of said statement, and that said judgment still stands open upon the records, was deposited in the Comptroller's office.

18. Because the Referees omitted to include in their findings the fact, proved by J. E. Patton, that he told J. W. Patton, at the time he informed him of having signed the release for him, that the company had promised to pay him off in endorsed bonds very soon, and that he did not know the fact himself, and therefore did not tell J. W. Patton that by said release he was to be paid in three installments, and partly in other assets, and that J. W. Patton never did know that the release required him to be paid in three installments, and was not informed that he was expected to take part of his judgment in other assets until months after he received the $5,000 in bonds, in June, 1858.

19. Because the Referees omitted to include in their findings the fact that the State had endorsed the bonds over four months (30th January, 1858,) before J. W. Patton received any of them, (7th June, 1858,) and some time before he could have heard of the release by J. E. Patton.

20. Because the Referees omitted to include in their findings the fact, proved by certificate of John Dewberry, Sheriff, that J. W. Patton receipted for and took the fi. fa. in the case of J. W. Patton v. Spartanburg and Union Railroad Company out of the Sheriff's office on February 2, 1860.

21. Because the Referees erred in reporting that the whole credit of $9,680 placed by J. W. Patton upon his execution against the Spartanburg and Union Railroad Company was paid in endorsed bonds of the company, when the fact is, as proved, that only $5,000 was paid in endorsed bonds, purchased, as the receipt states, from the company, and $4,680 was paid in amounts over paid to J. E. Patton & Co., for which over payment J. W. Patton gave his individual receipt and credited same on his judgment.

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*22. Because the Referees erred in reporting, as a fact proved, that J. W. Patton acquiesced in the release of his lien by his brother, by receiving profit and advantage from the endorsement of the bonds of the company by the State, when the fact is that his debt was in a much more secure condition with his judgment lien than with the endorsement of the company's bonds.

23. Because the Referees erred in holding, as between the present bondholders and the lien of J. W. Patton's judgment, that the bondholders were entitled to be subrogated to the rights of the State under the statutory mortgage and to have a prior lien under it, because it is alleged they took said bonds on the supposition that J. W. Patton's lien had been released, when the fact is they took said bonds entirely on the faith of the endorsement by the State, as is shown by the fact, proved by J. L. Young, that the said bonds would not have sold for one cent without the State's endorsement, and the Referees report them worthless without it.

24. Because the Referees erred in holding that the present owners of the endorsed bonds are bona fide purchasers, (within the rule,) for valuable consideration without notice, when there is not a tittle of evidence as to the consideration paid (if any) by them for said bonds or that they did not have notice of J. W. Patton's judgment; on the contrary, the record of the judgment was notice to them.

25. Because the Referees should have held, as a matter of law, that the purchaser of a chose in action is not within the rule which protects purchasers of real estate for a valuable consideration, and that, therefore, the purchasers of the endorsed bonds in this case are not protected by the rule, even if it were proven that they had paid value for them, and that they are not entitled to set up said purchase as a bar to the lien of J. W. Patton's judgment.

26. Because the Referees erred in reporting that the sale of one hundred thousand dollars worth of bonds at ninety-five thousand dollars was a compliance with that part of the Act authorizing the endorsement of the bonds by the State, which required that they should be sold at par, and if not so sold that the endorsement of the State should be null and void.

27. Because the Referees should have held (it having been proved that part of the bonds were issued at less than par, in violation of the Act,) that it devolved upon each bondholder to prove that the bonds presented by him were issued at par, and, this not having been proved, that the liability of the State,

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as endorser, is released, *and the statutory mortgage, intended alone to secure the State against any loss, rendered thereby null and void.

28. Because the Referees erred in holding that J. W. Patton could ratify the release signed by J. E. Patton, which was under seal, by parol or in any other way than by an instrument under seal.

29. Because the judgment of J. W. Patton

having been established as still subsisting and unpaid, the question to be determined, and which the Referees should have determined in favor of the executors of J. W. Patton, is whether this Court will allow the release of the lien of said judgment, signed by J. E. Patton, to be set up and specifically enforced, without first requiring the Spartanburg and Union Railroad Company to perform their part of such release, which was to pay said judgment by the 1st day of February, 1858.

30. Because the Referees do not report upon all the available assets of the Spartanburg and Union Railroad Company as required by the order of reference.

On February 13, 1874, His Honor Judge Mackey filed the following decree:

The issues in this cause came before me for trial, without a jury, at the November Term of the Court of Common Pleas for Fairfield County, upon the report of the Special Referees appointed therein, and exceptions filed to said report by the attorney for Thomas Branch & Co., and the attorney for the executors of the will of James W. Patton, deceased. Arguments were heard on several of the issues at said term, when, on motion of the attorney for the said executors, the argument on the remaining issues involved was postponed to divers other days, to which the Court was adjourned, until, upon the 23d day of December, the cause came up for a final hearing. After certain preliminary motions had been disposed of, it was ordered, by the expressed consent of the attorney for the executors of Patton, and of Mr. J. H. Rion, representing the State (by authority of the Attorney General) and sundry creditors, that the cause should be decided by me on written or printed arguments, to be presented on or before the first day of February, 1874. By request of the attorneys for the said executors, I have delayed the decision of the cause thus far beyond the

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time specified awaiting *the receipt of their arguments, which, up to this date, they have failed to present. Considerations of justice will not permit me any longer to delay my decision, and I must, therefore, proceed to decide the cause upon a consideration of the argument already heard upon its several branches, the report of the Referees, and the exceptions filed by the executors of Patton.

I am of the opinion that the report of the Referees, filed on the 11th day of November, A. D. 1873, should be approved, and the exceptions thereto overruled. After having carefully weighed the evidence, and duly considered all the points of law raised by the very able and voluminous arguments of the several learned solicitors representing the plaintiff and the defendants, I am satisfied that all the findings of the Referees, both of law and of fact, are correct.

In my judgment the coupons past due on the day of foreclosure are entitled to a priority of payment over the bonds not yet due, neither the bonds nor the Act creating the statutory mortgage having any provision for the pro rata payment of past due coupons and unmatured bonds in the event of a foreclosure. In the event of a deficiency of assets to liquidate the bonds the bondholders must look to the State as the guarantor of the bonds.

As to the judgment of James W. Patton, I must hold that it has no lien upon any of the property of the Spartanburg and Union Railroad Company. Viewed in the light of the law and the evidence, the paper signed by John E. Patton, as attorney for his brother, James W. Patton, was not a release but an agreement for the satisfaction and a waiver of the judgment as a lien, while the judgment debt should stand as a subsisting obligation against the company. The question, therefore, as to whether the signature of John E. Patton, as attorney, was under seal, or as to the legal effects of its not being under seal, is not material, for a seal was not necessary to the validity of such agreement, there having been a good and valuable consideration therefor, of which consideration James W. Patton, in his lifetime, received a part in the bonds of the company, which bonds were endorsed in such a manner as to inform him that the lien of his judgment was regarded as released. Hence, James W. Patton must be held to have ratified the alleged unauthorized act of his brother, and to be estopped, by such ratification, from denying the validity of the State guaranty upon the bonds, some of which he received and disposed of to other parties for value, which bonds are now presented and proved by bona

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fide holders. *Indeed, the facts, proved incontestably before the Referees, show that it would be in the highest degree subversive of equity and violative of law to permit the executors of Patton now to assert the judgment as a valid lien. It is proper for me to observe that the very capable Referees, whose report is hereby approved, were nominated by the attorneys in the case—the State designating one and the creditors the other—and, after having been so nominated, they were appointed by the Court, and have acted for more than two years.

I deem it highly proper and desirable that I should state, in extenso, the reasons and authorities that have guided my judgment in the determination of this cause. In reference to its major branch—the status of the holders of the past due coupons and the bondholders in relation to the assets—there is no authority known to me directly in point, the cause being, in this particular primal, with no antecedent decision to furnish an index to its true solution. My judgment, therefore, upon that branch rests upon ascertained legal principles, unfortified by

any adjudicated case, presenting the identical question at issue, the application of such principles being made with due regard to the maxim "principia datasequuntur concomitantia." I am, however, debarred by the delay already incident to the case, and the presentation of the arguments therein, and by the necessity of filing the decision within the period prescribed by the Constitution of the State, (Article IV, § 17,) from embodying in this opinion citations from the leading authorities, on which my conclusions of law are in the main founded, and hence I can make only a mere reference to them.—Vide Statutes at Large, Vol. XII, 612, 614; 1 Bouvier's Inst., 322, 323; De Bruhl v. Neuffer, 1 Strob., 431; 2 Greenleaf on Evidence, 507, § 533; The City v. Lamson, 9 Wall., 483; [19 L. Ed. 725]; City of Lexington v. Butler, 14 Wall., 297 [20 L. Ed. 809]; Dunham v. Railroad Company, 1 Wall., 258, 265, 268, [17 L. Ed. 584]; 14 Stat., 613; 12 Stat., 612; Murray v. Lardner, 2 Wall., 110 [17 L. Ed. 857]; Miller v. Race, Smith's Leading Cases, Vol. I, Part II, (7th American ed.); Story on Agency, (7th ed.,) 286, § 242; Corbett v. Lucas, 4 McC., 331; Wentzy v. DeHaven, 1 Sergt. & R., 312; Whitehall v. Wilson, 3 Penn., 405; Chitty on Con., 775; Hazard v. Speers, 43 N. Y. 469, 480, 483; Bruce v. Davenport, 42 N. Y., 472; Murray v. Bininger, 42 N. Y., 107; Armstrong & Barnwell v. Gilchrist, 2 John's Cas., 424; Story on Agency, 297, § 255; Kerr on Fraud and Mistake, 127, et seq.; 2 Johnson, 573; Coyle v.

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City of Brooklyn, 53 Barb., *41; Story on Agency, 293, § 253; Bigelow on Estoppel, 475, 478, 497, 500, 501, 502, 509, 510, 511, 556; vide also Mercer Co. v. Hackett, 1 Wall. 83 [17 L. Ed. 548]; Gelpcke v. Dubuque, 1 Wall. 206 [17 L. Ed. 520]; Myer v. Muscatine, 1 Wall. 384 [17 L. Ed. 564].

For the reasons hereinbefore stated, I do adjudge and decree:

1. That the findings of law and of fact by the Special Referees in their report, filed on the 11th day of November, 1873, be confirmed, and that the same be made and declared the decree of this Court, and that all the exceptions thereto be overruled.

2. That the bonds and coupons reported by the said Referees in their said report, and also in their report filed on the 23d day of December, A. D. 1873, be adjudged as established, and that the same be paid, as far as may be, out of the proceeds of the property of the Spartanburg and Union Railroad Company sold under the proceedings heretofore had.

3. That out of the said proceeds of sale the coupons past due on the day of the sale of the mortgaged property be first paid, together with the interest thereon, calculated up to January 10th, 1872; and that the remainder of such proceeds be applied ratably to the payment of the bonds that have been proved.

4. That the claim of the executors of James W. Patton, deceased, be disallowed as a lien.

5. That the claim of Mrs. Gertrude Barnaby be disallowed.

6. That before the payment of any of the said coupons, interest thereon, or bonds, the Special Referees shall set aside a reasonable sum to provide for their just compensation and the expenses and costs of this cause; the sum so set aside and reserved not to exceed six thousand dollars, ($6,000,) and to be held subject to such orders as this Court may hereafter make in regard to the same.

Thomas Branch & Company, holders of bonds of the company which had been proved before the Referee and established by the report, and others in like interest with them, appealed from the foregoing decree, on the grounds that there was error in said decree in that it adjudged that the proceeds of the sale of the mortgaged property were applicable in the first place to the past due coupons and the interest thereon, whereas it should have adjudged that said proceeds were applicable ratably to the coupons past due on the day of sale with interest thereon to the day of sale and to the bonds of the company.

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*On October 29, 1873, the executors of James W. Patton filed a petition in the cause, wherein they claimed that the judgment of their testator against the Spartanburg and Union Railroad Company is a valid and subsisting lien on the property of the company and paramount to the mortgage held by the plaintiff, and prayed that the petitioners be made parties defendant in the cause with leave to file an answer and contest all the orders, decrees and other proceedings theretofore had in the said cause. An answer to this petition was put in by the Attorney General on behalf of the State, and on December 23, 1873, His Honor Judge Mackey made an order that the prayer of the petition be refused.

On February 27th, 1872, the Referee, William K. Bachman, submitted his report on counsel fees, wherein he recommended that fees, amounting in the aggregate to $15,500, be paid out of the proceeds of the sale, and on April 3d, 1872, the report was confirmed by His Honor Judge Thomas.

On the 15th day of December, 1873, W. R. A. Thomas and W. T. McJunkin, executors of William Kelly, deceased, filed a petition in the cause, wherein they alleged that on the 9th day of March, 1860, their testator recovered a judgment against the Spartanburg and Union Railroad Company for the sum of $1,521.28, and twenty-one dollars costs; that the said William Kelly was one of the creditors of the said railroad company for whose benefit the confession of judgment to David Goudelock, of date March 6, 1857, was made; that the said William Kelly never authorized satisfaction to be entered on the said judgment to Goudelock, and that the judgment of the said William Kelly against

the said railroad company was still due and unpaid, and the petitioners prayed that they be allowed to come in and establish their claim under the orders theretofore made in the cause. This petition was heard by His Honor Judge Mackey, who, on December 23d, 1873, made an order that the prayer thereof be refused.

The executors of James W. Patton appealed from so much of the decree of His Honor Judge Mackey as disallowed the claim of the said executors to a lien under the judgment in favor of the said James W. Patton against the Spartanburg and Union Railroad Company, on the grounds:

1. The report of the Referees concerning the said judgment is not sustained by the evidence concerning matters of fact and is not sustained by law in questions of law.

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*2. That Judge Mackey has made a distinction between an agreement for the release by John E. Patton of the judgment of James W. Patton against the Spartanburg and Union Railroad Company—the said John E. Patton being, as is conceded, wholly unauthorized to make such agreement—and the release of the said judgment, when such agreement was wholly unauthorized, and the legal proposition is resolved into this: That a person wholly unauthorized may bind another to an agreement to release a lien while he could not execute the release himself because of the want of power given him for that purpose.

3. Because Judge Mackey has decided that a sufficient consideration is proved to sustain what he alleges was the agreement of John E. Patton, which, therefore, became binding on James W. Patton: and this consideration Judge Mackey doth further allege to be the bonds received by James W. Patton, when it was the proof before him that James W. Patton never acknowledged that he had received bonds in payment of his judgment, but, in the receipt held and produced by the President of the Spartanburg and Union Railroad Company, James W. Patton declares that he was the purchaser of the bonds, and when the uncontradicted testimony of John E. Patton is that the consideration which moved him was the promise that by his signing the release the claim of his brother, James W. Patton, would be paid in full,—a promise which has never been fulfilled; which it would appear could not have been fulfilled; and which, unperformed, could never have supported an agreement which rested upon it.

4. Because Judge Mackey has decided that as James W. Patton purchased certain bonds guaranteed by the State, and sold them to others, that he is estopped from asserting that the lien of his judgment is paramount and prior to the lien of the State. A proposition which involves the supposition that he, by such sale, the seller of such bonds, became the guarantor of the guaranty of the State: and that the mortgage to the State was a security belonging to each bondholder, and that, too, guaranteed by each seller of a bond to the purchaser of it, as a valid and paramount lien on the property of the Spartanburg and Union Railroad Company.

5. Because the decree of Judge Mackey is not supported by the proofs in the case, nor sustained by the law of the case, and should be reversed; and the judgment entered in the lifetime of James W. Patton against the Spartanburg and Union Railroad Company

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*be established as a subsisting lien on the property of the said road and prior to the statutory mortgage to the State.

They also appealed from the order of His Honor Judge Mackey of date December 23, 1873, refusing the prayer of their petition; and the executors of William Kelly also appealed from the order of the same date refusing the prayer of their petition.

C. D. Melton, Magrath & Lowndes, for Thomas Branch & Company, appellants.

Jones & Jones, Magrath, for executors of J. W. Patton, deceased, appellants.

Steadman, for the executors of William Kelly, appellant.

Rion, contra.

April 22, 1875. The opinion of the Court was delivered by

MOSES, C. J. The General Assembly, by Act of December 21st, 1857, (12 Stat., 612) passed an Act by which it directed that its guaranty should be endorsed upon certain bonds of the Spartanburg and Union Railroad Company, and that "as soon as any of the said bonds shall have been endorsed, and as they may be endorsed, they shall constitute a lien or mortgage upon the whole of the said railroad," etc., and that "the State of South Carolina, upon the endorsement of the said bonds, and by virtue thereof, shall be invested with the said lien or mortgage without any deed from the said company to secure the payment of the said bonds and the interest thereon by the said company as the same shall become due."

The bonds were issued by the company, maturing in 1879, bearing interest at the rate of seven per centum per annum, payable semi-annually, and attached to them were coupons for the interest. The bonds were endorsed with the guaranty of the State, and on their face expressed that they were issued pursuant to the provisions of the said Act. By the fourth Section of it the State reserved its right to enact all such laws as may be deemed necessary to protect its interest and to secure it against loss in consequence of the said endorsement, but in such manner as not to impair the just rights of the stockholders of the company.

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*By Act approved March 7th, 1871, (14 Stat., 612,) the General Assembly "required

and authorized the Attorney General, immediately after the expiration of thirty days after its final passage, for and on its behalf, and in its name, to cause suit or other legal proceedings against each railroad company which has heretofore issued bonds with its guaranty endorsed and on which interest is now due and unpaid, unless within thirty days from its passage such company shall fully pay such interest, for the purpose of enforcing all interest due on the bonds of such railroad company and protecting and securing the State against loss or damage by reason of said guaranty; and to this end to enforce the rights of the State, by virtue of the statutory or other lien or mortgage held by the State, or held to secure the payment of said bonds, on all or any of the property, assets and effects of such company or companies."

The third Section provides "that if the property included in the statutory or other lien or mortgage held to secure the payment of the bond or bonds named in the first Section of the Act shall not realize enough upon any sale or sales of all the property, assets and effects under any judgment or decree in such suit or proceeding to pay the principal and interest of such bond or bonds, the deficiency shall, and is hereby, made a debt of the State, and shall be and is made payable as such."

The Spartanburg and Union Railroad Company failed to pay the interest upon their bonds, and the action was commenced by the Attorney General under the said Act of 1871, in the name of the State, to protect the interests of the State, and to this end prayed a foreclosure of its statutory lien or mortgage. By an order in the cause the railroad and other property of the company were directed to be sold and the stockholders and creditors of the company and all persons claiming under them barred from and foreclosed of all right, title and equity of redemption. The property was sold and did not realize enough to meet the coupons past due proved before the Referees, much less the bonds also proved and established.

The Circuit Judge decreed that the coupons past due on the day of the sale of the mortgaged property be first paid, together with the interest thereon, calculated up to January 10th, 1872, out of the said proceeds of sale, and that the remainder of such proceeds be applied ratably to the payment of the bonds that have been proved.

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*Messrs. Thomas Branch & Co., and others in like interest, holders of bonds which they have proved, appeal from the decree, because: "It should have adjudged that the proceeds of the sale of the said mortgaged property, after deducting the costs and disbursements incident to the proceedings in the said case, be paid and applied ratably to the bonds and coupons past due on the day of said sale, together with interest on said coupons to the said day of sale."

The corporation is insolvent. Its whole property has been sold under a proceeding by the State to foreclose the statutory lien or mortgage which it held to secure it against the liability which it had assumed by the guaranty or endorsement of the bonds. The proceeds of the sale are in the custody of the Court, to be distributed among such of the creditors of the company as have an equity through the guaranty of the State to the benefit of the said mortgage.

The question first presented for the determination of the Court is, whether the holders of the coupons past due are entitled to the proceeds of the sale to the entire exclusion of the bondholders?

It must be so regarded and considered, for the whole fund is not sufficient to meet the coupons due proved on the reference. Before discussing the legal principles involved in the proposition submitted on the part of the respondents, it is proper to inquire whether it can be sustained, as they contend, by anything either in the Act of December 21, 1857, "to afford aid in completing the Spartanburg and Union Railroad," or that of March 7, 1871, "to protect the interest of the State whenever payment of any interest now due remains unpaid on bonds issued by any railroad company and whenever the guaranty of the State is endorsed." It is claimed that by the provisions of the first Act the mortgage "was to secure the payment of the bonds and the interest thereon by the company as the same shall become due." Such, however, would have been the effect of the mortgage without the superadded words. Suppose the language of the Act had merely been to secure the payment of the bonds,—would it not necessarily have been held to include the interest as well as the principal? And if the words "as the same shall become due" had been entirely omitted, would the right of the State to foreclose upon the non-payment of the interest when "it became due" have been in any way impaired or affected? The lien was the security for the guaranty of the

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bonds. They represented the *debt as a whole, for which the State was liable, and its express reservation of right "to enact all laws necessary to protect the interests of the State in consequence of its endorsement, but in such a manner as not to impair the just rights of the stockholders of the company," left it free to exercise its power of foreclosure on any default in the payment of the debt which it had guaranteed. The words imply no priority of payment in favor of any holder, either of the bonds or the coupons. The mortgage was to secure the whole debt endorsed by the State. The fund to be distributed is a common one, representing the property which was held not only to secure the interest but the principal of the bonds. The

third Section of the Act provided that as soon as the guaranty of the State was endorsed on any of the bonds mentioned before, and as they may thereafter be endorsed, "they shall constitute a lien or mortgage upon the whole of the said railroad, including, &c." The subsequent words, "as they became due," were but a consequence resulting from the mortgage itself, which would have followed from the nature of the lien without any such expression. The construction of the respondents proceeds from a supposed distinction between the bonds and the interest, whereas the interest is as much included in a bond bearing interest as the principal itself.

The words have no meaning unless they refer to the right of foreclosure through the liability to forfeiture on the non-payment either of the interest or principal as it may fall due. Nor is there anything in the Act of 1871, under which this foreclosure was enforced, to sustain the right claimed by the respondents, even assuming that the State could by legislation subsequent to its contract, through its guaranty, change its relation to the bondholder. The Act of 1871 does not restrict the action which it contemplates to the mere collection of the interest due on the bonds, but resorts to it "to enforce the rights of the State by virtue of the statutory or other lien or mortgage held by the State, or held to secure the payment of said bond or bonds, on all the property, assets or effects of such company or companies." Section 3 looks to the event of a failure to realize on the sale of the property a sufficient amount to pay the principal and interest of the bonds, and by Section 4 a provision is made for such contingency. We fail to see in the terms of the contract which was created by the Act of 1857, or in that of 1871, which enforces the foreclosure, anything from which a right to priority of payment can be even

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inferred in favor of the holders *of the coupons past due. As was said in the argument, if the principle contended for can apply, then, "as between the coupons, if the fund is insufficient to pay all, those shall be preferred which first became due."

What is there in a coupon which by its mere form and designation can change its qualities as the representative or evidence of the interest to become due and payable on the bond? The Act of the Legislature was complied with by the Comptroller General when he endorsed on the bonds of the company the guaranty of the State for the payment, both of their principal and interest, "according to the stipulations on their face." The coupons were the issue of the company for their own convenience, and resorted to as an inducement to the more ready sale of their bonds in market from the negotiability and other properties of instruments of that character. The liability of the State was in no way affected by the form which the company might adopt to facilitate the collection and payment of the interest to be due upon its bonds, whether in the shape of a warrant or any other instrument denoting its intended purpose.

While coupons are recognized as choses in action, having many of the incidents of commercial paper, transferable, when payable to bearer, from hand to hand, and bearing interest, because payable on a given day, yet, though detached from the bond, in contemplation of law they still remain a part of it and are protected by and subject to the covenants which it contains. Mr. Justice Nelson, in the City of Kenosha v. Lamson, (9 Wall., 483 [19 L. Ed. 725],) said: "The coupon is not an independent instrument like a promissory note for a sum of money, but is given for interest thereafter to become due upon the bond, which interest is parcel of the bond and partakes of its nature." To the same effect said Mr. Justice Clifford in City of Lexington v. Butler, (14 Wall. 296 [20 L. Ed. 809].)

The mode in which the fund in Court is to be distributed not depending, then, on the mere form of the coupon as distinguishing it from what it really represents, the interest accruing on the bond, it is necessary to ascertain the nature of the assets to which the holders of the coupons past due assert a prior claim. It by no means follows, because the Court of Equity holds in its custody assets to be distributed by its order, that they necessarily are of that equitable character to which its rule of "equality" must apply. Where, for instance, as is put by Mr. Spence,

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in the second volume of his treatise, *p. 421, lands were assigned in trust for the payment of debts, in the administration of the trust by the Court, judgments which affected land by their own strength and nature were directed to be paid according to their legal preference. But when the party has no lien which he can assert at law, and must resort to a Court of equity to obtain satisfaction of his demand out of assets in its control, the remedy he invokes is of that equitable character which binds him to all its requisitions and obligations.

"Equitable assets include all which are chargeable with the payment of debts or legacies in equity and which do not fall under the description of legal assets. They are called equitable assets, because, in obtaining payment out of them, they can only be reached by the aid and instrumentality of a Court of equity."—Story's Eq. Juris., § 552.

"Generally speaking, assets are equitable when, to obtain payment out of them, a creditor by bond or simple contract is obliged to go into a Court of equity."—Ram. on Assets, 317.

"The distinction between legal and equitable assets refers to the remedies of the creditor and not to the nature of the property."—See note to Adams Eq., 252.

The fund here to be distributed arises from

a proceeding belonging exclusively to equity jurisdiction. The creditors who are contesting it would have had no status in a Court of law. The mortgage was held by the State and they were entitled to no relief through its foreclosure but by a resort to the equitable doctrine of subrogation, which entitles the creditor to the security which the guarantor took for his own protection. The State, the guarantor of all the bonds, delivers its security to the Court, and says: I hold this as a security for all the creditors interested in the debts of the Spartanburg and Union Railroad Company, created under the Act of 1857. Foreclose it and divide the proceeds among those for whose common benefit it was intended. What rule of law or principle of equity will prevent all who had a common interest from sharing in the common benefit? No case can be found where a different rule has been applied to creditors standing as those before us in relation to a fund of the nature of that now in contest. Suppose the bonds fell due at different periods and the mortgage had been executed by the company directly to the holders of them, and foreclosed in equity,—on what principle, when the lien was for the security of the whole debt represented by the bonds, could

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those *whose bonds had matured claim the proceeds of the sale to the exclusion of those whose bonds were not yet due? The security was for the protection of every bond and the interest which was to accrue on it.

The rule for the administration of equitable assets is well understood. Mr. Story, in his work on equity jurisdiction, Section 554, says: "Equitable assets shall be distributed equally and pari passu among all the creditors, without any reference to the priority or dignity of the debts; for Courts of equity regard all debts in conscience as equal jure naturali, and equally entitled to be paid; and here they follow their own favorite maxim, that equality is equity—æquitas est quasi æqualitas. And if the fund falls short, all the creditors are required to abate in proportion."

The respondents further insist that their claims are to be preferred because the interest of a debt is first payable, and that where a payment is made it must be so applied. We know no rule of law which requires or directs such preference. In the absence of any contract regulating the appropriation of partial payments, the creditor has a right to apply them at his pleasure where the debtor refrains from directions as to their disposition either by express words or by acts sufficient to denote his purpose, which may also be inferred from the attending circumstances. It is always a question of intention, to be determined by the conduct of the parties, and is the result of voluntary acts already performed. It cannot apply where the payment has not been appropriated and the manner in which the appropriation is to be made is to be determined by the Court. Mr. Justice Story, in delivering the opinion of the Court in U. S. v. Kirkpatrick, (9 Wheat., 737 [6 L. Ed. 199]) says: "The general doctrine is, that the debtor has a right if he pleases to make the appropriation of payments; if he omits it, the creditor may make it; if both omit it, the law will apply the payments according to its own notion of justice. It is certainly too late for either party to claim a right to make an appropriation after the controversy has arisen."

Chancellor Johnson, in Jones v. Kilgore, (2 Rich. Eq., 66,) says: "There is no doubt that if no directions are given by the party making the payment, the right to make the application is with the party receiving. If neither has fixed the application, it devolves upon the court, and will be made pro rata to the demands made by him who receives the money against him who paid it; or, if one

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of the *demands be less secured than the others, the application will be made to it in the first instance." With how much greater reason does this mode of appropriation by the Court apply where the fund is the proceeds of a security which was taken for the common benefit of all who invested in the bonds, invited to do so by the provisions of the Act which gave the security, which could not have been rendered available but through the aid and instrumentality of the Court? Any other rule would be inconsistent with the principles of equity or the dictates of justice.

In Stephens v. Guernsey & Collier, (9 Paige, 356,) where a question arose as to the right, under the banking law of New York, to a preference of payment out of funds in the hands of the Comptroller by the holders of protested notes of an insolvent bank over the other creditors, whose notes had not been protested, Chancellor Walworth, referring to certain decisions, said: "These, therefore, are merely referred to for the purpose of showing the strength of the principle that equality among persons having a common right to payment out of a fund provided for the benefit of all is equity, and the length to which Courts of justice have gone to sustain that principle and to give it its full effect. The principle, therefore, ought not to be departed from in this case without clear evidence of an intention to give one creditor a payment over another." And this language may well be applied to the case before us.

In our view, the proceeds of the sale must be distributed ratably between the bonds proved and the coupons due January 10, 1872, with interest thereon from said date, together with the coupons falling due after said day,—coupons of the latter class not, however, to bear such interest.

The executors of J. W. Patton appeal from the order of the Circuit Court of December 23, 1873, refusing the prayer of their petition, "that the plaintiff may be required to amend the complaint by making them parties de-

fendants with leave to answer and object to any orders made in the said cause, and that, in the meantime, no further proceedings be had in the cause." They found their application on the fact that before creditors were called in by any notice, orders were made affecting their rights, which they were thus prevented from resisting, and from which they should be allowed to appeal. It cannot be disputed that the order of November 15, 1871, was, in some respects, erroneous, and to the prejudice of the rights of the creditors, and yet one of the largest among them

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*was a party then before the Court and made no resistance. The order, too, covered matters on which no hasty action was necessary. Payment of the fees of the counsel should not have been ordered out of the proceeds of the sale; and much less those of counsel who had represented the company in other cases, having no connection with the one before the Court. The fees of the counsel of the plaintiff in the cause were chargeable to the plaintiff, and the counsel in the other cases stood but as the creditors of the company, with no right to preference or priority. The proceeding on the part of the State involved no difficulty. Its right to foreclose its lien or mortgage could not have been successfully resisted in any Court having proper jurisdiction of the subject matter. So, too, there was error in the appointment of the Referees. Conceding to the gentlemen selected the high character to which they are so well entitled, the one, the President of the company, a party to the cause, and the other, of counsel for the plaintiff, they were disqualified by their relation to it to act as Referees.

The executors of Patton, however, are now precluded from interposing any objection. Their position as creditors called in by the order of the Court gave them the same latitude of defense in every particular to which the creditor (one of the defendants on the record) was entitled. No right of exception, appeal or objection in any form were they prevented from asserting; but it should have been exercised at the proper time. If they proposed to object, they should have filed a petition to the Court as soon as they had notice of the order, setting forth their claim, and asking, before they submitted it to the Referees, to be heard on their exceptions to such parts of the order as they desired to contest. Instead of this, they presented their claim to the Referees, offered testimony to establish it, cross-examined the witness who was introduced on the part of those who resisted it, and then, for the first time, asked that all proceedings should be stayed to allow them the opportunity of being heard by petition "as to their claim to be made parties to the cause without prejudice to their right to be heard in opposition to the orders already made in the cause." They should not have silently stood by and allowed the order of which they afterwards complained to be executed and the fund, out of which the payment of the fees referred to was to be made, to the extent of their amount, to pass beyond the control of the Court.

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*The report of the testimony is singularly defective as to dates. The time at which the publication was made or the claim presented does not appear, nor is a single day named on which a reference was held. There is no excuse for such omissions. We are at liberty, though, to infer, as the order required the creditors to establish their claims as early as December 26, 1871, that it was published before that day. The order confirming the report on fees and directing their payment was not made until April 3, 1872. The claimants here must have had full knowledge of it and should have excepted in time to have secured its suspension.

Without stopping to inquire whether the said claimants, if they had a right to a trial by jury, as they contend, have not lost it by the course they pursued, we will consider this ground of their appeal. It is a misconception to suppose that Section 290 of the Code of Procedure refers to an issue of the character of the one made on the claim of these creditors. It refers to the ordinary proceeding by "action on contract, (and with the assent of the Court in other actions,") where an issue of fact is to be made up to be determined between the parties by the finding of a jury. It includes actions such as before its adoption were recognized as actions at common law. The distinction is clearly made by the Code, which provides for "trial by Referees" as well as "by the Court," where the "trial by jury" is waived, in the mode pointed out by the said Section. It might be enough to say that the demand here was not on any contract sought by a plaintiff on the one hand against a contending defendant on the other. It was the case of a creditor standing in the relation of a defendant, claiming against his co-defendants a priority of payment out of a fund in Court through a lien on the property it represented.

A further and brief examination of other Sections of the Code will show that the mode pursued here has been in conformity with the long-settled course of the Court where assets were to be administered by it, and is in strict accord with the practice established by the Code. Section 276 directs that issues of fact in certain named actions must be tried by a jury, unless a jury trial is waived, as provided in Section 290, or a reference ordered, as provided in Sections 294, 295. "Every other issue (by Section 277) is triable by the Court, which, however, may order the whole issue, or any specific question of fact involved therein, to be tried by a jury, or may refer it, as provided in

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Sections 294, 295." The said Sec*tion 294 allows "a reference of all or any of the issues of fact or law upon the written consent of

the parties;" while Section 295 empowers the Court, "where the parties do not consent, upon the application of either, or of its own motion, to direct a reference in the following cases," which it specifies:—and the character of the case before us brings it within the classes there named.

The said executors also claim that by virtue of a judgment recovered by their intestate against the company, and duly entered in the office of the Clerk of the Court for Spartanburg in June, 1857, they are entitled to be paid the balance due upon it in preference to any of the holders of the bonds or coupons. The Referees, in their conclusions of fact, find that the judgment was so recovered, but that John E. Patton signed "a release of lien for J. W. Patton without his authority; but that after notice of the conduct of his brother, touching said release, he acquiesced in the release of his lien and approved thereof, by profit and advantage therefrom;" and find as a conclusion of law "that so far as the lien affected the property mortgaged by the Act of the Legislature, it is released until the bonds and coupons secured by the statutory mortgage are paid." The Circuit Judge overruled the exceptions to the report so finding, and confirmed it. The executors appeal to this Court for a reversal of his order.

It is not our purpose in the judgment which we shall pronounce on this part of the case to notice separately each of the numerous grounds of exception on which the appellants rested in the Court below for the reversal of the findings of the Referees. Our conclusion will be reached by a consideration of the evidence as a whole, and the application of the legal principles which they involve. The declarations of the deceased to Mr. Young will be discarded, as we are not satisfied of his competency to testify to them.

The declarations to the family were clearly inadmissible; but as the counsel for the respondents, in their argument, seemed to waive any objection to them, they may be regarded as properly in evidence.

The instrument executed by John E. Patton was not a release of the judgment, (giving significance to the word in its technical sense), though it is so called by the Referees. It was a satisfaction of the judgment, destroying its validity as a lien, but recognizing the debt on which it was founded as one for which the company was still liable, and making, on valuable consideration, a new con-

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tract *in regard to its payment, for which it substitutes another mode, and extended the time within which it was to be made. The judgment could have been enforced at once, and the plaintiff had a right to say that it should be discharged only by a legal tender. The contract changed this by the stipulations that the plaintiff would accept endorsed bonds and assets—the endorsed bonds having reference to those which had been guaranteed by the State. The seal affixed against his own name by J. E. Patton, we think, must be taken as that of the principal for whom he assumed to act. The place in which it appears is not conclusive of the design of the party in adding a seal. The execution of the instrument was on behalf of the principal, intended to bind him, and on its face it expressed that in witness of the agreement thus made by the parties to it they were "to set their hands and affix their seals." The L S after the name of J. E. Patton, who professed to act as attorney for J. W. Patton, must be accepted as the seal of the party on whose behalf he acted, and, whether it followed the name of the attorney or the principal, or preceded either, effect must be given to the act according to its apparent intention. J. E. Patton, in his individual right, was also a party to the instrument. On his own behalf he had already signed and sealed it, and placing the seal after his own name, when he undertook to represent another and sign for him, must be considered and taken as something done on behalf of such other which he conceived necessary to bind him.

The purpose to be accomplished by the instrument did not, however, require a seal, and could, therefore, be ratified by the principal by any writing, acts or words which would be sufficient to confirm a simple contract executed by an attorney.—See Story on Agency, § 49. If the purpose to be effected by the writing could only have been accomplished by a deed, then its execution by an agent must be ratified by the deed of the principal, if no previous power, by deed, authorized the act in his name. This was not a technical release which required a seal for its validity. Satisfaction of the judgment could have been acknowledged by a receipt, and would have been sufficient to the end in view; and a contract even by parol would have bound the company for the payment of the debts held by the testator against it according to the stipulations which may have been agreed upon between them.

We are obliged to accept the testimony as reported by the Referees. Although some ex-

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ceptions were taken to its omission of *certain facts, averred to have been proved, and to error in the report of some of them, we have nothing before us by which it can be corrected. The proper course for the appellants was to have moved the Circuit Court to recommit the report on the exceptions thus taken, that they might have the opportunity of showing wherein they were prejudiced by its statement of the evidence. No such application was made and we are not at liberty to go outside of the report.

We do not think that the authority of J. E. Patton for executing the instrument of January 14, 1858, can be properly inferred from any of his previous acts in regard to the business of his brother. They related generally to his railroad contracts and mon-

ey received on account of them. They are not of the nature of the one by which he is now sought to be charged. His liability to whatever obligation was imposed on him has arisen from his own acts. Mr. Woodfin, one of his executors, proves that the deceased had knowledge of the intention of the company to apply to the Legislature for the aid which it obtained, and from his testimony we must infer that his testator had actual knowledge of the passage of the Act. J. E. Patton swore that a month or more passed after the meeting at which he signed the paper before he saw his brother—informed him of his having signed and of his assurance that he would receive bonds. He thus had notice of some act by his brother in regard to his judgment—expressed no dissent and made no inquiry into the character of the agreement by which he had undertaken to bind him. Mrs. Henrietta K. Patton, another witness, goes further and testifies "that he heard of the release soon after its execution; he positively disapproved; said he would not have released himself; always said he would not abide by it." It is true that the recognition of the acts of an agent will not bind his principal unless made with a knowledge of the material facts in relation to it. But was it not the duty of J. W. Patton, on the notice of the release, to inquire into and ascertain the nature of the act, that he might know how and to what extent it affected his debt? Was it not due to the company that he should acquaint himself with its terms, so that, in the event of his dissent, it might not, in the meantime, be prejudiced by a performance on its part of any of the duties which it imposed on them? According to the report of the Referees, the bonds were not issued when J. E.

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Patton *informed his brother of his action. It was a gross neglect of his duty, both to the company and the Comptroller General, when he refrained, in a matter of so much interest to himself, from ascertaining the exact particulars of the act of his brother, that, if dissatisfied, the other parties to the contract might have early notice. In June, 1858, he accepted $5,000 of the said bonds in payment of his debt.

It is said that he purchased them. This could make no difference, for, if he did, the purchase money was at once allowed as a credit on his debt. But, according to the testimony of J. E. Patton, the deceased, in the Summer of 1858, had knowledge of the actual terms of the agreement and yet lived till December, 1861, without a word of protest or a single act done to remedy the wrong of which his executors now complain. In June, 1858, he had notice, through the bonds which he held, that the lien of his judgment was regarded as discharged; made no objection to it save to his own family and accepted a large railroad contract from the very company. How is this silence for so long a period to be explained except on the theory of his acquiescence in the act of his brother? With this array of testimony against the executors on a question of fact, to be governed and determined almost exclusively by intention, we find no evidence of sufficient weight to counteract the conclusions in which the Circuit Judge and the Referees both agree, and must yield to the effect which they give it.

The appeal of the executors of William Kelly must be sustained. While the fund is in Court, no creditor who has failed to submit his claim within the period fixed by the order is debarred from making it. Payment of the demands of creditors is not regulated by the time at which they may be severally presented, where the fund has not been appropriated and passed beyond the control of the jurisdiction which has power over its distribution.—Shubrick v. Shubrick, 1 McC. Ch., 406; Ex parte Hanks, Dud. Eq., 231.

So much of the decree as directs (after provision for the compensation of the Referees and for the costs and expenses of the case) payment of the coupons past due on the day of sale, with the interest due thereon, out of the proceeds of the sale and applies the remainder ratably to the bonds proved, and also the order of 22d December, 1873, in regard to the claim of the executors of Kelly, are reversed. The motion on behalf of the executors of Patton is dismissed.

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*The case is remanded to the Circuit Court for the orders which may be necessary to give effect to the judgment of this Court according to the views herein set forth.

WILLARD, A. J., and WRIGHT, A. J., concurred.

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BRICKMAN v. SOUTH CAROLINA RAILROAD COMPANY.

(Columbia. April Term, 1876.)

[*Death* ⇐31.]

Where an engineer in the employment of a railroad company is killed by accident to the train, caused by the gross negligence of the company in the construction of its road, the company is liable to the representatives of the engineer for such accident.

[Ed. Note.—Cited in Gunter v. Graniteville Mfg. Co., 15 S. C. 455.

For other cases, see Death, Cent. Dig. § 38; Dec. Dig. ⇐31.]

[*Appeal and Error* ⇐1004.]

The Supreme Court has no power to grant a new trial upon the ground that the verdict was against the evidence or that the damages are excessive,—that Court having no power to weigh the evidence and draw from it conclusions of fact.

[Ed. Note.—Cited in McElwee v. Hutchinson, 10 S. C. 440; Steele v. Charlotte, C. & A. R.

Co., 11 S. C. 591; Steele v. Charlotte, C. & A. R. Co., 14 S. C. 326; Bowen v. Atlantic & F. B. V. R. Co., 17 S. C. 581; Altee v. South Carolina Ry. Co., 21 S. C. 558; Hyrne v. Erwin, 23 S. C. 231, 55 Am. Rep. 15.

For other cases, see Appeal and Error, Cent. Dig. § 3944; Dec. Dig. ⟸1004.]

[*Appeal and Error* ⟸1005.]

Where a motion for a new trial, made upon the ground that the verdict was without evidence to sustain it, is denied by the Circuit judge,—not upon the ground that he had no authority to set the verdict aside, but because, in his opinion, substantial justice had been done in the case,—the Supreme Court has no power to grant the motion for a new trial.

[Ed. Note.—Cited in Sullivan v. Byrne, 10 S. C. 130.

For other cases, see Appeal and Error, Cent. Dig. §§ 3860–3876, 3948–3950; Dec. Dig. ⟸ 1005.]

[*Judgment* ⟸263.]

Judgment will not be arrested because of defects in the complaint which could have been cured by amendment before or after judgment.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 474; Dec. Dig. ⟸263.]

Before Reed, J., at Charleston, November, 1875.

This was an action by Mary A. Brickman, widow and administratrix of William H. Brickman, deceased, suing for the benefit of herself and her four children against the South Carolina Railroad Company to recover damages to the amount of $20,000 for an accident on said road which occurred about fifty miles from Charleston on the morning of September 20th, 1873, and resulted in the instant death of the plaintiff's intestate.

The complaint, after alleging that the defendant was a corporation and the owner of the road on which the accident occurred; that Brickman was an engineer in the employment of the defendant, at a salary of $120 per month, and that he came to his death on the 20th of September, 1873, by the gross negligence of the defendant, proceeded further to allege that about 3 o'clock on the morning of September 20, 1873, as the express train of the defendant was pro-

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ceeding from Charleston to Augusta, *in charge of Brickman as engineer, the engine, with four box cars attached, was precipitated down a broken culvert, through which the waters were rushing to a depth of nearly fifteen feet, thereby causing the instant death of Brickman; that the road and track of the defendant at the point of accident, about fifty miles from Charleston, were defective and unsound and unfit to be used for that purpose, which the defendant might and would have known by due care, but, not regarding their duty, they negligently suffered it to be used, and that caused the death of Brickman: that at the point of accident the road of defendant rested upon an embankment of sand, which was entirely unfit and inadequate to resist the pressure of water rushing against it, and, proving defective, unsound and unfit for the purpose, was washed away in a very short time, leaving nothing to support the track of the road, and thereby causing the death of the said Brickman; that, by the gross negligence of defendant, the train of cars in charge of Brickman on the night on which the accident occurred was three hours behind its schedule time, and, by reason thereof, together with the unsound condition of the road, as before alleged, and the gross negligence of the defendant, was thrown from the road, thereby causing the death, as before alleged, of the plaintiff's intestate.

The defendant answered, admitting that it is a body corporate, owning and operating the road where the accident occurred, and that the plaintiff's intestate was at that time in the employ of the defendant as its engineer on the train to which the accident happened which caused his death, and denying all the charges of negligence against the defendant, and, for a further defense, averring that the track and road at the point of accident were in all respects sound and serviceable and fit for the purposes for which they were used; that they had been constantly and carefully supervised by competent and attentive workmen in the employ of the defendant, and that the accident was caused not by any defect in the road or train or by any negligence of the defendant, but by reason of a violent gale, accompanied by an unprecedented heavy fall of rain, which swelled the creeks and swamps in the vicinity to a height previously unknown and accumulated vast bodies of water against the road and track and undermined and destroyed them; and defendant further averred that it used due care and diligence in the construction and operation of its road and in the employment of skillful and competent persons to supervise and operate the same,

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*and has faithfully endeavored, to the best of its ability and judgment, to guard against and prevent accidents, and has not been negligent or careless in regard to any of the matters charged against it in the complaint.

At the hearing testimony was given on behalf of the plaintiff tending to sustain the allegations of the complaint and on behalf of defendant tending to sustain the defense set up in the answer.

The plaintiff asked the Court to instruct the jury as follows:

1. That it is a duty which a railroad company owes to its employees to furnish a proper and safe road-bed, culverts and crossings of dangerous places and trestles, as well as to select proper machinery, implements and boilers used in the operation of their road; and in procuring and constructing them to see that every safeguard known to science and the construction and testing of these instrumentalities have been employed before

exposing the lives and safety of those in their service, whom they are bound by their duty and obligation to preserve from all risks other than the ordinary risk of the employment; and if the jury believes that these precautions have not been taken, their omission to do so renders the company culpable, and they should find for the plaintiff.

2. That this responsibility cannot be avoided by delegating the power to others; and the understanding is direct with their servants that they will furnish suitable and safe structures; and they cannot shift the blame upon those employed to furnish the said structure, and thus excuse themselves from an injury resulting from an unsafe and defective structure; and if the jury believe that the crossing, when plaintiff met his death, did not come up to these requirements, the plaintiff is entitled to their verdict.

3. If the plaintiff's death has resulted from the acts or property of the defendant, the burden of proof is on the defendant to exculpate itself by showing that the catastrophe was not traceable to any act or omission of its own.

4. That plaintiff could not be held responsible for the fault of a servant engaged in a different and independent part or business of the road; and if fault there was in the structure, through the defect of which he came to his death, no matter by whom done, he is bound to recover.

5. That the risk of losing his life through a broken embankment or unsafe culvert was not one of the risks incident to plaintiff's em-

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*ployment, and he could not contribute to the negligence of the conductor or constructor of the crossing, to whom he stood as in the relation to his master, the road; and if, from the constructor's fault, the catastrophe occurred, he can justly claim damages at your hands.

6. The elements of the contract between the company and the deceased were these: On the part of the company, so far as they were to construct, equip and move the road, that they would carry him safely; and on the part of the deceased, that he would perform certain duties. With respect to the last, he was their servant; with regard to the first, he was their passenger, and as their passenger he was killed.

7. If the jury should believe that the sudden and violent precipitation of the train down this gully was the proximate cause of his death, they should render him a verdict for damages.

And the defendant asked for the following instructions:

1. That if the jury believe that the disaster was occasioned by the sudden flood, that ends the case, and defendant cannot be liable.

2. That if the railroad company constructed their road with due skill and care, and employed competent and reliable persons to supervise the track and road-bed, then they have performed all their duty to plaintiff, as an employee, and cannot be responsible for any damage to him.

3. That in order to charge the defendant, it must be shown that the track was defective, and that the defect was known to the President and Directors of the road.

4. The defendant is responsible only for negligence, and, as between employer and employee, negligence cannot exist if the employer does his best to supply competent persons.

5. That even if there were defects in the construction of the culvert, the defendant is not liable to employees for injuries arising from these defects if it employed skillful and experienced men to construct the road and locate the culvert.

6. That employee takes the risk of his employment.

His Honor the presiding Judge instructed the jury as follows:

I regret exceedingly that you have been detained so long, but we must, nevertheless, dispose of this case quietly, calmly and justly. I regret, also, with counsel, that we had

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not a longer time to devote *to its development. We had done a good day's work before we commenced it, and I would not have gone into it without being assured that the testimony in the former case should be read in this and the arguments considerably shortened.

This case is a very different one from the last: in that, it was alleged that the young man who lost his life was where he ought not to have been, and that his death was caused by his own imprudence. In this, Mr. Brickman was in his proper place; he was the engineer upon the train that was precipitated into Polk Swamp, and was engaged in the proper discharge of his duty when he came to his death. This is admitted, and his wife, as administratrix, brings this action to recover damages for the loss of her husband. The case is, therefore, a legitimate one, and it is properly before the Court. She is a widow with four children, and her condition must necessarily enlist the sympathy of all kind-hearted people. But we are not to decide cases by our sympathies, but by the law and the testimony. As to the law, it is my duty to give it to you, and yours to take it as given. If I commit error, there is a higher tribunal that will correct me; but you are the exclusive judges of the testimony, and it is your duty to apply it to the law and find your verdict according to your judgment. If Mr. Brickman, the deceased engineer, had been a passenger on the train, this case would stand very differently before you from what it does now. As you heard me state this evening, a railroad company is the insurer of passengers and goods; and if the

life of a passenger be lost whilst they are transporting him, nothing can excuse them from legal responsibility but the act of God or the public enemy. The deceased was, however, an employee of the road, and not a passenger; and he did not, therefore, occupy, in law, the same relation to the defendants that a passenger would. The man who goes into the employment of a railroad company does not take absolutely all the risks that might exist, but he does take the ordinary risks incident to his position, and the company are liable to him only for gross negligence. If they have exercised ordinary care and diligence in the erection of their works, such as a prudent man would take in the management of his own affairs, and the life of an employee be accidentally lost, they are not legally responsible to his representatives. There must be, as to the employee, evidence of negligence, and of gross negligence, to fix their responsibility, differing, materially, from the case of a passenger.

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Then, the questions for *you are: Was there negligence on the part of the defendant, and was the death of plaintiff's intestate caused by such negligence? You heard me state this evening, and I repeat it, that if there were any defects in their works or machinery that were patent, that could be seen or detected by ordinary vigilance, and the death of the deceased was caused by such defect, they would be liable, even to an employee, for all the consequences. But if they have exercised ordinary care and diligence to guard against accidents, they are not liable to an employee for latent defects; that is to say, for defects not visible to the eye upon inspection, and not to be discovered by ordinary care and prudence. That is the distinction and it may be illustrated in this way: If an employee were required to ascend from the platform to the top of a car on a ladder that appeared to be sound, there being no defect visible to the eye, or that could be discovered by ordinary vigilance, and it turned out that the timbers were rotten internally, from which the party was thrown down and killed, the company would not be liable, because they could not have foreseen or prevented the accident. But if the defect in the ladder could have been detected by any ordinary care, and the death could be traced to a want of such care, then the company would be legally liable for the consequences.

What are the facts in this case? In the early history of defendant's road, a trestle fifty-five or sixty feet in length was built across Polk Swamp, which remained there until two or three years ago, when the Vice President, Mr. Tyler, concluded to substitute it by a brick culvert. A number of other trestles on the line of the road were filled up and culverts substituted about the same time, which, it is proven, was good engineering and good economy.

The Superintendent, before the change, employed Mr. DeCaradeux, a civil engineer by education and experience, to examine and report upon its propriety. He states that he examined the ground, and consulted with the Superintendent, Mr. Buckhalter, Mr. Thames, Mr. Fickling and a number of other persons long familiar with the locality, and made up his mind that a culvert twelve feet wide and eight or nine feet high would be amply sufficient to carry off the water; and it was constructed accordingly, and the trestle filled up. It is in testimony that the current of the stream came directly towards the culvert, and to within thirty or forty feet of its entrance, and that a rise of six inches in the stream would send the water through the culvert, where it was carried off by a canal.

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*The Superintendent and other men of science who examined and were engaged on the work have testified that they were of opinion the culvert was entirely sufficient to carry off any water that would collect at the locality, and that it was good engineering to construct it and fill up the trestle. Were they mistaken? Are you so satisfied from the testimony? And, if mistaken, does that make the company responsible? Is there such negligence proven on the part of the company in having permitted that work to be done by its engineers, and in running their trains over it, as to make them justly liable to an employee? or had such skill and caution been exercised as to throw on him the risk of his position? Could any of you, gentlemen, have told that there was danger there? Would you not have relied on the opinions of civil engineers and of the other persons of practical experience? or what would you have relied upon? If the company were guilty of having unskillfully and negligently constructed their road, and plaintiff's intestate came to his death thereby, then they are legally liable for the consequences. But if they exercised ordinary skill, care and diligence, they are not responsible. Gentlemen, how did this accident happen? Was there anything unusual occurred on that day that caused it? It is in testimony that there had been an extraordinary fall of rain during the evening of the 19th of September, and that there was such an accumulation of water in Polk Swamp as to overwhelm and carry off the trestle and embankment, whereby the train was precipitated in the chasm and the engineer killed. Was this one of the ordinary heavy rainfalls that occasionally occur in the country, or was it of such extraordinary character as to be properly characterized as the act of God, which human foresight cannot guard against? If it be the act of God, then there is no human responsibility.

Gentlemen, weigh the testimony carefully and impartially, and let your verdict reflect an honest judgment. If you are satisfied

that the death of plaintiff's intestate is attributable to the gross negligence of the defendant company, you will find for the plaintiff. In making up your verdict, if you should so find, you will look to all the circumstances, and give some reasonable sum by way of damage, and not permit yourselves, as juries sometimes do, to seek the ruin of a corporation through sympathy for an individual. Counsel always ask in their cases much heavier damages than they expect to get. If, however, the plaintiff is, in your

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judg*ment, entitled to recover anything, she should have reasonable compensation.

But, gentlemen, upon looking into the testimony as given upon the stand, and applying it to the rules of law, whatever may be your sympathies for the plaintiff and her children, if the case has not been made out to your satisfaction, it is your duty to find for the defendant.

The jury found for the plaintiff $10,000, and the defendant gave notice of a motion for a new trial upon the following grounds:

1. That the verdict was against the well-settled law of the case and the charge of the Court.

2. That the verdict was wholly unsustained by the evidence and was against the evidence in the case.

3. That the damages were excessive.

4. That the verdict of the jury was partial and capricious in the conclusion they reached and the damages they assessed.

Defendant also gave notice of a motion in arrest of judgment on the following grounds:

1. That the complaint in the said action does not aver that the said defendant had notice of the defects complained of as causing the injury.

2. That the complaint in the above action does not contain any premises or allegations from which the duty of the defendant, as therein alleged, can be inferred.

3. That the complaint does not set out any contract in which the obligation or duty of the master to safely and securely carry the servant is expressed, or from which it can be inferred.

These motions having been argued, His Honor Judge Reed, on the 4th of December, 1875, "ordered that the execution be stayed until the decision of the Appeal Court;" and on the 10th day of January, 1876, filed the following opinion and order:

I have been strongly inclined to grant a new trial in this case, as the verdict of the jury is very far from commending itself to my approval. But, after hearing the argument, my opinion has been modified, not as to the merits but as to the propriety of my applying the remedy asked for.

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*The law of the case is very clear to my mind, and in my charge to the jury I discriminated between the liability which the company assumed to its passengers and that which it assumed to its employees.

As to the latter, I charged that the defendant corporation could not be made liable unless it was found that they were guilty of gross negligence, and I cannot but think that the jury, in coming to their conclusion, have either misunderstood the law or misapplied it to the facts as elicited from the stand.

Whatever doubts may exist, as a question of engineering, as to whether the open trestle or the embankment and culvert made the safer road-bed at Polk Swamp, the testimony was uncontradicted that the company employed skillful persons to examine the locality and determine what was proper to be done before any change was made; and when it was decided to substitute the trestle by an embankment, the work was superintended and executed by persons of skill and experience. I do not discover the evidence, therefore, upon which the jury found gross negligence, if negligence of any degree. But there was testimony sufficient to go to the jury, and upon it they have found the verdict before us, and I am not prepared to say it is without evidence to support it.

The question as to whether the accident which caused the death of plaintiff's intestate was the result of negligence at all, or was caused by the act of God from an unusual fall of rain creating a sudden rise of the waters of Polk Swamp, which swept away the embankment and left the chasm into which the train was suddenly plunged, was also submitted to the jury with very full instructions. They were told that if the accident resulted from the act of God, that was the end of the matter; that in such a case there could be no liability even in the case of a passenger, and certainly none as to an employee, where the rule is much less stringent. This question was also determined against the defendant by the jury, and I cannot say their finding in this particular is without evidence to support it.

With regard to the damages found being excessive, I entertain very decided convictions, and on this ground alone I would unhesitatingly order a new trial if I did not regard myself restrained by the authorities pressed upon me from our own Courts. In the case of Zempt v. The Wilmington and Manchester Railroad, a passenger who lost an arm, as I remember it, by imprudently

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standing on the *platform of the car, a verdict of $10,000 damages was sustained; and in the more recent case of Collins, an employee of the city of Charleston, as steeplemen at St. Michael's Church, who lost his life by a fall, a verdict for $7,000 was set aside and one for $10,000 afterwards sustained in the same case. These recoveries are to my mind excessive, such as I could have neither given or sustained if it had been my province to pass upon them.

The Act of the New York Legislature, to which my attention has been called, fixing $5,000 as the maximum of damages that can be given in actions of this nature, is eminently wise and proper, and I would gladly follow it if it were the law here. For, according to my observation, the tendency of juries in all this class of cases is to let their sympathies run away with their judgments and give damages wholly disproportioned to the justice and merits of the case. In the absence of legislation on the subject, I think the law should be more definitely settled by adjudication in this State, that railroad companies and other public corporations may be afforded some reasonable protection, particularly against their employees, without which their proper functions must be performed with great difficulty.

The motion for new trial and in arrest of judgment are dismissed.

The defendant appealed from the order refusing the motion for new trial and in arrest of judgment on the following grounds:

1. That under the law applicable to the case the defendant was not liable for the injury sustained by the plaintiff's intestate, and that the verdict of the jury making the defendant liable was against the law, and the refusal of the Judge to set aside the verdict and grant a new trial was error of law.

2. That the verdict of the jury was without evidence to sustain it, and manifestly against the evidence in the case, and that the verdict of the jury is clearly against the evidence in the case; and the refusal of the Judge to grant a new trial is error of law.

3. That the verdict was against the law and the evidence, and should have been set aside as subversive of the law, and establishing a liability which the law does not create, and that the Circuit Judge erred in not setting aside the verdict and granting a new trial or order for judgment non obstante veredicto.

4. That the Circuit Judge erred in not sustaining the motion in arrest of judgment on the grounds submitted in the said motion.

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*5. That the damages were excessive, and were so regarded by the Circuit Judge; and, being so regarded, it was within the jurisdiction of the Circuit Judge to have set aside the verdict and granted new trial, and it is error of law not to have so ordered.

6. That on the pleadings and evidence in the case the defendant is entitled to judgment in its favor, either by way of nonsuit or by leave to enter judgment non obstante veredicto.

Conner, for appellant:

This is an action to recover damages for the death of the plaintiff's intestate, an engineer in the employ of the defendant.

The case is briefly this:

The South Carolina Railroad Company constructed a line of railroad from Charleston to Branchville. At or about the fifty-one mile post the track crossed a flat swamp known as Polk Swamp. Prior to 1872 the crossing had been on a trestle. In 1872 Mr. Tyler, the Vice-President and General Superintendent of the road, pursuing the system of establishing a solid and permanent roadway, filled in the trestles wherever practicable. Polk Swamp was filled in. The trestle was not removed; it still remained; but the spaces were filled with earth, so that at that point there was the original trestle and an embankment in addition. A culvert was made under the track to vent the water from the swamp. This work was commenced in the latter part of 1872 and finished early in 1873.

On the afternoon and night of the 19th of September there was a very heavy storm and fall of rain, extending from Charleston to Augusta. At Polk Swamp there was a fall of water greater than had ever been known in so short a time.

The accumulation of water carried away the embankment and part of the old track, and the train on which Brickman was fell into the chasm early on the morning of the 20th of September.

Several of the trains had passed over the road at that point that night safely. The last passed over it at a little after 1 o'clock the morning of the 20th of September and met the train on which Brickman was at the forty-one mile post. Tharin, the engineer of the down train, told Brickman that "he would find one or two bad places at Reeves'; he could go slowly and at the middle of the creek he would find water; with

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those exceptions he could go as *fast as he pleased." Brickman went on, and some time after, 3 A. M., his engine fell into the chasm at Polk Swamp and he was killed.

1. If the death of Brickman, the engineer, was occasioned by an extraordinary casualty, such as the flood, then, clearly, defendant is not liable.

"The company have shown the inevitable accident or act of God. If the effect of this arose from the imperfect structure of the bridge, embankment or trestle, the plaintiff was bound to show it."—Lefford v. Railroad Company, 7 Rich., 410; Railroad Company v. Reeves, 10 Wallace, 189.

These were cases of common carriers, where, of course, the responsibility is more stringent than obtains between master and servant.

Nichols v. Marsland (L. R., 10 Exchequer, 255,) is in point. Defendant had constructed pools. There was "a rainfall greater and more violent than any within the memory of the witnesses." Defendant's banks broke and the water injured plaintiff. The Court said, no doubt not the act of God or a vis

major, in the sense that it was physically impossible to resist it, but in the sense that it was practically impossible to do so. Had the banks been twice as strong, or, if that would not do, ten times, and ten times as high, and the weirs ten times as wide, the mischief might not have happened. But those are not practical conditions; they are such that to enforce them would prevent the reasonable use of property in the way most beneficial to the community. And the verdict for plaintiff was set aside and rule made absolute to enter verdict for defendant.

2. If the death was caused by an ordinary casualty, then the question arises: was there negligence on the part of the defendant?

The gist of the action is the negligence of the defendant, and unless that is proved there is no right of action.

But to make out negligence for which defendant is responsible to plaintiff, there must have been some defect in the road or its appointments which reasonable care could have obviated, or there must have been the want of reasonable care by the defendant in the selection of the agents and servants engaged in the management and operation of the road.

And the injury must have resulted from one or the other of these two causes.

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*If the defect in the road was latent, then the law is clear that defendant is not responsible.

If the defect was patent, then it was known to Brickman as well as the defendant; and if, knowing the defect, he continued in the service of the company, he voluntarily assumed the risk of the employment and no action lies.

An examination of the leading cases on this branch of the law will show the correctness of these positions, and I will class the cases under two heads:

1. The duty of the employer.

2. The responsibility of the employee.

1. The duty of the employer:

"Where a master uses due diligence in the selection of competent and trusty servants, and furnishes them with suitable means to perform the service in which he employs them, he is not answerable to one of them for an injury received by him in consequence of the carelessness of another while both are engaged in the same service."—Farwell v. Boston Railroad Company, 4 Mete., 49; Redfield Supplement, p. 384.

"The master takes upon himself no higher duty than that of using reasonable care in the selection of workmen."—Tarrant v. Webb, 18 Common Bench, 803, (88 E. C. L.)

"The master does not warrant the competency of those whom he employs."—Jervis, C. J., ibid.

"The master may be responsible where he is personally guilty of negligence, but certainly not where he does his best to get competent persons."—Jervis, C. J., ibid, 804.

The general rule is clearly and strongly laid down to the same effect in Pierce on American Railroad Law, pp. 295, 296. So, too, with regard to defects in the road and its appointments. "The company does not warrant their absolute sufficiency and is not responsible for injuries arising from latent defects or such patent defects as the servant was himself cognizant of and had not reported to its officers. While he remains in its service, informed of such defects, he is presumed to take upon himself the risks incident thereto."—Pierce's Railroad Law, p. 294.

2. The responsibility of the employee:

"The general rule, resulting from considerations as well of justice as of policy, is that he who engages in the service of another for

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*the performance of specified duties and services for compensation takes upon himself the natural and ordinary risks and perils incident to the performance of such service, and, in legal presumption, the compensation is adjusted accordingly."—Farwell v. Boston Railroad Company, 4 Mete., 49.

And Chief Justice Shaw, placing the rule on considerations of justice as well as of public policy, adds: "Where several persons are employed in the conduct of one common enterprise or undertaking, and the safety of each depends much on the care and skill with which each shall perform his appropriate duty, each is an observer of the conduct of the others, can give notice of any misconduct, incapacity or neglect of duty, and leave the service if the common employer will not take such precautions and employ such agents as the safety of the whole may require." * * * "It was a voluntary undertaking on his part, (the employee's,) with a full knowledge of the risks incident to the employment; and the loss was sustained by means of an ordinary casualty caused by the negligence of another servant of the company. Under these circumstances, the loss must be deemed to be the result of a pure accident, like those to which all men in all employments, and at all times, are more or less exposed; and, like similar losses from accidental causes, it must rest where it first fell."—Ibid.

"With the plaintiff the defendant contracted to pay hire for his services. Is it incident to this contract that the company should guarantee him against the negligence of his co-servants? It is admitted he takes upon himself the ordinary risks of his vocation; why not the extraordinary ones?"—Murray v. South Carolina Railroad Company, 1 McMullan, 400.

And what is said by Chancellor Johnson in the concurring opinion is especially in point.

"He knew that the employment was peril-

ous and that its success was dependent on the common efforts of all hands; and, with proper diligence and prudence, he might have been as well, and it does not follow that he might not have been better, informed than the defendants about the fitness and security of all the appointments connected with the train. If he was not, it was his own want of prudence, for which defendants are not responsible. If he was, he will be presumed to have undertaken to meet all the perils incident to the employment."—Ibid, 402.

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*The general doctrine is well stated in Pierce's American Railroad Law, p. 292; 1 Redfield, Law of Railways, p. 520, et seq.

And the rule applicable to employés themselves applies equally when the action is by the representatives of employés under the statute.—Pierce, 293.

In Warner v. Erie Railroad Company, (39 N. Y., 468.) the jury found that the bridge fell from decay in its timbers. The Court said (page 475): "There is really, then, no conflict of evidence as to the care and skill used in the construction and maintenance of the bridge, the inspection to which it was subjected, the adequate skill and competency of the employés engaged in that specified duty, the experience of defendant, both in the construction and duration of such structures, and the absolute want of any actual notice to defendant or any of its employés of any defect, real or suspected, in the bridge;" and, on the general doctrine of law already referred to, the Court held that defendant was not responsible and "that it was the duty of the Court to take the case from the jury, and hold that, on the established facts, the plaintiff could not recover," and the rule laid down in Warner v. Erie Railroad Company was recognized and approved in 49 N. Y., 528.

In King v. Boston Railroad Company, (9 Cush., 113,) the accident was caused by the breaking of a switch. The Court held "there is no principle of law upon which this action can be maintained. The plaintiff can maintain his action only upon one of two grounds, to wit: that plaintiff was injured by neglect of co-employé or by neglect of the defendants themselves. That the plaintiff cannot recover on the first, is too clear for controversy; and it is clear that plaintiff cannot maintain his action on the last ground, and a nonsuit must be entered."

To same point are McDermot v. Pacific Railroad Company, 30 Mo., 115; Faulkner v. Erie Railroad Company, 49 Barb., 324; Indianapolis Railroad Company v. Love, 10 Ind., 554; Mad River Railroad Company v. Barber, 5 Ohio, 541.

And see a concise exposition of the law on the "liability of master to servants," by Judge Cooley, in the Southern Law Review for April, 1876.

Apply these legal principles to the case. There was not even the attempt by plaintiff to prove that the track and road-bed were unsound, defective or insufficient; or that

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the servants of the com*pany employed in the construction, maintenance and supervision of it were incompetent, unskillful or negligent.

Not a single witness has given a particle of testimony on either of these points; and one or the other must be proved to entitle plaintiff to recover.

1. Whilst defendant proved that the track and road-bed had been carefully constructed, and was carefully supervised by competent and reliable servants, and that defendant had use the greatest care and diligence in securing a good and safe road-bed.

2. That all that the plaintiff relied upon as implied negligence was the alleged substitution of a bank and culvert for the trestle; and this is the foundation of the action in the complaint. Whereas all the evidence in the case for the plaintiff and defendant showed that the trestle had never been removed, but that the track still rested on the trestle, and that it was strong and sound.

3. That there was no proof by plaintiff that the filling in of the trestle was unwise or injudicious. Whereas defendant proved by the testimony of Thames, Caradeux and Tyler that such filling in was good engineering; and that instead of the road being weakened by it, it was stronger and safer. That it is a general law of railroad construction that trestles are constant sources of danger, and that a solid road-bed is always to be preferred.

4. That to assume, as the jury did, that the accident was caused by the filling in of the trestle, is to assume, without evidence, the very fact in dispute. For it cannot be said that it would not equally have happened had the trestle been open. And there is much evidence to show that by reason of the flood it would have happened in any event.

I have already cited plaintiff's witnesses to prove the flood. The testimony of defendant's witnesses is equally strong.

5. That had the trestle not been filled in and the accident occurred, plaintiff would have relied on the evidence of the case to prove that trestles were dangerous, and that defendant should have constructed solid banks and culverts.

6. That the trestle had been filled in about nine months; that Brickman, during all that period, was on the road, and that no complaint of the place being dangerous had been made by Brickman or any other engineer; but all of them ran over it in their daily duty, without a suspicion of danger or word of objection. Brickman knew that trestle

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had been filled—knew the locality—*knew the heavy fall of water that night—was further cautioned by Tharin, and yet went on

without suggesting that there was danger at this point.

The language of Johnson, Ch., in Murray's case, is exactly in point: "With proper prudence and diligence he might have been as well, and it does not follow that he might not have been better, informed than the defendants about the fitness and security of all the appointments connected with the train. If he was not, it was his own want of prudence, for which defendants are not responsible. If he was, he will be presumed to have undertaken to meet all the perils incident to the employment."—402.

7. That without the slightest evidence to prove negligence, the jury could only have reached their conclusions by assuming:

1. That the filling of the trestle was an error of engineering, and weakened the road and caused the accident.

2. That such error or mistake of judgment on the part of the engineer was an act of gross negligence on the part of the company.

3. That the accident was due to the negligence, and to no other cause, and would not have happened but for that.

And yet not one of these propositions is true either in law or in fact.

8. That what influence the filling in of the trestle had in producing the disaster is opinion and speculation. While the fact is undoubted that there was that night a sudden and rapid accumulation of water, owing to an unprecedented rain. It is, therefore, clearly apparent that in the case made there is neither defect in the road or incompetency in the employés.

We might rest the case here, but a stronger ground remains. Even supposing there was a defect, the plaintiff, in order to recover, must prove that the defect was known to the defendant, and that the accident arose from the negligence of the defendant in not repairing the defect.

This is clearly put in Murray's case, in Pierce's Railroad Law, 294, already cited, and is referred to in all the leading cases cited, in which the principle of the rule is placed upon the fact that the employé has the best means of knowing defects in road and machinery, or carelessness and incompetency on the part of his fellow servants, and can give notice and leave the service if the defects are not remedied or the servants not removed.

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*In Priestly v. Fowler, (3 M. & W., 1,) there was verdict for plaintiff. On motion in arrest of judgment, the court said: "It has been objected to the declaration that it contains no premises from which the duty of the defendant, as therein alleged, can be inferred in law; or, in other words, that from the mere relation of master and servant no contract, and therefore no duty, can be implied on the part of the master to cause the servant to be safely and securely carried, or to make the master liable for damage to the servant arising from any vice or imperfection, unknown to the master, in the carriage or in the mode of loading or conducting it. For, as the declaration contains no charge that the defendant knew any of the defects mentioned, the Court is not called upon to decide how far such knowledge on his part of a defect unknown to the servant would make him liable;" and judgment was arrested.

The exact point is stated in Wright v. New York Central Railroad Company, (25 N. Y., 562.): "Knowledge of the defect or insufficiency must be brought home to the master, or proof given that he was ignorant of the same through his own personal negligence or want of care. In other words, it must be shown that he either knew, or ought to have known, the defects which caused the injury."

And in Warner v. Erie Railroad Company, (39 N. Y., 468.) the Court says: "The true principle applicable here is, I think, that when the defendant has erected a structure to be used in its ordinary and accustomed business without fault as to plan, mode of construction and character of material, so that it was originally sufficient for all the purposes for which it was used; employs skillful and trustworthy agents to supervise, examine and test it, and that duty is performed with frequency, and with such tests as custom and experience have sanctioned and prescribed, it has exercised such care and skill as the law exacts of an employer in reference to his employé, and that no liability can attach to a party for a defect in such structure, by which an employé has sustained injury, unless there has been actual notice or knowledge that defects existed, which, unless promptly remedied, would be liable to produce serious or fatal consequences."

In McMillan v. Saratoga and Washington Railroad Company, (20 Barb., 450.) the complaint alleged defect in the locomotive, and that defendants neglected to keep their road in good repair, and failed and refused to provide a good, safe and secure track, and

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*neglected to keep in repair the bridges and cattle guards and fences, and that by reason of such negligence the death of the engineer was caused.

There was demurrer to the complaint, and demurrer was sustained. On appeal, the Court said: "The plaintiff's intestate was the engineer. It was his duty to have made known the defects. He was responsible as well to the public as to the company for not making them known. He was more likely to know of occasional defects in fences, cattle guards or bridges than the company or their officers. He had the knowledge, or the means of knowledge, within his own power. He might have required indemnity against all risks, or he might have given notice to the company and thrown the risk upon them."

The servant, then, to be entitled to recover, as seems to be established by all the cases, must prove actual notice to the principal of the defects complained of as causing the injury, or some of them. And in order to be able to prove notice, he must allege it in his complaint.—See, also, 2 Parson's Contracts, 42: Addison's Contracts, 744.

In Seymour v. Maddox, (16 Adol. & Ellis, 326, 71 E. C. L.,) defendant possessed a theater. Plaintiff was hired as actor, and fell into a hole on stage. Declaration alleged that it was the duty of defendant to cause the floor to be lighted and the hole fenced, so as to prevent injury. Verdict for plaintiff. Held, on motion in arrest of judgment, that declaration was bad. Lord Campbell, C. J.: "The judgment must be arrested. The duty, a breach of which is laid, does not arise from the particular facts stated in the declaration, nor from the general relation of master and servant;" * * and per Coleridge, J.: "No special contract is stated. If this duty arises from the general relation of master and servant, I do not well know where the master's liability is to stop. * * The servant is not bound to enter the particular service. If he does, he must take things as he finds them."

In Couch v. Steele, (3 Ellis, 1 B., 407, 77 E. C. L.,) Lord Campbell, C. J.: "The count discloses no contract or legal duty of which there has been a breach, the subject of an action. * * * There being no allegation of a scienter. If we held the defendant liable on the count, we must hold a ship owner always liable to an action from every seaman, if from any accident, a butt having started, or the like, the ship was not seaworthy. No such action has ever been brought. This is a case of first impression,

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in support of which *neither a decision, nor even a dictum, has been brought to our notice, nor has any legal principle been urged in its support." And Coleridge, J.: "The state of the ship may have been such that the defendants and the master may, with perfect bona fides, have believed her to be seaworthy, though she was not. The plaintiff, therefore, must rely on a general principle, that in all such cases there is an implied contract that the vessel is seaworthy. It is enough to say that no such action has ever been maintained;" and the declaration was held bad, "there being no allegation of knowledge or deceit, nor of any express warranty."—S. P. Hutchinson v. Railroad Company, 5 Exch., 343; Wigmore v. Jay, 5 Exch., 357.

As there was no evidence whatever that the supposed defect in the road was known to the defendant, and such proof was necessary on the part of the plaintiff to entitle her to a verdict against defendant, the Court should have instructed the jury as prayed for in the fourth instruction: That in order to charge the defendant, it must be known that the track was defective, and that the defect was known to the President and Directors of the road; and this prayer is almost exactly in the words of that used in Warner v. Erie Railroad Company, (39 N. Y., 469,) and which the Court said (p. 470) "would have exactly precluded a recovery in this case."

These authorities also sustain the proposition that the complaint fails to state a legal cause of action and that the judgment should have been arrested.

This examination of the authorities establishes:

1. That the complaint does not state facts sufficient to constitute a cause of action.

2. That giving to the facts of the case all the weight that can be claimed for them, they fail to establish any cause of action against defendant; and, therefore, the defendant was entitled to have the judgment arrested or new trial granted, and it was error of law in the Circuit Judge not to grant such order.

In Massey v. Adams (3 S. C., 263,) the Circuit Judge instructed the jury to find for the plaintiff. They found for the defendant. New trial was granted and defendant appealed, and the Court ordered that plaintiff have judgment absolute against defendant, saying: "The only question proper for our consideration is whether there was error of law in the order granting the new trial." That is exactly the question we raise here. Was there error of law in refusing the new trial and arrest of judgment?

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*In McGowan v. Lawrence (3 S. C., 365,) "if it appears that some proposition of law material to the question has been erroneously solved, then there must be a new trial granted."

If "it is found, as in this case, that the judgment is contrary to the law, a new trial will be granted."—Detheridge v. Erle, 3 S. C., 400.

We submit, also, that there was error of law in the Circuit Judge's refusal to grant a new trial on the ground of excessive damages.

The general principles governing new trials in such cases are stated in Graham & Waterman on New Trials, vol. 1, p. 413; vol. 3, pp. 1127–1133.

The Circuit Judge says, as strongly as he can well put it, that the damages are excessive. On that point he "entertains very decided convictions." He approves the New York law, fixing the maximum of damages in such cases at $5,000, and "would gladly follow it if it were the law here;" but, "in the absence of legislation, the law should be more definitely settled by adjudication in this State."

In other words, the Judge says the damages are excessive, the verdict should be set aside and the law definitely settled, but the power to do so is in the Supreme Court.

Here was clearly error of law, for it is ex-

pressly ruled in Byrd v. Small (2 S. C., 388,) that the authority of the Circuit Judge to set aside verdict for excessive damages is without limit or restraint; and to same effect is Craven v. Rose, (3 S. C., 77;) and, unless the Supreme Court can and does correct the error, this results: that a verdict, confessedly unjust, has been rendered and neither Court can redress it.

Buttz, with whom was O'Connor, contra:

Upon review of the evidence spread out in the printed record of this case, the following leading facts, necessary to be kept in view by the Court in considering the two motions, for a new trial and in arrest of judgment, are made to appear:

1st. That William M. Brickman, the husband and intestate of plaintiff, while in discharge of his duty as an engineer, at his post of duty on his engine, in the early morning of the 20th of September, 1873, with his train of freight cars, and one passenger coach

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*attached, came to his death while standing on his engine, which was precipitated suddenly, in the darkness of the night, through a broken culvert, to a depth of fifteen feet, through which the waters of the surrounding swamp were rushing.

2d. That this casualty, by which he met his death, was occasioned by the giving way of an earthen embankment, which had been thrown up over Polk Swamp, around and against an old and decayed trestle, which for over thirty years had spanned the swamp. The earth had been banked up and filled in up to the top and on a level with the track. This alteration in the crossing of the stream was made during the superintendency of Mr. Tyler, who directed the change of substitution of the embankment for the trestle, and, at the same time, in order to afford a vent for the waters during the rainy period, constructed, on the left bank of the swamp, and above the bed of the swamp, a brick culvert, whose arch was about twelve feet in height and twelve feet in width.

3d. The original trestle being open work, permitting a free and unobstructed passage of the collecting rains which had fallen, had stood for nearly forty years the pressure of storms and floods, without the occurrence of a single accident, and it is to be presumed that if no change had been made in the original structure it would have survived the pressure of this night and been standing to this day.

4th. It is evident, from the testimony, that after the heavy fall of rain which had taken place at this season the swamp became full, and the pressure of the body of water banked up against the earth around the old trestle, and without adequate vent, occasioned the break or sluice which resulted in washing away the superstructure of the road, with a great part of the old trestle, leaving a gully into which the approaching engine fell.

5th. It appears from the evidence that, notwithstanding the fact that the rain this night extended over a large district of country traversed by the railroad, this was the only part of the road that gave way.

The propositions of fact involved in the case were all submitted to the jury:

1. Whether the accident was occasioned by the vis major, or was the result of negligence.

2. And whether there was any contributory negligence on the part of the plaintiff.

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*It being the province of the jury to pass upon the facts, the moment they concluded to award in behalf of the respondent, it was tantamount to finding that the railroad company's negligence caused the death of Brickman; and, resting or acting upon this conclusion, the damages cannot be found excessive. The motion for a new trial was on the ground of excessive damages, and it would be capricious for the Judge to disturb any such verdict for damages in a case where death had ensued from negligence of the company.

The charge of the Judge to the jury was wholly in favor of the railroad company. The following propositions of law are relied upon as applicable to this case:

1. That it is a duty which a railroad company owes to its employés to furnish a proper and safe road-bed, culverts and crossings of dangerous places and trestles, and to see that every safeguard known to science and the construction and testing of these instrumentalities have been employed before exposing the lives and safety of those in their service, whom they are bound to preserve by their duty and obligation from all risk other than the ordinary risk of the employment.—Vide 2 Redfield, 231; Hegerman v. Western Railroad, 3 Kernan, (13 N. Y.,) 1; Sherman on Negligence, 15, p. 13; The Chicago and Northwestern Railroad, appellant, v. Jackson, 55 Ill., 492; the same against same, 45 Ill., 197; Greenleaf v. Illinois Central Railroad, 29 Iowa, and in 4 American Reports, 182.

A brakeman on a railroad, in the discharge of his duty, while descending a defective ladder on a freight car, fell and was crushed by the engine so that amputation of his legs was necessary. It was held that the company was liable, unless the brakeman was negligent, or unless he knew or might have known of the defect in the ladder; and this latter was a question for the jury.—Northwestern Railroad v. Jackson, 55 Ill., 492.

There was no privity of relation between the engineer of the train and the constructor of the culvert and builder of the embankment around the old trestle, or with the civil engineer, superintendent or contractor who planned the new work, which fell in. Brickman, the engineer, had no choice but to obey

the orders of his superiors, and he was compelled this night to run his engine from Charleston to Augusta. He was not and could not be responsible for the defect in the em-

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bankment, or culvert, or road-bed, *as this work belonged to an entirely different department of the road, and they were not his co-servants. The fault was not that of a servant engaged on the same department; it was the act of a superior in another department.

Although a railroad may construct their road and furnish its machinery through its servants, yet other employés in different departments are not to be prejudiced by the negligence of such servants. This doctrine is explained and illustrated in the cases cited above. Those cases are singularly parallel to the one now under consideration. They run on all-fours with it.

The railroad company cannot plead that it was a case that comes under the head of contributory negligence. This plea can only avail where the fault or negligence complained of by a fellow-servant was that of a servant engaged in the same department of the common business. The defect in the road must have been such as the plaintiff might, by proper care, have taken notice of, and the damage resulting must have grown out of one of the risks assumed by him and incident to his employment. For instance, if the engine had been thrown from the track in consequence of an imposed obstruction, or from the negligence of the engineer or any of the servants on the train, and serious injury or death had ensued to one of the officers or hands on the train, this would have constituted that contributory negligence which would prevent a recovery. The engineer of the train and the constructor of the road worked in entirely independent spheres of action, and in no sense could Brickman have contributed to the negligence of the contractor or constructor, through which he met his death. The care of the road-bed was a department of the business of the road entirely separate and distinct from it. It was not in the power of Brickman to have cognizance of defects in the embankment or crossing, to guard against them.

It was certainly a question for the jury, and left to them to determine, whether the road at the point of the accident was in a safe condition, and whether the defendant was negligent in not furnishing a proper crossing for Brickman's engine at this point. —See Redfield on Railways, vol. 2, § 251, p. 571; Dalton v. Western Railroad Company, 10 How. Prac. Rep., 97; 15 N. Y., 544.

In view of the magnitude of the interests which depend upon the skill of the agents operating railways, and the utter powerlessness of those who trust to that skill to pro-

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vide for their own *security, railway companies are held to the strictest responsibility under this doctrine.—Idem.

It has been held that a traveler upon a railroad upon a free pass who should be injured by the negligence of the company is entitled to recover damages for his loss.—2 Redfield on Railways.

A party injured by a railroad, although in fault to some extent at the time, may, notwithstanding this, be entitled to reparation in damages for an injury arising from the negligence of another which he could not have avoided by the exercise of ordinary and reasonable care on the part of the injured party.—Zemp v. Northeastern Railroad Company, 10 Rich., 90.

How could Brickman have avoided the injury? Suppose, even, that he could be chargeable with negligence; where the negligence of the railroad company is the proximate cause of the injury, but that of the plaintiff only remote, his action for reparation is maintainable.—Idem.

In the case of the Union Pacific Railroad Company v. Jesse L. Fant, decided in the Supreme Court of the United States, October, 1873, it was held that the railroad company was responsible to one of its servants for an injury caused by the negligence of a fellow-servant, and the company was liable.—American Law Times, vol. 1, p. 121.

A master bricklayer was held responsible for injury caused by defective tools in the hands of an employé.—Milk v. Boone, Am. Law Times.

The Supreme Court has no power to correct an error of fact committed by the Circuit Judge in refusing a motion for a new trial made on the ground that the evidence was insufficient to support the verdict.—Abrahams & Son v. Kelly & Barrett, 2 S. C., 235.

The Supreme Court has no power to set aside the verdict of a jury upon questions of fact, even in a case tried in 1867 and taken by appeal to the late Court of Appeals.—Edward v. Scurry, 1 S. C., 139.

The Supreme Court has no power, under the Constitution, to award new trials for errors of fact in the verdicts of juries. Its authority in granting new trials is limited to cases where there are errors of law in the decisions or rulings of the Judge.—Floyd v. Abney, 1 S. C., 114.

The Supreme Court cannot grant a new trial for excessive damages.—Craven v. Rose, 3 S. C., 72; Massey v. Adams, 3 S. C., 254.

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*A motion for a new trial can only be granted upon exceptions, or for insufficient evidence, or for excessive damages on Circuit.—See Code of Procedure, p. 485.

The Judge on Circuit having refused the motion for a new trial, made on the only grounds legally admissible, the appellant is thereby estopped from going further or higher.—See Graham & Waterman on New Trials, vol. 3., Chap. XV., p. 1203.

The motion in arrest of judgment goes to the form of the pleadings and not to the substance. By Section 165 of the Code all that

the complaint shall contain is: 1st. The title of the cause, Court, County in which trial to be had, and names of parties. 2d. A plain and concise statement of the facts constituting a cause of action without unnecessary repetition. 3d. A demand of the relief to which the plaintiff supposes himself entitled. If the recovery of money be demanded, the amount thereof shall be stated.

July 12, 1876. The opinion of the Court was delivered by

WILLARD, A. J. The charge appears to have presented the law of the case favorably for the defendants on all the points raised by their requests to charge. . It does not appear that defendants' counsel excepted to the charge as variant from the requests submitted by them. This would ordinarily lead to the conclusion that they were satisfied that the charge was in conformity to their requests. This inference is strengthened by comparing the charge with the requests. The first request was substantially charged. The propositions included in the second to the fifth requests, inclusive, although modified, were charged as favorably for the defendants as the law would permit. The charge places the legal question of the liability of the defendants upon the solution of the question whether there were patent defects in the works or machinery of the defendants, and whether such defects implied gross negligence. It would be difficult to state the law more favorably for the defendants. If such defects existed, the defendants would be chargeable with notice of their existence from the nature of the defects themselves. As to the sixth request, that the employee takes the risk of his employment, the charge seems to have omitted nothing favorable for the defendants. Their liability is placed upon the ground of gross negligence alone. As neither party alleges any error in this limitation of the liability of the defendants to

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a case of gross negligence, it is *not necessary for us to look into the state of the law on that subject. All we are called upon to say is, that the defendants were not entitled to a more favorable charge. No error is shown to exist in the rulings or charge of the Judge. The grounds for the motion for a new trial involved matters of fact only. They are reducible to two propositions: first, that the verdict was against evidence, and, second, that the damages were excessive. To pass upon these questions, it is necessary that the Court should have power to weigh the evidence and draw from it conclusions of fact. This could be done by the Court of original jurisdiction, but cannot be done by us in a case in the nature of an action at law, as we have just held in Gibbs v. Elliott [8 S. C. 50].

But it is said that it appears from the opinion of the Circuit Court upon the motion for a new trial that the Judge was only prevented by a misconstruction of the law from granting a new trial, both on the ground of the verdict being against evidence and being excessive. It is true that he shows that the determination of his mind would be in favor of granting a new trial but for the effect of certain authorities referred to by him. It does not follow from this that the scruple in his mind was as to his legal powers in the case. There was a certain amount of discretion to be exercised by him in coming to his conclusion, the solution of which depended upon his judgment whether substantial justice had been done in the case. This discretion is a sound discretion, and seeks the light of adjudicated cases and precedents. We are compelled to conclude that it was in the last named aspect alone that the Judge allowed his mind to be affected by the authorities. It certainly cannot be affirmed, from the evidence afforded by his opinion, that the Circuit Judge declined to look into the merits of the motion on the facts involved upon any idea that he had no power of granting new trials upon the grounds there presented to him in a case where he believed that substantial justice had not been done by the verdict of the jury. If he felt at full liberty to exercise that sound discretion, but has failed to give full weight to all the considerations that ought to have had force in moulding that exercise of discretion, it is an error that cannot be reached by our jurisdiction, not being an error of law.

If the Circuit Judge had a clear judgment that the evidence did not support the verdict, he should unhesitatingly have set the verdict aside. If, on the other hand, it was a case of nicely-balanced evidence, adduced to support contradictory conclusions where the

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*evidence on either side would have been sufficient to support the proposition sought to be deduced from it, in the absence of the other, then the Court could properly defer to the jury as the constitutional tribunal for the determination of questions of fact. So, where there is a question of the character and credibility of witnesses, the Court ought to give great weight to the conclusions of the jury, if apparently impartial. So, if there is a known or apparent prejudice in the minds of the jury arising from sympathy for the one side and antipathy or indifference for the other, as is sometimes the case where corporations are concerned, the Court should not permit a verdict to stand that contradicts its sense of right, if in its judgment the testimony is defective in strength to support such verdict. We cannot assume in the present case that the Court has failed to receive due influence from these considerations, for the opinion does not exclude the idea that the action of the Court resulted from a doubt as to the correctness of the conclusions of the jury, while to set aside a verdict in such cases the judgment of the Court on the facts should be clear.

The appeal from the order denying the

motion in arrest presents no ground for disturbing the judgment below. The motion in arrest is based upon the want of certain averments in the complaint.

The true office of the pleadings, under the Code, is to shape the introduction of evidence at the trial. The Court is at all times bound to allow amendments to the pleadings, in furtherance of justice and upon reasonable and just terms, and, even after judgment, may amend the pleadings so as to conform to the facts proved.—Code, § 193. The power of amendment after judgment is of the utmost importance to certain cases, in order to give symmetry to the system of pleading adopted by the Code. The rigidity of the rules of pleading at common law arose largely from the fact that the record, consisting of the pleadings, postea and judgment, were intended to form a record that should disclose the true matters at issue, as operating both directly on the rights of parties and privies, and indirectly by way of estoppel. Hence arose a tendency to confine the issues and judgment to the scope of the pleadings. This theoretical advantage was more than compensated by the evils resulting from inability to mould the process of the Court to meet the necessities arising in the course of the development of the issues involved. This

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led, in practice, to a liberality in the *admission of evidence and a complexity in the structure of pleading that almost destroyed the value of the record. The Code solves this difficulty by enforcing the largest duty of allowing amendments and admitting testimony, and yet permitting parties, when they deem it important that the record should show the true nature of the issues on which the judgment rests, to have the pleadings moulded upon these issues, after verdict, and either before or after judgment. This is of special importance where the title to land is affected by the judgment. It would follow that the grounds alleged by way of arrest are insufficient. The most that could have been demanded by either party was that the pleadings should be conformed to the facts found. Neither party appears to have made such a request, nor is any reason disclosed why either party should deem such an application of any importance.

The motion should be denied.

WRIGHT, A. J., concurred.

MOSES, C. J., concurred and filed the following separate opinion:

MOSES, C. J. No exception having been taken to the charge, the motion for a new trial was one exclusively for the presiding Judge, to be determined by his view of the duty of the jury in regard to the facts and the application of the law as expounded by him. The propriety of the verdict, both as to the party in whose favor it was rendered and the amount, were elements necessarily entering into his consideration of the motion.

The very earnest and ingenious argument of the learned counsel for the appellant, while it fails to impress us with his conviction that the refusal of the presiding Judge resulted from a belief of his want of authority to grant a new trial on the grounds that the verdict was against the evidence, and excessive in amount, has induced me to examine with much care if the position is well founded. So far from finding anything to justify it, the whole current of his opinion conclusively shows that, recognizing his authority, he refuses to disturb the verdict because, as he says, although not able to "discover the evidence upon which the jury found gross negligence, if negligence of any degree; but there was testimony sufficient to go to the jury, and upon it they have found the verdict before us, and I am not prepared to say it is without evidence to support it." In fact, he premises his opinion with the

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following *language: "I have been strongly inclined to grant a new trial in this case, as the verdict of the jury is very far from commending itself to my approval. But, after hearing the argument, my opinion has been modified, not as to the merits, but as to the propriety of my applying the remedy asked for."

Where there is no averment of error of law in the charge of the Circuit Judge, or in the refusal on request to charge, this Court has no power to order a new trial. In addition to what has been said in the opinion of my associate in regard to the motion in arrest of judgment, as affected by the provisions of the Code, I will only add that the case of Conlin v. City Council of Charleston (15 Rich., 209,) decides the very point, by holding that objections which might have been fatal to the plaintiff, if made upon demurrer, are cured by the verdict.

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8 S. C. 202

JONES & PARKER v. WEBB.

(Columbia. April Term 1876.)

[*Partnership* ⇨344.]

In an action for settlement of the business of a copartnership, its creditors were called in and required to present and prove their claims before a Referee. Some of the claims presented and proved were not due; but, by consent of all the parties to the action, a judgment was rendered upon the report of the Referee as well for the claims not then due as for those that had become due before the action was commenced: *Held*, That this was not such an irregularity as authorized the Circuit Court, on the motion of the defendant, to set aside the judgment so far as it related to the claims not due when it was rendered.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 813; Dec. Dig. ⇨344.]

[*Judgment* ⟸90.]

A judgment by consent of parties is in the nature of a contract between them, and cannot be set aside, where fraud or mistake is not alleged, merely because of some irregularity of procedure.

[Ed. Note.—Cited in American Publishing & Engraving Co. v. Gibbes & Co., 59 S. C. 219, 37 S. E. 753; In re Duncan, 64 S. C. 484, 42 S. E. 433; Beck v. Northwestern R. Co., 99 S. C. 310, 83 S. E. 335.

For other cases, see Judgment, Cent. Dig. § 149; Dec. Dig. ⟸90.]

Before Moses, J., at Newberry, March, 1875.

The case is as follows:

The plaintiffs, Lambert J. Jones and William C. Parker, and the defendant, William H. Webb, were partners in business at Newberry, under the partnership name of Webb, Jones & Parker. In February, 1874, Jones and Parker commenced this action against Webb, alleging that the defendant had improperly applied partnership funds to his own use, and other irregularities, and praying that the partnership be dissolved; that

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a receiver of its assets be ap*pointed; that creditors be enjoined from suing at law, and that they be required to present and prove their claims before a Referee. On the 16th day of February, 1874, His Honor the Judge of the Circuit made an order dissolving the partnership, with the consent of the defendant, and, upon motion of plaintiffs' attorney, passed a further order appointing receivers of the partnership effects, enjoining the creditors from suing at law, and requiring them to prove their claims before the Clerk of the Court. On the 12th day of May, 1874, the Clerk made his report on the claims that had been presented and proved before him. Amongst the claims so reported upon was one in favor of Inmann, Swann & Co., upon three promisory notes, for $3,000 each, dated February 2, 1874, and payable one on the 15th day of October, 1874, one on the 15th day of November, 1874, and one on the 15th day of December, 1874. Other claims, which were not due when the report was made, were reported upon as presented and proved.

Many other claims then due were also reported upon as proved.

Upon the claims not due the Clerk allowed the usual rebate of interest.

On the 12th day of May, 1874, the Circuit Judge made an order at Chambers, with the consent, in writing, of the attorneys of the plaintiffs and the defendant, confirming the report of the Clerk and making it the judgment of the Court.

The order gave the parties whose claims were proved the right to issue executions, but provided that the claims not then due should not be enforced by execution until they became due.

In July, 1874, the defendant, Webb, moved the Circuit Court to set aside, as to him, the judgments of the 12th of May, 1874. The motion was dismissed, so far as it related to claims that had matured when the judgment of May 12, 1874, was rendered, and was granted so far as it related to claims not then matured.

Inmann, Swann & Co., and other creditors of Webb, Jones & Parker, (holders of claims which had not matured when the judgment of May 12, 1874, was rendered,) appealed from so much of the last mentioned order as vacated the judgment of May 12, 1874, upon their claims.

Suber, for appellant, cited Story Eq. Pl., § 99; Whittimore v. Oxborough, 2 Y. & C., 17; 3 Waite's Pr., 344; Hutchison v. Bates, 1 Bail., 111; 3 Waite's Pr., 615; Montgomery

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v. Ellis, 6 *How. Pr. R., 326; Code, § 197; 2 Dan. Ch. Pl. and Pr., 1179; Atkinson v. Marks, 1 Cow., 693; Harrison v. Rumsey, 2 Ves., Sr., 488; Jarvis v. Halner, 1 Barb. Ch., 379; Cosgrove v. Butler, 1 S. C., 241; Ex parte Monteith, 1 S. C., 231; and other authorities.

Youmans, contra, cited Barnes v. Branch, 3 McC., 19; Haigler v. Way, 2 Rich., 324; Thew v. Porcelain Company, 5 S. C., 415; Wainthrop v. Law, 3 DeS., 323; Barnes v. Milne, Rich. Eq. Cases, 459; Cohen v. DuBose, Harper Eq., 102; Wiseman v. Finley & Hunter, 14 Rich. Eq., 172; Allen v. Richardson, 9 Rich. Eq., 56; Adams' Eq., 220; 1 Chit. Pl., 453; Walker & Bradford v. Roberts, 4 Rich., 567; 2 Waite's Pr., 133; Josey v. Dickson & Tindall, 12 Rich., 378; and other authorities.

October 31, 1876. The opinion of the Court was delivered by

MOSES, C. J. Notwithstanding the extended brief and the many principles which the counsel thought it necessary to invoke in their respective arguments, there is but a single proposition presented for our determination, and that involves neither doubt nor difficulty. It questions the right of the Circuit Judge, by his order filed on the 29th March, 1875, to set aside that portion of his order of 12th May, 1874, in regard to the demands held by creditors of Webb, Jones & Parker not at the time matured.

The order so changed or modified was by consent of the parties interested. They were unaffected by any disabilities which rendered them incompetent to consent. It awarded judgment and execution and was final in its character. The motion by Webb, one of the copartners, after the dissolution of the firm, to set aside as to him the judgment in favor of the creditors of the copartnership established by the order of 12th May, 1874, had reference to all the judgments which it embraced, excepting none, and the other copartners, Jones and Parker, who now here contest the motion of the appellants, did not

unite with Webb in his application to the Court below. Some new view of their interest has induced them to resist a motion which seeks to set aside an order materially affecting one taken on a complaint brought by them and passed on the motion of their own solicitor.

The Circuit Judge does not rest his decision on the ground of "inadvertence, mistake or excusable neglect," as the counsel here do. He vacated the judgment because the de-

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mands on which they *were founded were not due at the time he made the order. But the plaintiffs, in whose favor the judgment was rendered, were properly in Court. They were called in as creditors, and the fund in the hands of the Court could not have been distributed without provision for the equitable proportion to which they were entitled. If a party sues on a note not due and the defendant does not interpose and present the objection in proper form, but either consents to a judgment or submits some other ground of defense, and a judgment follows, can he afterwards on motion set it aside on the ground either of "inadvertence, mistake or excusable neglect?"

Where the estate of a deceased is either involved or insolvent, and administration of it through the Courts becomes necessary, all creditors, whether holding debts due or payable at a future day, are required to establish them, that provision may be made for the proportion of payment to which they may be entitled out of the assets to be so applied. We do not see why the same rule should not hold as to partnership property where the Court takes charge of it for final settlement and enjoins all other Courts from interfering with it. Here the unmatured debts were estimated as of a date to which the other debts were referred and a proper rebate of interest was allowed upon them.

Was the Court authorized to set aside a portion of the order made on the presentment of the report of the Referee, with the consent of all of the parties, leaving the rest of it with the full force which it acquired when originally passed? If he was, then the order no longer remained one of consent, but one entirely of his own notion, for no such modification was asked for by Webb or either of the other partners, or any creditor, and was without notice, too, to the parties affected by it.

When the report of the Referee was submitted, no creditor whose claim was embraced in it had acquired any lien on the property held by the firm or any member of it. The order gave a decree against each one of the firm on every claim reported, with leave to its holder to issue execution. It was made by consent, for its benefit was to be enjoyed by all the creditors. When it is sought so to amend it as to exclude a portion of those without whose consent it could not have been had, may they not with right and propriety say: "Our consent was in consideration of the benefit we secured by the order, and to vacate so much of it as is in our favor and continue it in favor of others who are there-

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by to gain an advan*tage at our expense is a violation of the obligation through which they secured our assent"?

In the case before us the change in the order was not asked for by any party in interest. "A consent order is the mere agreement of the parties under the sanction of the Court, and is to be interpreted as an agreement."—Allen v. Richardson, 9 Rich. Eq., 56. If so, how can it be set aside in part, so that while the one retains the benefit he expected to receive under it, he may absolve himself from the duty which devolved upon him in regard to the other?

It may be that where a mere administrative order is derived from consent, it may be modified or reformed by the Court on the ground of mistake. Where, however, a decree or judgment is founded on the consent of parties, it is binding and conclusive; and, while it may be assailed for fraud, cannot be attacked by the parties to it either directly or collaterally. In 2 Daniel Ch. Prac., 617, it is said "that a decree or order made by consent of the counsel for the parties cannot be set aside either by rehearing or appeal, or by a bill of review, unless by clerical misprision anything has been inserted in the order." In Harrison v. Rumsey, (2 Ves. Sr., 488,) Lord Chancellor Hardwicke said he "would by no means set aside a decree obtained by consent of counsel on both sides, for it would be most dangerous." In French v. Shotwell, (5 Johns. Ch., 564,) Chancellor Kent said: "The same rule was admitted by Lord Hardwicke, in Bradish v. Gee, (Ambler, 229,) and there can be no doubt of the settled doctrine that a decree by consent is binding, unless procured by fraud." In Atkinson v. Monks, (1 Cowen, 709,) it is said by Judge Sutherland: "No appeal or rehearing lies from a decree made by consent." In Leitch v. Compton, (4 Paige, 476,) Chancellor Walworth says: "It had been decided in the case of The Washington Insurance Company v. Shee, which was before the Court in March, 1832, that an answer by consent could not be modified or varied in an essential part without the assent of both parties to such order." If, therefore, a Court of equity will not set aside a decree or judgment taken by consent, so that the parties would be remitted to the positions they occupied before it was taken, what answer could it make to an application to avoid only so much of it as requires a duty to be performed by the one now seeking to avoid it, while the obligation on the others is to remain in full force and vigor?

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*In our view of what was said in the argu-

ment, and is referred to in the petition of J. B. Jones, L. W. White, W. C. Bee & Co., the Court feels it a duty to Mr. Suber, the attorney and counsel for the appellants, Inman, Swann & Co., to say that it perceives nothing in regard to his course in the case inconsistent with a high and honorable discharge of the duty which he owed to his clients.

The motion is granted, and the order referred to in the record, dated May 12, 1874, will stand as originally passed by the Circuit Judge. The costs of the appellant on his appeal must be paid out of the fund in the hands of the Receiver.

WRIGHT, A. J., and WILLARD, A. J., concurred.

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8 S. C. 207

Ex parte DUNN, In re HAND v. SAVANNAH AND CHARLESTON RAILROAD COMPANY.

(Columbia. April Term, 1875.)

[*Judgment* ⇐585; *Railroads* ⇐169.]

A decree of the Circuit Court, made in April, 1874, transferring the possession of the Savannah and Charleston Railroad to a Receiver and an Advisory Board, to be operated for the benefit of the creditors and stockholders of the road, is no bar to a proceeding by the Comptroller General under the fifth Section of the Act of 1869 to take possession of the same road.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1094; Dec. Dig. ⇐585; Railroads, Cent. Dig. § 542; Dec. Dig. ⇐169.]

[*Railroads* ⇐169.]

The exercise of the authority conferred upon the Comptroller General, by the Act of 1869, to take possession of the Savannah and Charleston Railroad is not in conflict with the rights of the creditors of the road, nor does it impair the obligation of the contract between the State and the holders of the bonds issued by the corporation and guaranteed by the State under the Act of 1856.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 542; Dec. Dig. ⇐169.]

[*States* ⇐191.]

Where the Constitution of a State does not make it liable to be sued, an action cannot be maintained against it except as provided by the Constitution of the United States. The mere consent of the Attorney General by appearing to the action and answering the complaint in the name of the State does not bind it.

[Ed. Note.—For other cases, see States, Cent. Dig. §§ 179, 180; Dec. Dig. ⇐191.]

[*States* ⇐212.]

Even where the State authorizes its proper officer to appear to a suit against it, it is not bound by the judgment as a legal, but only as a moral obligation.

[Ed. Note.—For other cases, see States, Cent. Dig. § 201; Dec. Dig. ⇐212.]

[*Railroads* ⇐169.]

The act of 1869 authorizing the Comptroller General on a certain contingency to take possession of the Savannah and Charleston Railroad is not repealed by the Act of 1871 directing proceedings for foreclosure to be taken against all railroad companies which had failed to pay the interest due upon the bonds of the companies guaranteed by the State.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 542; Dec. Dig. ⇐169.]

[*Statutes* ⇐162.]

Unless the intent to abrogate is very clear, a special is never abrogated by a general law.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 235; Dec. Dig. ⇐162.]

[*Equity* ⇐429; *Receivers* ⇐58.]

An order appointing a Receiver and an Advisory Board to take possession of a railroad with all its property and operate it for the benefit of its creditors, stockholders and all others interested is not a judicial, but an administrative order, which may be modified or changed without the consent of parties.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 1027; Dec. Dig. ⇐429; Receivers, Cent. Dig. § 97; Dec. Dig. ⇐58.]

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[*Attorney General* ⇐9; *Railroads* ⇐24; *States* ⇐205.]

*The authority conferred upon the Attorney General by the Act of 1871 to bind the State by appearing in any action against a railroad company must be confined to cases similar to those which by the same Act he was authorized to bring against railroad companies.

[Ed. Note.—For other cases, see Attorney General, Cent. Dig. § 12; Dec. Dig. ⇐9; Railroads, Cent. Dig. § 52; Dec. Dig. ⇐24; States, Cent. Dig. § 198; Dec. Dig. ⇐205.]

[*Railroads* ⇐169.]

Where the State had guaranteed the payment of bonds issued by a railroad company and had taken from the company a mortgage or lien upon the railroad and all its property to protect the State from loss on account of its guaranty, an Act of the Legislature authorizing and directing the Comptroller General to take possession of the road on the company's becoming insolvent and failing to pay the guaranteed bonds does not authorize the performance of an act which could only be performed through the instrumentality of the judicial department of the State.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 542; Dec. Dig. ⇐169.]

Before Reed, J., at Charleston, April, 1875.

This was a petition in the Circuit Court of Charleston County, entitled "Ex parte Thomas C. Dunn, Comptroller General of South Carolina, in re Daniel Hand v. The Savannah and Charleston Railroad Company and others."

The case may be thus stated:

On April 28th, 1874, after the decision of the Supreme Court in the above entitled case of Hand v. The Savannah and Charleston Railroad Company, dismissing the appeal which had been taken therein, (See 5 S. C. 182,) had been rendered, the following decree was made in said case by His Honor Judge Graham:

This cause is now before this Court for such further orders and decrees as the Court may be authorized to make, and the rights and interests of all the parties thereto may require. From the former order of this Court, filed October 3, 1872, the defendant, the Savannah and Charleston Railroad Company, appealed to the Supreme Court, and the Supreme Court has now sent down its

judgment dismissing said appeal for irregularity, without prejudice.

The plaintiff, as a creditor of the defendant company, seeks, on behalf of himself and other creditors of like character, the payment and satisfaction of his demands, as a holder of certain past due coupons, for interest on bonds for which the defendant company is alleged to be liable. The complaint prays that an account may be taken of the amount due the plaintiff; that, in default of payment by a certain day, an order of sale and foreclosure of the mortgage, created by the Act of 1856, may be made; that a Receiver may be appointed; and that the plaintiff may have such other relief "as the nature and circumstances of this case may require."

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*The opinion of the Supreme Court, already referred to, uses these words: "Nor do we intend to define the nature of the issues which may properly arise under the pleadings, or to limit the control of the Circuit Court over the case."

In this condition of the cause, a projet of a decree, designed to harmonize and secure the rights and interests of all parties, has been submitted to the Court by the several counsel engaged in the cause, and the Court has carefully and maturely considered the same, with a view to do full justice and to secure the best practical results to all interested. The leading feature of this projet is the appointment of a Receiver to hold and operate the railroad of the defendant company and to apply the net profits to the payment of its debts. The plaintiff, in his complaint, seems to have had in mind such an alternative mode of payment, in praying, as he does, for the appointment of a Receiver to "take charge of the said road, with its appurtenances, until the amounts due to himself and the other creditors, whose claims are secured by the said mortgage created by the Act ratified December 20, 1856, with the interest thereon, have been paid and satisfied, or until the said road has been sold and disposed of as prayed for."

The power of a Court of equity to mould its decree to all the equitable exigencies of a cause is wide and clear, and has at all times been considered one of its most beneficent offices. Moreover, by Section 299 of our present Code of Procedure, the Court may grant "any relief consistent with the case made by the complaint and embraced within the issue."

The proposed decree is, therefore, considered by the Court to be within its jurisdiction in the present cause.

It appears, in the light of all information available to the Court, to be likewise adapted to secure the payment of the debts of the defendant company, and at the same time to avoid a probably disastrous result to both parties from a present sale of the railroad and property of the company.

It is now, therefore, ordered, adjudged and decreed, that until the maturity of the six per cent. interest bearing bonds of the Charleston and Savannah Railroad Company, secured by the mortgage of the road and its appurtenances, now the property of the defendant company, created by the provisions of the Act of the General Assembly of December 20th, 1856, the railroad of the said defendant company, together with all its roll-

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ing stock, its whole outfit and *property of every kind whatsoever, be, and hereby, is transferred and delivered into the possession of, and to be held by, a Receiver hereinafter to be named by the Court, and an Advisory Board of management to be appointed as follows: Two to be appointed by the holders of the bonds of the Charleston and Savannah Railroad Company, and of the defendant company, guaranteed by the State of South Carolina, or a majority of them in amount; two to be appointed by the holders of the seven per cent. interest-bearing bonds of the defendant company, or a majority of them in amount; one to be appointed by the holders of the eight per cent. interest-bearing bonds of the defendant company, or a majority of them in amount; one to be appointed by the Court to represent the State of South Carolina; one to be appointed by the other and unsecured creditors of the defendant company, or a majority of them in amount; and two to be appointed by the said defendant company; and in case the said Advisory Board shall not be appointed as above provided, within a reasonable time, then the members thereof shall be named and appointed by the Court.

The said railroad, stock, outfit and property of the defendant company shall be held, worked and managed by the said Receiver and Advisory Board with the greatest possible skill and economy, and the results be reported quarterly to the Court in this cause, and the net profits, after paying all necessary expenses, including such amounts, if any, as may be due the employés and officers for services, shall be applied quarterly to the payment:

1. Of the six per cent. coupons reported as proved in this case by W. J. Gayer, Referee, in his report, filed on the 18th day of December, 1872, with interest on said coupons from September 1, 1869.

2. Of all other outstanding, unpaid or unsatisfied coupons for interest now due and payable, or to fall due and payable, in the order of their rank and right of payment, all questions arising as to such rank and right of payment or priority of lien to be referred to and determined by the Court whenever they may arise and after full hearing.

3. Whenever it shall happen that the interest coupons thus as aforesaid to be paid shall have been paid, and provision shall also have been made for the payment of those to

fall due, satisfactory to the Receiver and Advisory Board, and any surplus of net profits shall remain or arise, the same shall be ap-

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plied to the payment of *any other liens, if any there are, and then to the payment ratably of the unsecured debts of the defendant company.

The costs and disbursements of this cause shall be taxed and paid by the Receiver and charged to and as expenses. The proper expenses and counsel fees paid or due by the plaintiff, and the like expenses and counsel fees due by the defendants, shall be ascertained by a Referee, to be appointed by the Court, on motion, and reported to the Court, to be paid and charged as may be hereafter ordered.

Charles T. Mitchell is hereby named and appointed Receiver, with such salary as shall be fixed by the Advisory Board, and he shall hold his office until the maturity of the said six per cent. bonds and the further order of the Court, unless sooner removed by order of the Court, upon the recommendation only of the Advisory Board, and not otherwise.

The defendant company, the Savannah and Charleston Railroad Company, at any time pending this cause, upon showing that they have paid all the interest coupons in arrear, and that they have paid, or satisfactorily secured to be paid, all other and unsecured debts due by them, shall have leave to move for and be entitled to have their said railroad and property restored to them, and the Receiver shall further hold the said railroad and property open at all times at private sale upon favorable terms, such terms to be first reported to the Court and submitted to the counsel representing parties in this cause.

All creditors of the defendant company not now represented in the cause shall have leave by petition to come in and become parties to the cause.

To avoid multiplicity of suits and prevent waste, it is hereby ordered that each and all of the creditors and claimants against the said railroad and property of the defendant company, in anywise, and who may not voluntarily become a party to this cause, be, and hereby is and are, strictly enjoined from bringing or prosecuting any suit, action or proceeding against said company or its property, otherwise than in this cause, and from intermeddling with the possession and management of the said railroad and property by the said Receiver and Advisory Board in the due execution of their trust and duty under this order and decree.

It is further adjudged that the foregoing order is without prejudice to the right of the plaintiff, and other like holders of cou-

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pons *of the Charleston and Savannah Railroad Company, to the assertion of their lien by way of mortgage on the road and its appurtenances, for the payment and satisfaction of their claims in the event that their said claims are not paid and discharged out of the income as herein provided for.

No appeal was taken from said decree, and on March 1st, 1875, the above entitled petition was filed by Solomon L. Hoge, then Comptroller General of the State, in which he stated that on the 18th day of February, 1875, it was officially brought to his attention that the said Savannah and Charleston Railroad Company had failed to pay the interest upon its debt within six months after it became due; that the said company did not on the 1st day of March, 1874, pay the interest coupons upon their bonds which fell due on that day,—the payment of which bonds and coupons had been guaranteed by the State; and that said company has continued to fail, up to the present time, to pay the said interest, though payments had been demanded by the holders of the bonds.

That the petitioner had attempted to take possession of said railroad pursuant to the provisions of Section 5 of the Act entitled "An Act to enable the Savannah and Charleston Railroad Company to complete their road," which was ratified on March 2d, 1869; that on February 24th, 1875, he made a formal demand upon Charles T. Mitchell, President of said railroad company, to turn over to the petitioner the said railroad with all its appurtenances; that the said Mitchell refused to do so, and, in stating his reasons for said refusal, claimed to be in possession of said road as Receiver under the above recited order or decree of April 28th, 1874.

That, as Comptroller General of the State, it is made the duty of the petitioner, by the said Act of March, 1869, to take possession of the said road, with all its appurtenances, upon the happening of the contingency above recited, and the petition prayed that the Court would rescind so much of said order or decree of April 28, 1874, as placed said road in the possession of the said Charles T. Mitchell, as Receiver, and thus enable the petitioner to take possession thereof; and should the Court deem it advisable that said Receivership should be continued under said order or decree, then that the petitioner be allowed to perform the duties of said Receivership under the orders and direction of the Court.

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*On March 1st, 1875, an order was signed by his Honor Judge Reed requiring the said Charles T. Mitchell to show cause why the prayer of the petitioner should not be granted.

On the 30th day of March, 1875, an order was made that the petition be amended by inserting therein the name of Thomas C. Dunn, who, in the meantime, had become Comptroller General of the State in the place and stead of Solomon L. Hoge, the late Comptroller General of the State.

Daniel Hand filed an answer to the petition, wherein, after reciting the prayer of the petition and the decree above recited of

April 28th, 1874, and stating that the petitioner is not a party to the suit of Daniel Hand against the Savannah and Charleston Railroad Company, and others, and setting forth who were the parties to said suit, he proceeded as follows:

4. That the said Charles T. Mitchell, Receiver, and the Advisory Board created by said decree, are thereunder in possession of said road and its appurtenances, and the corporation referred to in the Act of 1869 is out of possession.

5. That the said decree met the approbation of all the parties in the cause, and no appeal ever was taken from it; and that the projet of said decree referred to therein was prepared and submitted by the Attorney General in behalf of the State.

6. That by a provision of the Act of 1869 it is provided and made the duty of the Comptroller General, upon the happening of a certain contingency, to take immediate possession of the road and appurtenances, and to lease the same to responsible parties, who shall have control thereof until the General Assembly shall by law provide for the settlement of the affairs of said company in the interest of all its creditors. That by this provision the petitioner was to do a single administrative act and no more. He was to dispossess the corporation and lease, but the Court did this before he had the opportunity. If the petitioner were in possession under said provision, he could not hold, but must lease, and his functions would then terminate, and the lessee would hold until the General Assembly should legislate.

7. That this provision of the Act of 1869 contemplated having done no more than that which the Court by its decree has already done, namely, taking the property from the insolvent corporation and causing it to be properly administered by responsible persons.

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*8. That afterwards the said General Assembly, by an Act approved March 7, 1871, (Statutes at Large, vol. 14, p. 612), did provide by law for the contingency contemplated by the Act of 1869, and thereby superseded the provision of said Act wherein the petitioner claims; and, in fact, that the Attorney General, pursuant to the provisions of said Act of 1871, did commence proceedings thereunder, on which this Court made its decree, from which an appeal was duly taken, which said appeal is now pending before the Supreme Court.

9. That the said Charles T. Mitchell, Receiver, is not alone in possession of the said road and its appurtenances, but conjointly with the Advisory Board duly appointed, pursuant to the provisions of the decree above recited, and his and their possession is lawful and proper; and he, the said Daniel Hand, denies that either the said Charles T. Mitchell, Receiver, or the Advisory Board can be lawfully disturbed or dispossessed upon a proceeding such as the present rule to show cause, which is unusual, irregular and illegal.

10. That he, the said Daniel Hand, is a creditor of the said Savannah and Charleston Railroad Company to the extent of about fifty thousand dollars, including the principal and interest of the coupons held by him, and, under the decree, is to be first paid out of the income of the said road, without any prejudice to the lien on the property of the said the Savannah and Charleston Railroad Company held by him for the satisfaction of the principal and interest of his said coupons, and objects to the removal by this Court of the said Charles T. Mitchell, Receiver, and the Advisory Board.

11. That he understands and believes that a large majority of the creditors of the said Savannah and Charleston Railroad Company who have liens by way of mortgage on the property of the said road are well content with the decree filed on the 28th day of April, 1874, and are opposed to the removal of the said Charles T. Mitchell, Receiver, and the said Advisory Board and the substitution as Receiver of the said petitioner or any one else; and it is respectfully submitted that the opinion of these said creditors, who are alone and substantially interested in the property of the said road, are entitled to favorable consideration on this question.

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*12. That the said petitioner is no longer the Comptroller General of the State of South Carolina, having ceased to hold the said office on the 4th day of March, 1874.

13. That the State of South Carolina, by its then Attorney General, Hon. D. H. Chamberlain, became a party to the suit of him, the said Daniel Hand, against the Savannah and Charleston Railroad Company, and, having answered the complaint filed by him, and submitted itself to the jurisdiction of the Court, is bound by all the proceedings therein, and more especially by the decree filed on the 28th day of April, 1874, and all persons holding office under the said State are absolutely bound and concluded by the said decree as long as the same remains unreversed.

14. That the said petitioner is a resident of the city of Columbia, in the County of Richland, in the State of South Carolina, and it is impossible for any one to properly discharge the duties of Receiver of the said Savannah and Charleston Railroad unless he resides, as does the said Charles T. Mitchell, in the city of Charleston, and, like him, devoted his whole time to the interest of the said road.

15. That it is contrary to the course and practice of the Court to remove or displace a Receiver acceptable to the large majority of the creditors interested in a fund which is the subject of suit without some allegation as to the unreliableness of the said Receiver for the office held by him, or that he is unfaithful to his trusts, or that the property in his hands and under his control can be more suc-

cessfully and judiciously managed by another Receiver, to be appointed in his lieu and stead, and no such pretenses are set up here for the removal of the said Charles T. Mitchell.

Charles T. Mitchell also filed an answer, wherein, after reciting the prayer of the petition and the decree of April 28th, 1874, he proceeded as follows:

4. That this respondent and the Advisory Board created by said decree are thereunder in possession of said road and its appurtenances, and the corporation referred to in the Act of 1869 is out of possession.

5. This respondent has understood, and believes it to be true, that said decree met the approbation of all the parties in the cause, and no appeal ever was taken from it.

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*He has also understood and believes that the projet of said decree, referred to therein, was prepared and submitted by the Attorney General in behalf of the State.

6. This respondent has understood, and believes it to be true, that, by a provision of the Act of 1869, it was provided and made the duty of the Comptroller General, upon the happening of a certain contingency, to take immediate possession of the road and appurtenances, and to lease the same to responsible parties, who shall have control thereof until the General Assembly shall, by law, provide for the settlement of the affairs of said company in the interest of all its creditors.

It will be seen by this that the petitioner was to do a single administrative act, and no more. He was to dispossess the corporation, and to lease, but the Court was in possession when the contingency happened.

If the petitioner were to take possession under said provision, he could not hold, but must lease, and his functions would then terminate.

7. This respondent is advised and instructed that the provisions of the Act of 1869 do not contemplate that the Comptroller General shall dispossess this Court or supersede its functions, and more especially when it is manifest that the parties beneficially interested under said Act prefer their affairs to be administered and settled by the judicial department of the government, having agreed to or acquiesced in the decree of this Court.

8. This respondent further says that he is advised and understands that afterwards, the General Assembly by an Act approved March 7, 1871, (Statutes at Large, vol. 14, p. 612,) did repeal the Act of 1869, and thereby superseded the provisions of said Act, wherein the petitioner claims, and in fact that the Attorney General, pursuant to the provisions of said Act of 1871, did commence proceedings thereunder, on which this Court made its decree, from which an appeal was duly taken, which said appeal is now, after argument, pending undecided before the Supreme Court.

9. This respondent says that he is not alone in possession of the said road and appurtenances, but conjointly with the Advisory Board duly appointed pursuant to the provisions of the decree above recited, and this, and their possession is lawful and proper, and he denies that he or they can lawfully be disturbed or dispossessed upon a proceeding such as this rule to shew cause, which is

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*unusual and irregular, for the purpose of changing title and possession.

10. And he further says that since the date of this order to shew cause the petitioner has gone out of office and is no longer the Comptroller General.

11. That the Act of 1869 is a contract between the Savannah and Charleston Railroad Company and the State, and the same has been disregarded and virtually waived by the State in respect of this matter and various others therein.

On April 2d, 1875, the petition was heard by His Honor Judge Reed, who made an order that the petition be dismissed, that the prayer thereof be refused, and the rule be discharged.

Thomas C. Dunn, the petitioner, appealed.

[For prior opinion, see 6 S. C. 307. For subsequent opinions, see 10 S. C. 406; 12 S. C. 314; 17 S. C. 219.]

Corbin & Stone, for appellant:

We maintain in this case that the Court below should have granted the petition of the Comptroller General, so as to enable him to take possession of the Savannah and Charleston Railroad Company's road and appurtenances, pursuant to the provisions of the Act of March 2, 1869, entitled "An Act to enable the Savannah and Charleston Railroad Company to complete their road."

The respondents admit that the Act of March 2, 1869, was part of the charter of the Savannah and Charleston Railroad Company; that it was duly accepted by the said company on the 7th day of March, 1869, and that it is still binding between the State and said corporation, unless repealed or modified by the Act of March, 1871.

The Act of 1871 is a general Act, applying to all railroad corporations, and directs the Attorney General to cause to be instituted, immediately after the expiration of thirty days after the final passage of the Act, actions against railroad companies which have failed to pay the interest on the bonds issued by them and guaranteed by the State, unless before the expiration of said thirty days such railroad company or companies shall fully pay and discharge such interest.

There is nothing in this Act which expressly repeals the provisions of Section 5 of the Act of 1869, and we contend that it does not repeal them by implication.

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*1. The Act, while general in its application to all railroads whose bonds were guaranteed by the State, is limited as to time, for it does not contemplate proceedings under it, unless

taken immediately after the expiration of thirty days after its passage, and such proceedings were to be had for the purpose of enforcing the payment of all interest due and unpaid at the time of the passage of said Act. If a company, the interest on whose bonds was not in default at the time of the passage of said Act, should subsequently thereto be in default as to interest, the provisions of this statute would not be of force, but the State would be left to pursue any remedy which might be proper for it.

2. There is no inconsistency in the provisions of the two Acts. The one furnished a summary remedy in favor of the State, which it could enforce so long as the contract existed between the State and the corporation. The other provided for the immediate action, on the part of the Attorney General, to enforce the claims of the State in the ordinary mode of legal procedure.

The later Act, not being inconsistent with the earlier, both could stand; and, as the later Act has virtually expired by its own limitation, the earlier one remains in full force and effect.—Sedgwick on Stat. and Const. Law, 361; Potter's Dwarris on Stat., 154–157; State v. Alexander, 14 Rich., 247; McCool v. Smith, 1 Black, 459; Henderson's Tobacco, 11 Wall., 652.

Though the provisions of two Acts be different, a general statute without negative words will not repeal a previous one which is particular.—Potter's Dwarris on Stat., 73, note 5, citing Brown v. County Commissioners, 9 Harris, (Pa.,) 37.

It is a rule that special laws are not abrogated by general ones unless the intent to do it be very clear.—Steamboat Company v. Collector, 18 Wall., 478; dissenting opinion of Bradley, J., 493; Sedgwick on Stat. and Const. Law, 361.

3. If, then, the statute of 1869 is of force, there can be no question as to the duty and authority of the Comptroller General in the premises. By the terms of this Act, which forms a part of the contract between the State and the corporation, if the corporation fails to pay the interest on its debt within six months after it shall become due, or fail to pay or provide for the payment of its debt within six months after it shall have become due, it becomes the duty of the Comptroller General of the State, and he shall have the power, to take immediate possession of the

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road, with all its ap*purtenances, and lease the same to responsible parties, who shall have control thereof until the General Assembly shall, by law, provide for the settlement of the affairs of said company in the interest of all its creditors.

The contingency provided for in the charter has happened. The company failed to pay the interest on its debt within six months after it became due. This fact was duly brought to the attention of the Comptroller General. His duty then was imperative. He must take possession of the road, and the company must necessarily yield possession to him.

The statute is remedial. It gives the State a remedy to protect itself, which it would not have had otherwise.—Potter's Dwarris on Statutes, 73; Sedgwick on Stat. and Const. Law, 308.

The statute must be liberally construed in favor of the State and against the corporation.—Gillett v. Moody, 3 N. Y., 479, 487.

Where by statute a new right is given and a specific remedy provided, the power can be executed and the right vindicated in no other way than that prescribed by statute.—Sedgwick on Stat. and Const. Law, 343; State v. Bank of State of South Carolina, 1 S. C., (N. S.) 63.

It is hardly necessary to say that the statute is one which the State had power to make, since it contravenes no provision of the State Constitution.—Potter's Dwarris on Statutes, 79, 80, 81; Calder v. Bull, 3 Dall., 386, 399.

The duty of the Comptroller General in the premises would be perfectly clear were the road still under the entire control of the corporation.

But now arises an apparent difficulty. The corporation and certain of its creditors say the road is no longer in the possession of the corporation. The Court has intervened and has appointed a Receiver, who has now charge of the entire property of the concern. But it can make no difference in whose hands the road and property of the corporation may be, so long as the corporation has the equity of redemption. The possession of the Receiver is not such a possession as ousts the State of its rights, and the corporation cannot be permitted, under the guise of a Receiver, to defeat the rights of the Comptroller General to take possession of the road and its appurtenances and dispose of them as directed by law.

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*The Comptroller General bases his right to the possession of the road on the ground that he has the paramount right to it under the contract—the Act of March, 1869.

His position is like that of a first mortgagee who claims a fund in Court realized from sale of mortgaged property on proceedings for foreclosure instituted by a second or subsequent mortgagee, or like that of a lien creditor of a bankrupt, whose claim must be first settled before the general creditors can be paid.

To him the State and the corporation have given the right, and on him imposed the duty, of taking possession of the road on the failure by the corporation to provide for the payment of its bonded debt or the interest thereon. This right neither the company nor the Court can take away; and when the attention of the Court is called to this right

vested in him, it is its duty to remove every obstacle imposed by its orders and decrees in the way of the exercise thereof.

It is no sufficient answer to this proposition to say that the estate is a fund in Court, and that the Court will protect the rights of the State as the guarantor of the bonds. The State has a right, under the law and by its contract, not to the fund, but to the possession of the property, to dispose of it, not as the Court may direct, but as the Legislature may provide.

And as a Court would order the payment of a fund in its keeping to him who had the prior right, so it should allow the estate to go into the hands of him whom the law has designated as the person to take charge of it.—Wiswall v. Sampson, 14 H., 52; Gooch v. Haworth, 3 Beav., 428; Russell v. East Anglican Railway Company, 3 Mac. & G., 104; Kerr on Receivers, 174.

Again, the Comptroller General has a paramount right to the possession of this road and all its property for the following reasons:

1. The statute gives it and the corporation has assented to it.

2. The statute confers authority only on the Comptroller General to take possession in the event of a failure to comply with the terms of the contract. Power thus given to one person excludes the exercise of a like power by any other person.—Dwarris on St., 275, and note, with authorities.

3. The Comptroller General is not bound by the decree of the Court in this case: (a) because he is not a party to the proceedings; (b) because even if he were a party he

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could not consent to *a proceeding which, so far as he is concerned, the law forbids; (c) because the appearance by the Attorney General on the part of the State in this case cannot be regarded as a waiver by the State of its rights under the contract set forth in the Act of 1869, when the enforcement of those rights does not rest with the Attorney General but with the Comptroller General; (d) because it is not shown that the Comptroller General knew of the order appointing a Receiver in this case until he demanded possession of the road.

(a.) The decree in this case not only appoints a Receiver but forbids everybody, by a general injunction order, from bringing or prosecuting any suit, action or proceeding against the company or its property otherwise than in this cause, &c., without prejudice, however, to the right of the plaintiff and other like holders of coupons of the Charleston and Savannah Railroad Company to the assertion of their lien by way of mortgage on the road and its appurtenances, for the payment and satisfaction of their claims in the event that their said claims are not paid and discharged out of the income provided for in said order.

Now, while this decree may be binding on all creditors of the road who are or may choose to become parties to the suit, it can have no effect on parties who are outside of the territorial jurisdiction of the Court, or who have been given special privileges under the grant by the State to the corporation, which the Court was not asked to and has not passed upon. As to such persons the decree is not binding.

An injunction will not be allowed against a party not a defendant to the bill or not properly before the Court.—Fellows v. Fellows, 4 Johns. Ch., 25; High on Injunctions, § 747; Waller v. Harris, 7 Paige, 168.

(b.) The Comptroller General could not, if he had been a party to the case of Daniel Hand v. Savannah and Charleston Railroad Company, have consented to any order which would relieve him from a duty imposed on him by law.

When the duty is clearly defined, he must execute it as an executive officer of the State, and the judiciary department of the government could not, by its decrees, work a repeal of a positive constitutional statute.—Marbury v. Madison, 1 Cr., 137, (171); Grier v. Taylor, 4 McC., 206.

To do so would be to usurp legislative or political power.—Cherokee Nation v. Georgia, 5 Pet., 1, (20, 28, 75.)

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*(c.) The State has not lost its right to enforce its contract with the corporation because of the appearance of the Attorney General on behalf of the State in the case of Daniel Hand.

The question in the cases of Hand v. Savannah and Charleston Railroad Company, and State v. Savannah and Charleston Railroad Company was whether the corporation was or was not liable for coupons of bonds issued by the Charleston and Savannah Railroad Company under the Act of December 20, 1856. If the defendant corporation were not liable for payment of said coupons, then it was not in default, and the Comptroller General had no right to the possession of the road so long as the company paid the interest on the coupons for which it was undeniably liable. This interest it did pay until the 1st day of September, 1873, so far as the Comptroller General is informed.

But as to the coupons or the bonds of 1856, the Comptroller General could properly decline to take action, since the State was itself seeking a judicial determination of the question of the liability of the defendant corporation thereon.

(d.) The order appointing a Receiver was not made with the knowledge or consent of the Comptroller General. So far, then, as it abridged the powers conferred on him by statute, or interferred with him in the performance of his duties, it is a nullity, and the Court below should have so held.

But the Court having made the order, and

the Receiver appointed by it being in possession, the Comptroller General, out of respect to the Court, and to avoid any conflict of jurisdiction between the executive and judicial departments of the government, comes in by petition and asks the Court to modify its order forbidding all persons from meddling with the possession of said road, so as to permit the Comptroller General to perform his duty under the law without coming in conflict with the officers of the Court.

Of the regularity of this mode of proceeding there is no question raised. It is strictly in accordance with the established practice in equity and under the Code of Procedure. —Wiswall v. Sampson, 14 H., 66; Kerr on Receivers, 172–4; Story's Eq. Prac., 267, 377; Hoffman's Prov. Rem., 508.

The Court, then, should have granted the prayer of the petition, because it is evident that by its decree it was infringing upon the duties devolved by law on the executive department of the government and usurping functions which did not belong to it.

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*A Court can compel an executive officer to perform duties required of him by law, but it cannot constitutionally enjoin or prevent him from performing duties which the law says he must do, and which he is willing to undertake.—Marbury v. Madison, 1 Cr., 137, p. 164.

All that the Court is asked to do, as a matter of strict law, is to allow its own officer to place in the hands of the person entitled to it under the charter the possession of this road and all its appurtenances, so that the State, the chief creditor of the corporation, and the guarantor of its bonds, may protect its interests, as provided by law, while it sees that no harm is done to other creditors.

This request is reasonable. To the bondholder it can make no difference who has the road so long as he gets his money. In the economical administration of its affairs, he has little interest, as he has the State guaranty to fall back on when the road's assets are exhausted.

The corporation has no right to object, because it is bound by its charter to give possession to the Comptroller General whenever it fails to comply with the terms of its charter.

The Receiver has no right to object, because he is surrendering possession to one having paramount right.

The State, which is ultimately liable for the payment of the bonded debt, has the right to have the road administered by the officers whom it has designated for the purpose, so that it may not be compelled to pay a larger bonded debt than is just and right.

It was a matter of legislative discretion by whom possession of the road should be taken. The Legislature, in the exercise of its discretion, put this duty on the Comptroller General, and the Courts have no constitutional power to thwart this discretion by appointing a Receiver, and upholding him in his refusal to permit the law to be carried out as directed by the statute of 1869.

Buist & Buist, contra:

Daniel Hand, the plaintiff, being a holder of a large amount of bonds and past due coupons of bonds of the Charleston and Savannah Railroad Company, issued under the provisions of the Act of the General Assembly of South Carolina ratified on the twentieth day of December, 1856, and guar-

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anteed by the State, filed his com*plaint on the 12th April, 1870, against the following parties as defendants, to wit: The Savannah and Charleston Railroad Company, William Aiken, George W. Williams and James Robb, trustees, and D. H. Chamberlain, Attorney General of South Carolina.

At the same time there was filed a notice of lis pendens as prescribed in Section 155 of Title IV, p. 600, of the General Statutes, it being provided thereby "that every person whose conveyance or encumbrance is subsequently executed, or subsequently recorded, shall be deemed a subsequent purchaser or encumbrancer, and shall be bound by all proceedings taken after the filing of such notice to the same extent as if he were made a party to the action."

The complaint, among other things, sets forth that the Charleston and Savannah Railroad Company having become insolvent by reason of the casualties of the war a new company had been incorporated by Act of the General Assembly, ratified on the 20th December, 1866, and that the said company thereby formed had become invested with all the rights, powers, privileges and franchises of the Charleston and Savannah Railroad Company, and had assumed and become liable for the payment of the six per cent. interest-bearing bonds of the said Charleston and Savannah Railroad Company, guaranteed by the State, held by the plaintiff and others.

It likewise set forth that the defendants, the Savannah and Charleston Railroad Company, by Act of the General Assembly, which became a law, in due form, on the 6th March, 1869, had been empowered to borrow and raise a sum not exceeding $500,000, secured by a mortgage of the road, and that under the provisions of the said Act the said bonds had been issued, and a mortgage to secure the same executed by the said Savannah and Charleston Railroad Company to the defendants, William Aiken, George W. Williams and James Robb, trustees.

The prayer of the complaint was for judgment against the said Savannah and Charleston Railroad Company for the amount of the principal and interest of the coupons held by the said plaintiff, and for the assertion of the lien which he held as security for the payment of the same under the Act of 20th December, 1856, and for the foreclosure and

sale of the mortgaged premises and distribution of the proceeds of the sale among the parties equitably and of right entitled to the same.

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*To this complaint all the defendants duly answered,—the answer of the defendant D. H. Chamberlain, Attorney General of South Carolina, having been filed on the 28th March, 1870, and in and by the said answer the said Attorney General, "for and on behalf of the said State of South Carolina, which had guaranteed the payment of the principal of the bonds issued under the Act of 20th December, 1856, and of the coupons thereof, submitted the rights of the State in the case to the judgment and protection of the Court, being content with the relief, if any, which may be afforded to the plaintiff suing on behalf of himself and all other creditors, the Charleston and Savannah Railroad Company standing in the same plight and condition with himself."

His Honor Judge Graham, of the First Circuit, filed his judgment sustaining the claim of the plaintiff on the 3d October, 1872.

From this judgment the defendants, the Savannah and Charleston Railroad Company, and Aiken, Williams and Robb, trustees, appealed, and, the case having been twice argued before this Court, judgment was pronounced on the —— day of ——, 1874, and by this judgment the appeal was dismissed for irregularity without prejudice.

The case having thus been again remitted to the Circuit Court, Judge Graham, on the 28th April, 1874, filed a judgment, from which no appeal has been taken by any of the parties.

By this judgment all the property of the road, the subject of the suit, with its appurtenances, together with all its rolling stock, its whole outfit and property of every kind whatsoever, was transferred and delivered into the possession of the Receiver named and an Advisory Board of Management, until the maturity of the six per cent. interest-bearing bonds of the Charleston and Savannah Railroad Company, and provision was made that it should be worked and managed by the said Receiver and Advisory Board, and the net profits, after paying all necessary expenses, applied to the payment of the coupons of the outstanding bonds.

It was further provided that all the creditors of the defendant company not then represented in the cause should have leave, by petition, to come in and become parties to the cause, and the creditors and claimants against the said railroad in anywise, and who may not voluntarily become parties to the cause, should be enjoined from bringing or presenting any suit, action or proceeding against said company or its property, other-

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wise than in the said *cause, and from intermeddling with the possession and management of the said railroad and property by the said Receiver and Advisory Board in the due execution of their trust and duty under the said decree.

The petition of the Comptroller General sets forth that, as Comptroller General of the State, it is made his duty, and he is given the power, by the Act ratified on the 2d March, 1869, to take immediate possession of the said Savannah and Charleston Railroad, with all its appurtenances, and the prayer is that so much of the decree of 28th April, 1874, as places the said railroad in the possession of the said Charles T. Mitchell, as Receiver, be rescinded, and "thus that your petitioner be enabled to take possession thereof; and should it be deemed advisable that said Receivership should be continued, then, he, the said petitioner, suggests that, with the other duties imposed upon him by law, he may also perform that duty."

The State, having submitted itself to the jurisdiction of the Court, became bound by the judgment of Judge Graham, filed on 28th April, 1874.

Associate Justice Willard, in the case of the State, ex relatione the Attorney General, v. the President and Directors of the Bank of the State of South Carolina, (1 S. C., 71,) states the law as it stands on this question: "But it is equally clear that the Court of Chancery has possession of the controversy both as it regards the questions at issue and the parties. The State has intervened in the person of its Attorney General and submitted its right to that Court by answer."

And at page 72: "In the present case, however, the State is a real and not a nominal party; and this is claimed as placing the case in a peculiar attitude to the rule in question. The State can neither be sued nor compelled to appear in its own Courts or elsewhere. Where it enters the Courts, it does so voluntarily, and, it is to be presumed, for the reason that some important object cannot be attained except through the aid of the judicial arm of the government. But no proposition is more clear than that when the State places itself in the attitude of a suitor in its Courts, it subjects itself to all the rules that bind the jurisdiction from which it seeks relief."

When it enters the Court of Chancery, it conforms to every requirement that binds the humblest citizen.

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*When it claims the aid of the writ of mandamus, it takes it subject to all the rules that control its employment. It follows, therefore, that the same rule must be applied in the present case that would govern in a case of private rights, and, accordingly, that, regarding the State as a claimant to the fund in question, an insuperable objection exists to the exercise of the jurisdiction claimed in these proceedings.

If the petitioner claims the road as a public officer, his claim must rest upon the provisions of the Act of March 2, 1869, and he can

only claim and hold for the purposes and objects contemplated by this Act.

The Act provides, in Section 5, that, upon a contingency specified, it shall be his duty, and he shall have the power, to take immediate possession of said road, with all its appurtenances, and lease the same to responsible parties, who shall have control thereof until the General Assembly shall by law provide for the settlement of the affairs of said company in the interests of all its creditors.

Under this provision of the Act of 1869 it was contemplated that nothing more should be done than that which has been already done, to wit, the transfer of the property from the insolvent corporation, causing it to be regularly administered by responsible persons.

So long as the judgment of Judge Graham, filed on 28th April, 1874, remains without modification or reversal, its provisions, which are obligatory on the State as much as on any of the other parties defendants, render it impossible that the petitioner should discharge the duites imposed upon him as a public officer by the Act of 1869.

The practical result of placing the petitioner as a public officer in the custody of the road under the Act would be to deprive the Court of Common Pleas of the County of Charleston, which now has control of all the property of the road, it being a fund in Court, of all jurisdiction in the matter, and give him supreme power, only to be interfered with by the General Assembly of the State.

If the petitioner, as a private citizen or an individual, desires to install himself as the Receiver, under the judgment of Judge Graham, he has made no shewing, either by affidavit or otherwise, to entitle him to receive the appointment.

It is the will of all the creditors that the management of the road should remain as it is.

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*It is incumbent on the petitioner to shew that the present Receiver, Mr. Mitchell, and the Advisory Board have acted either indiscreetly or to the injury of the creditors, and this he has not attempted.

All the creditors have confidence in the administration of the affairs of the road and are unanimous in opposing a transfer of the property.

In Kerr on Receivers, p 149, it is said: "Where a Receiver has been appointed, the Court will not remove him on the mere ground of his being an illiterate person, unless some other reason can be given, such as mismanagement, dishonesty or incompetency to manage the estate."

The fifth Section of the Act of 1869 is repealed by the provisions of the Act approved March 7th, 1871, entitled "An Act to protect the interests of the State whenever payment of interest now due remains unpaid on bonds issued by any railroad company, and whereon the guaranty of the State is endorsed."

By the first Section of this Act it is provided as follows, to wit: "That the Attorney General be, and he is hereby, required and authorized to cause to be instituted immediately after the expiration of thirty days after the final passage of this Act, for and on behalf of, and in the name of, the State, an action, suit or other legal proceeding in any Court of this State, or of the United States, against each railroad company which has, also against all railroad companies which have heretofore, issued bonds upon which the guaranty of the State is endorsed, and on which interest is now due and unpaid, unless within thirty days after the final passage of this Act such railroad company or railroad companies shall fully pay and discharge such interest, for the purpose of enforcing the payment of all interest due on the bonds of such railroad company and protecting and securing the State against loss or damage by reason of said guaranty, and to this end to enforce the rights of the State by virtue of the statutory or other lien or mortgage held by the State or held to secure the payment of said bond or bonds on all or any of the property, assets or effects of such company or companies."

By the second Section the Attorney General was authorized to appear for, on behalf of, and in the name of the State, in any action, suit or proceeding on behalf of any other party or parties against any such railroad

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company or railroad companies, and to *bind the State in such action, suit or proceeding, and to protect the interest of the State therein.

By the seventh Section all Acts and parts of Acts inconsistent with the said Act were repealed.

It is submitted that it was the design and purpose of the General Assembly, by the Act of March 7th, 1871, to supersede the remedy provided in the Act of 1869 against defaulting railroads.

A new, complete and more comprehensive system was engrafted on the law by the Act of March 7, 1871; and the Act of 1869, in so far as it authorized the Comptroller to take possession of and lease the Savannah and Charleston Railroad, was virtually abrogated.

This conclusion results from the proper construction of the Act and of the law applicable thereto.

The provisions of the two Acts are so repugnant that they cannot stand together or be consistently reconciled.

In Daviees v. Fairbain, (3 Howard, 636,) it is ruled that "if a subsequent statute be not repugnant in all its provisions to a prior one, yet if the later statute clearly intended to prescribe the only rules which would govern, it repeals the prior one."

In the following cases, to wit, West v. Pine, (4 Washington Circuit Court Reports,) Milne v. Huber, (3 McLean's Reports,) and United States v. Irwin, (5 McL., 178,) it was ruled

that a later statute repugnant to a former one on the same subject matter, so that they cannot stand together, repeals it by implication.

In Norris v. Croker, (13 Howard's Reports, 429,) it is ruled that "when a new statute covers the whole subject matter of an old one, and adds offenses and prescribes different penalties from those enumerated in the old law, it is by necessary implication a repeal of the former statute."

There is another and very serious view of this matter. It goes to the heart of it.

Is the Act of 1869, so far as it gives the Legislature judicial powers, within the Constitution?

Article I, Section 26, of the Constitution declares that "in the government of this Commonwealth the legislative, executive and judicial powers of the government shall be forever separate and distinct from each other, and no person or persons exercising the function of one of said departments shall assume or discharge the duties of any other."

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*The Act of 1869 undertakes to charge the Legislature with judicial functions.

If there may be any doubt of this, then the very question made here proves it.

This proceeding not only asks judicial functions for the Legislature, but it seeks for that purpose to take them from the Courts,—to take away from their jurisdiction after being possessed of the whole matter.

Again, it may be said the Act of 1869 is a contract between the parties, namely, the State and the corporation.

That by such contract the corporation contracted with the State that the General Assembly should have the administration of its affairs in case of failure, instead of the Courts provided by the Constitution for such jurisdiction.

This may be true; but if it is, Daniel Hand was no party to it. The holders of the bonds of 1856, secured by the statutory lien, were not parties to it. Neither Hand nor other holders are bound by such contract.

Again, jurisdiction cannot be given and cannot be taken away by consent or by contract.

This contract, if there be one, takes from the judiciary department of the government a jurisdiction imposed upon it by the Constitution, and it gives to the legislative department judicial functions, which are withheld from it by the Constitution.

September 17, 1875. The opinion of the Court was delivered by

MOSES, C. J. The decree of 28th April, 1874, in the case of Hand v. Savannah and Charleston Railroad Company, which it is claimed deprived the State of the power it proposed to exercise under the fifth Section of the Act of 1869, (14 Stat., 202,) is interposed as a bar to the petition of the Comptroller General, filed in the cause, for the possession of the road of the said company under the Act above referred to. So far as that decree vested any rights in the creditors of the company, it must be allowed all the force and validity of a judgment of a Court having jurisdiction over the subject matter and the parties properly before it. So far as it appropriated the net profits of the road to the payment of the demands of certain classes of creditors, its validity, except by appeal, cannot be questioned. We cannot,

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therefore, perceive how the enforce*ment of the provision of the said Act, as to the possession of the road, conflicts with the rights of creditors, or impairs the obligation of any contract between the State and the holders of bonds issued, either by the Charleston and Savannah Railroad Company or the Savannah and Charleston Railroad Company, and guaranteed by it.

Unless the Constitution of a State recognized its liability to suit in its own Courts, it is protected, by reason of its sovereign capacity, from process issued by judicial authority, except as provided by the Constitution of the United States. The mere consent of an officer of the State, by appearing and answering in its name, does not bind it by the judgment or decree which may be the result of the suit.

The Attorney General, although a law officer of the State, in fact properly belongs to its executive department, and has no more power to control the state by his action in Court than the Governor or the Comptroller General. Indeed, when a State can be made a party in the Supreme Court of the United States, the process to that end must be served on the Governor. The legislative power, where in its opinion the interest of the State demands that it should be protected by a proper representation in a legal proceeding, may authorize any of its officers, or, indeed, any person to appear on its behalf and bind it by his action. While a decree against the State so appearing could not constitute a judgment against it to be enforced by a levy and sale of its property, its good faith and honor would be so involved as to compel the Legislature to recognize the debt or demand thus created as one with which compliance could not be avoided without prejudice to its character and name.

Before determining whether and how far the decree of the Court in the case of Hand deprives the State of the power reserved by the Act of 1869, it is proper to consider whether so much of it as confers the power in question on the Comptroller General is repealed by the Act of 1871.—14 Stat., 612.

By the Act of 1869 the Savannah and Charleston Railroad Company was empowered to raise $500,000 in bonds, to fall due twenty years from their date, and to bear seven per cent. interest per annum. To make the proposed issue available to the

company, by readily raising money for its use, the State agreed that the primary lien which it then held on the road as a security for a former guarantee of bonds, for the payment of which the road was liable, "shall, upon the issue of the bonds provided for in

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and by the said *Act, be postponed and become a second lien." It thus subordinated its security to that which might be created in favor of such new bonds. It will not be forgotten that this Act was in the nature of an amendment of the charter and thus constituted a contract between the State and the company. The contract could only be extinguished by a compliance on the part of the company with the obligations it imposed or a release of it by the State.

This right of the State to take possession of the road through its named officer, the Comptroller General, in the event of a failure by the company to fulfill the conditions of the contract undertaken by it, was the consideration for the surrender of its first lien. It was an agreement on what the parties regarded full consideration. The company issuing the bonds and disposing of them under the advantages afforded by the condition acceded to the whole as a contract binding on it, and which still continues to bind it, unless rendered void by some subsequent legislation by the State.

The measure to which it resorted by the Act of 1871 was but the enforcement of a right incident to the lien which it held on all the roads which had failed to pay the interest on the bonds it had guaranteed.

The power to take possession, reserved by the Act of 1869, did not deprive it of its right to foreclose its lien through the Courts.

The provision in the said Act constituted a remedy by the agreement of the parties, of which the State might avail itself in the event of a certain contingency, and that had occurred. The State consented to occupy a less favorable position than it held before, but the consideration which induced it was the right which it secured by the provision it is now attempting to enforce. If, under the Act of 1871, it had actually proceeded to a foreclosure, and consummated it by a sale, then the power under the Act of 1869 would have been lost by the change in the title and possession of the property. The construction of the Act of 1871 contended for on the part of the appellees would place the State in a worse position than it occupied before its passage, and cannot prevail unless the intention to that end is clear and manifest, keeping in view the purposes of the two Acts. Though "a subsequent statute, if taken strictly and grammatically, would control a prior statute if it were intended to have that operation," yet, though the terms be general, if by the peculiar character of the former statute the last enactment is so inconsistent with its terms

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and purposes that it is manifest it was *not intended to be included in its terms, it will not be construed a repeal.—Williams v. Pritchard, 4 T. R., 2.

The Act of 1869 was in effect a contract between the State and the company. It annexed a condition which gave it an additional and independent power separate and apart from that which it could exercise under its general right of foreclosure. "A special law is not abrogated by general ones unless the intent to do it be very clear."—Bradley, J., in his dissenting opinion in Steamboat Company v. Collector, 18 Wall., 478 [21 L. Ed. 769]. Best, J., in Rex v. Carlile, (3 B. & A., 161,) said: "It has long been a settled maxim that neither the provisions of the common or statute law are abrogated but by the express words of an Act of Parliament or by subsequent enactments so inconsistent with the previous law as to raise a necessary implication that the Legislature intended it should be altered." Holding that the said provision of the Act of 1869 is not repealed by the Act of 1871, it is proper next to consider the effect of the proceedings in the case of Hand on the application now before the Court. The second Section of the Act of 1871 authorized the Attorney General, for and on behalf of the State, to appear in any action on behalf of any other party or parties against any such railroad company or companies referred to, meaning those amenable to the provisions of the said Act. The order in the Hand case, set out in the pleadings, even if it is binding on the State by the action of the Attorney General, cannot prevent the enforcement of any right by the State not necessarily lost, destroyed or absorbed by the proceedings in which the said order was made. The act of the Court prescribing the agency through which the affairs of the company were to be administered, with the purpose of making profit on its capital for the benefit, first of its creditors, and then of its stockholders, was not a judicial act, in the proper sense of the term, so binding as to be beyond change or modification. The form adopted may have been the best and most proper at the time, and may be considered so now; but if the order which directed it was not of that character which vested rights, the scheme resorted to could be substituted by any other which promised better results for the general benefit of all concerned. The power exercised, that of appointing a Receiver, (even with the extraordinary adjunct of an "Advisory Board of Managers,") is discretionary with the Court and one of a purely provisional character. The mere appointment does not affect the title to the property or rights of

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any who *have an interest therein. Whatever vested rights creditors may have by the order of the Court in regard to the final dis-

position of the property or its profits in the hands of the Receiver are not impaired or affected by the mere change in the possession of the property.

Besides, the order for the appointment of a Receiver is not irrevocable. He is the officer of the Court, acting as its agent in a particular matter, and always subject to its control. He is usually appointed to close and wind up an estate or concern: but here the purpose was "to hold and operate the railroad of the defendants company," under a Board of Directors, to be selected in a manner not directed by the charter but prescribed by the Court.

While the decree must be respected and enforced, so far as it fixed the rights of creditors before the Court and appropriated the profits of the road to their payment, it cannot operate to deprive the State of a right which it has against the company. Its charter has not been extinguished. The property of the Company is even now held subject to its equity of redemption, and the title to it still remains unchanged. The power conferred on the Attorney General to bind the State by appearing in any action against any railroad company must be held to refer only to cases of a nature similar to those he was authorized to bring under the Act and must be confined to the purposes which it was intended to accomplish. The end proposed by the Act was an enforcement of the lien given to the State to secure its guaranty. It contemplated no purpose of a different character. Will it be claimed that the Attorney General, by so appearing, could bind the State to any order which should be made in the cause, even to the discharge and release of the lien of the State, while, at the same time, it should be ordered to pay the bonds which it had guaranteed? The right of appeal would be no safeguard, for the appeal could only be taken and perfected by the Attorney General himself, who it is not natural or likely to suppose would move against an order to which he had consented, even if such a course would be consistent with the practice of the Courts.

How, then, can it be contended that a right secured to the State, in full consideration, on its part, to take possession of certain property by a designated officer, can be lost by the consent of another of its officers, the Attorney General?

The enforcement of the remedy under the Act of 1869 was to be through the agency of the Comptroller, and we see nothing in the

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*Act of 1871, or the proceedings in the case referred to, which can properly deprive him of it. A waiver of so important a condition, and the only one which promised safety or protection to the State for its guaranty, is not to be legally presumed. Unless the intent manifestly appears from the Act of 1871, it should not be construed to be so general and absorbing, through the power which it extends to the Attorney General, as to destroy a valuable right by contract reserved to the State. It contemplated the foreclosure of the lien held by the State in the property of such railroad companies as had issued bonds with its guaranty, and had not paid the interest due; and as it was competent for any holder of such bonds to resort to the same remedy, the object proposed by the State, through the said Act, would be as readily accomplished as if the proceeding had been instituted in its name and in its behalf.

We see nothing in the Act of 1869 in conflict with the Constitution of the State. It is alleged that so much of it as looks to "a settlement of the affairs of the company by the General Assembly" assumes for the Legislature the exercise of judicial authority. But, as between the State and the company, such a contract violates none of the constitutional inhibitions against the exercise by one department of the duties belonging to another. The mode of settlement to which the Legislature may resort might be by a reference of the whole matter to the decision of the Courts, and the words "in the interest of all the creditors" seem to look to a forum with the power of a final adjudication of all rights involved. When the Legislature assumes to discharge duties from which it is prohibited by the Constitution, it will be time enough to inquire into and pass upon its action. The Court is not to anticipate that it will violate its constitutional obligation, or prescribe in advance the mode and manner in which its legitimate functions are to be administered. Such a course would find no sanction in propriety or precedent.

The order reversing the judgment of the Circuit Court dismissing the petition has been already filed.

WRIGHT, A. J., concurred.

WILLARD, A. J. I do not regard the fifth Section of the Act "to enable the Savannah and Charleston Railroad Company to complete their road," ratified March 2, 1869, (14

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Stat., 201.) as *intending to supersede the ordinary remedies provided by law in the case of an insolvent corporation. Authority is there given, on the contingency of a failure of the corporation to fulfill certain engagements, in respect to which the State stood in the position of a surety, to the Comptroller General of the State, to take immediate possession of said road, with all its appurtenances, and to lease the same to responsible parties, who shall have control thereof until the General Assembly shall by law provide for the settlement of the affairs of the comapny in the interest of all its creditors. While, as affecting the company, its stockholders and officers, this provision stands on the footing of a contract on consideration voluntarily acceded to by them,

yet to hold that it bound the creditors of the company to the extent of superseding their ordinary remedies in the Courts it would be necessary to find such an intent clearly expressed. I find no such intent expressed. On the contrary, the object and intent apparent on the face of the statute can be accomplished without such a construction. The plain intent of the Section was to strengthen and enforce by special provisions the general right of subrogation which is possessed by sureties. Although the provisions in question are in excess of what the law confers upon a surety through the right of subrogation, yet the object and intent can be fully understood by referring it to a purpose, on the part of the Legislature, to give, as against the corporation, special and peculiar rights to the State in the nature of the right of subrogation.

Such rights cannot displace the rights of creditors, for their rights are superior even to the right of subrogation enjoyed by the surety.

I think that there should be a strict Receivership, and, in order that the purpose of the statute may be as fully accomplished as the rights of parties will permit, that such Receivership is properly conferred upon the Comptroller General as the person designated to hold the property for the benefit of all parties interested in it.

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*STATE v. COLEMAN.

(Columbia. Nov. Term, 1875.)

[*Criminal Law* ⇐121.]

A prisoner under indictment for murder cannot, as a matter of right, demand that the venue shall be changed to a County not within the Circuit in which the indictment was found. To what County the venue shall be changed is a matter of discretion with the Circuit Judge.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 241; Dec. Dig. ⇐121.]

[*Jury* ⇐131.]

The right of a prisoner to examine jurors upon their voir dire cannot be exercised without restraint either as to time or mode.

[Ed. Note.—Cited in State v. Coleman, 20 S. C. 449; State v. Nance, 25 S. C. 171; State v. Hayes, 69 S. C. 297, 48 S. E. 251.

For other cases, see Jury, Cent. Dig. §§ 561–582; Dec. Dig. ⇐131.]

[*Jury* ⇐140.]

Where a prisoner has challenged a juror peremptorily he cannot afterwards have him recalled in order to object to him for cause.

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 629; Dec. Dig. ⇐140.]

[*Criminal Law* ⇐923; *Jury* ⇐109.]

Where it becomes known, after the jury has been empaneled, that one of the jurors had expressed an opinion in relation to the case, it is no ground for a new trial that the presiding Judge did not, of his own motion, dismiss the juror, the prisoner's counsel having declined to make a motion to that end.

[Ed. Note.—Cited in State v. Belcher, 13 S. C. 461; State v. Coleman, 20 S. C. 448.

For other cases, see Criminal Law, Cent. Dig. § 2226; Dec. Dig. ⇐923; Jury, Cent. Dig. § 534; Dec. Dig. ⇐109.]

[*Criminal Law* ⇐970.]

That the name of the Solicitor to the bill of indictment was not signed by him is no ground for a motion in arrest of judgment.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2445–2462; Dec. Dig. ⇐970.]

[*Indictment and Information* ⇐33.]

Even assuming the law to be (and there is doubt upon the point) that the signature of the Solicitor is necessary to make the indictment valid, still it is enough if his name, with his official character, is subscribed to the bill with his sanction.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 133; Dec. Dig. ⇐33.]

[*Jury* ⇐70.]

Where additional jurors are wanted, and they have been selected as directed by the Act of November 19, 1873, it is not an irregularity to summon them by a venire, and not by the Sheriff, under a mere verbal direction of the Judge.

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 320; Dec. Dig. ⇐70.]

[*Criminal Law* ⇐968.]

No irregularity in any writ of venire facias, or in the drawing, summoning, returning or empaneling of the jurors, is sufficient to annul the verdict, where the objections were not made before the verdict was returned, or where the party making the objection was not injured by the irregularity.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2441; Dec. Dig. ⇐968.]

[*Indictment and Information* ⇐79.]

It is no ground for a motion in arrest of judgment in an indictment for murder that the indictment charged the offense to have been committed "against the statue in such case made and provided."

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 210; Dec. Dig. ⇐79.]

[*Homicide* ⇐8; *Indictment and Information* ⇐32.]

The statute declaring the definition of murder, as understood at common law, and the punishment which follows its commission, does not change it from a common law to a statutory offense.

[Ed. Note.—Cited in State v. Bowers, 65 S. C. 213, 43 S. E. 656, 95 Am. St. Rep. 795.

For other cases, see Homicide, Cent. Dig. § 13; Dec. Dig. ⇐8; Indictment and Information, Cent. Dig. § 127; Dec. Dig. ⇐32.]

[*Indictment and Information* ⇐79.]

An indictment for the murder of "A B" alleged that J C, the prisoner, "on the 13th day of April, in the year of our Lord one thousand eigh hundred and seventy-three," at, &c., in and upon the said "A B" did make an assault, and him, the said "A B," then and there, with a certain large stick, did strike, giving him one mortal wound, of which the said "A B" "from the said 13th day of April, in the year of our Lord 1873, until the 14th day of the same month of April, in the year of our Lord last aforesaid, did languish," "on which said 14th day of April, in the year aforesaid, the said 'A B' at, &c., aforesaid, died:" *Held*, That the use of the letters eigh, in place of the word eight, and the omis-

sion of the word last, between the words "year" and "aforesaid" in the last averment of time, did not render the allegations of time uncertain, and was no ground for arresting the judgment.

[Ed. Note.—Cited in State v. Washington, 13 S. C. 457; State v. Moore, 24 S. C. 155, 58 Am. Rep. 241; State v. Brown, 24 S. C. 225.

For other cases, see Indictment and Information, Cent. Dig. § 214; Dec. Dig. ⟸79.]

Before Cooke, J., at Abbeville, October, 1875.

This was an indictment against Jerry Coleman for the murder of Adam Hackett.

The case had been tried before, and, upon an appeal by the prisoner, a new trial had been ordered.

The only statement of the case made at this, the second trial, which the Reporter has been able to obtain is that contained in the opinion of the Court.

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*The prisoner was convicted and appealed to this Court.

Thomson & Noble, for appellant.
Blythe, Solicitor, contra.

March 1, 1876. The opinion of the Court was delivered by

MOSES, C. J. The commendable zeal of the counsel for the appellant, and a knowledge of the laudable motive which prompted him to undertake the defense of the prisoner, whose interests are so deeply involved, have induced us to give a longer consideration of the points made on the motion before us than their merits demanded.

The first ground for a new trial assigned error on the part of the presiding Judge in not granting the motion for a change of venue to some County without the Eighth Circuit. The statute in regard to a change of venue allows the presiding Judge the exercise of his discretion in granting a motion to that end. While here, upon very general affidavits as to the improbability of a fair and impartial trial in the County in which the bill was found, the Judge expressed his willingness to transfer the case for trial to any County in the circuit except Pickens, where there would be no Court at the term next fixed by law. The prisoner refused to avail himself of the indulgence thus proffered and insisted that the change should be to a County out of the circuit. The refusal on the part of the Judge has not been shown to be an improper exercise of the discretion confided to him by the statute. In the absence of all proof to the contrary, we must assume that his course was prompted by a due regard to the rights both of the prisoner and the State. It is not a privilege conferred by the Act on a party, plaintiff or defendant, and neither can claim the benefit of the provision unless he shows that he is properly entitled to it. It was never intended to give one the selection of the County to which the case may be transferred, for this would make the order depend, not on the discretion of the Court, but the will of the party submitting the motion, and would be subversive of the very end which the Legislature designed in the enactment.

We cannot perceive in what manner the right of examination of the proposed jurors on their voir dire was violated, or its exercise even abridged, as is claimed by the sec-

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ond ground on which a new *trial is asked. On the contrary, a latitude was allowed much beyond what could be demanded either from the spirit or letter of the statute. In this particular the prisoner has certainly nothing to complain of. The right allowed to one in his condition of the examination of the juror is not to be exercised without restraint, either as to time or mode. If so, it might be prolonged to defeat a trial by the expiration of the term, and thus compel a continuance which would not be granted on a direct motion. In fact, the allowance of the examination by the counsel in the place of the Court was an indulgence. The presiding Judge must determine on the character of the questions proposed and when the examination shall cease. The questions must be pertinent and from their nature calculated to show that the person offered is not so free from bias as to sit as an impartial juror.

We see nothing sufficient even for a doubt that the right of the prisoner to a peremptory challenge of twenty jurors was in any way infringed. Derry Watt, when called, was objected to and sat aside. No evidence, discovered on the next day, to show that he might have been challenged for cause can give the prisoner the right to have him again presented to be objected to for cause, and his number of peremptory challenges, twenty, extended to twenty-one. We do not think that any precedent can be found to sustain so anomalous a proceeding. As was said by the Court in the State v. Wise & Johnson, (7 Rich., 416.) "the right to challenge does not draw after it the right of selection, but merely the right of exclusion."

The objection that the presiding Judge did not of his own motion dismiss Collier Ward from the jury after it had been empaneled is not well founded. Even assuming the fact, which does not in any manner appear, that he had expressed an opinion in regard to the case, and knowledge of it had only come to the prisoner after the jury was formed, when the counsel refused to move for his removal, and the substitution of another in his place, it would have been an arbitrary and unjust exercise of power on the part of the Court to displace a juror whom the prisoner had not challenged. The Judge went very far in deference to the counsel when he said he would allow the said juror to be withdrawn if he would make the motion. The counsel declined, and cannot ask us to do for him here what he declined from accepting of the Court

below, merely because he would not move for it.

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*The error assigned in not allowing Henry Callahan, or Calhoun, a juror presented, to answer the questions proposed, to wit: "If he had ever heard any one express an opinion as to the guilt of the prisoner, and, if so, when," seems to proceed upon a mistake of the fact in the matter to which it relates. The Judge in his report expressly states that, although he did sustain an exception to the question, he afterwards announced to the counsel of the prisoner "that he might ask any question he wished." Nay, he goes farther and says "that, in every instance in which he desired it, he ordered the juryman to stand aside." After an extension of such liberality, can the prisoner, with any grace, urge that his right of challenge was in any manner prejudiced by the Court?

Failing in the motion for a new trial, an arrest of judgment is asked on various grounds, which will be noticed in the order in which they appear in the brief.

It is first objected that the name of the Solicitor to the indictment is not signed by himself. This was not made to appear by any proof. Assuming the fact as alleged, it cannot affect the indictment. It is even doubtful that his signature is necessary; and in Arkansas, Indiana, Alabama and Missouri, it has been expressly decided that an indictment need not be signed.—See Wharton's Am. Crim. Law, § 474. While the better practice doubtless is for the prosecuting officer to affix his signature, the want of it certainly cannot so affect the bill presented by him to the grand jury, and by it returned "true," as to render it void. Here, too, the name of the Solicitor, with his official character, was subscribed to the bill, and if he adopted the signature as authorized by him, and made with his sanction, we cannot appreciate the argument which, under the circumstances, seeks to vitiate the indictment.

That the Court had the right to amend the caption of the indictment has been too long the recognized practice and rule in this State to be now questioned.—State v. Williams, 2 McC., 301; Vandyke v. Dare, 1 Bail., 65. In the first, after conviction, leave was granted by the Constitutional Court, although one of the very points on which the prisoner had appealed from the judgment of the Circuit Court was the insufficiency of the caption of the indictment under which he had been convicted. In fact, the caption forms no part of the indictment.—Wharton's Am. Crim. Law, §§ 219, 220.

The ground in arrest of judgment which questions the mode that was resorted to for the purpose of procuring additional persons to

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*serve as jurymen is not well taken. The Act of November 19, 1873, (15 Statutes at Large, 485,) amending the 24th Section of Chapter CXI of General Statutes, provides that "whenever it may be necessary to summon jurors from the bystanders the Sheriff and Clerk shall each furnish to the presiding Judge a list containing as many names as there are jurors required of persons duly qualified to serve as jurors, and the presiding Judge shall select therefrom those best fitted to serve as jurors, who shall forthwith be summoned by the Sheriff to serve until discharged by order of the Court." The objection is not to the mode in which the names were presented, but to the fact that the persons selected were summoned by a venire. It is claimed that they should have been summoned by the Sheriff by the mere verbal direction of the Judge. Is the performance of an official act to be questioned because it has been through a more formal manner than the law required? Is the notice less effective, or the duty of the citizen to obey less imperative, because the order is through a venire under the seal of the Court instead of a mere verbal or written order of the Judge? The complaint amounts to this: that the Court erred in resorting to that mode of securing the presence of the jurors which was the most formal and certainly the most efficacious. But if it were well founded, it is made too late. Exception should have been taken when the first juror so summoned was presented. The twenty-ninth Section of the Chapter of the General Statutes, already referred to declares "that no irregularity in any writ of venire facias, or in the drawings, summoning, returning or empaneling of jurors, shall be sufficient to set aside the verdict unless the party making the objection was injured by the irregularity, or unless the objection was made before the returning of the verdict."

Nor is there any better foundation for the ground which assumes error in the indictment in charging the offense "against the statue in such case made and provided." That statue was used instead of statute cannot avail the prisoner. A conclusion against the statute in an indictment for a common law offense is mere surplusage and should be disregarded. It is claimed, however, by the counsel for the prisoner that murder is now in this State a statutory offense. How this conclusion was reached we were not favored by any argument on the hearing. The General Statutes merely declare the definition of murder as understood at common law and the punishment which follows its commission.

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It in no way affects the ingre*dients which are necessary to constitute it—in no way alters or changes the forms for its trial, but leaves it exactly and in every particular as it stood at common law. "Where the common law and statutes differ, the common law gives place to the statute."—1 Black., 89. But here the statute is in no particular repugnant to the common law.

It remains only to consider so much of the motion as refers to alleged insufficiencies in the indictment. That greater nicety of pleading is required in criminal than civil cases must be admitted. In strict submission to the common law, its exacting demand is conceded even at this day by the Courts, notwithstanding the affirmation of many of the most eminent of the English Judges "that the grossest crimes have gone unpunished by reason of these unseemly niceties." "An indictment ought to be certain to every intent and without any intendment to the contrary."—1 Chit. Cr. Law, 172.

It is also laid down that every indictment must charge the crime with such certainty of expression that it may be understood by every one, alleging all the requisites that constitute the offense; and that every averment must be so stated that the party accused may know the general nature of the crime of which he is accused, and who the accusers are, when he will be called upon to answer. —Ibid.

The indictment charges that Jerry Coleman, late of, &c., on the 13th day of April, in the year of our Lord one thousand eigh hundred and seventy-three, at Abbeville C. H., &c., with force and arms, &c., in and upon one Adam Hackett, in the peace of, &c., then and there being, feloniously, willfully, &c., did make an assault; and that he, the said Jerry Coleman, then and there, with a certain large stick, &c., the said Adam Hackett in and upon, &c., did strike, &c., giving unto him, &c., one mortal wound, of which he, the said Adam Hackett, from the said 13th day of April, in the year of our Lord 1873, until the 14th day of the same month of April, in the year of our Lord last aforesaid, did languish, &c., on which said 14th day of April, in the year aforesaid, the said Adam Hackett, at Abbeville C. H., aforesaid, died. And so the jury as aforesaid, &c.

The indictment is charged as defective, because it does not allege that the prisoner committed the offense on a specific day. That certain combination of letters forming the syllable eigh, unmeaning in itself, is set forth as the allegation of the time when the offense

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*is charged, and that to every triable fact time should be repeated. Mr. Chitty, on page 173 of his first volume of Criminal Law, says: "If the sense be clear, nice distinctions ought not to be regarded."

Time and place must accompany every material allegation in the indictment, though it is not necessary in all cases to prove the offense on the day laid if it is before bill found. If, however, taking the indictment as a whole, a day is specified as to any issuable averment, the objection will not be fatal because the day is not repeated with every issuable fact. Admitting that the letters eigh make no word significant of time, if there was nothing else in the indictment by which a time was found to be specified by proper expression the exception should prevail. If there is, however, enough in the indictment to notify the prisoner of the time when the offense is laid, no advantage can be taken of "clerical or grammatical errors which do not obscure the meaning."—See State v. Wimberly, 3 McC., 190. The time in the indictment before us is made manifest and put beyond doubt, notwithstanding the employment of the letters "eigh," in setting out the day of the month and year on which the assault was made, by the after reference to it as "the said thirteenth day of April, in the year of our Lord one thousand eight hundred and seventy-three," referring to it as the time when the mortal blow was inflicted.

It is further urged "that the omission of the word last, between the words year and aforesaid, in the last averment of time in the indictment, renders the allegations of time uncertain and is fatal." In regard to this, it is enough to say "that the word 'aforesaid' in general refers to the last antecedent."—1 Chit. Cr. Law, 173.

The motion for a new trial as well as that in arrest of judgment are dismissed.

WILLARD, A. J., and WRIGHT, A. J., concurred.

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8 S. C. *244

*GATES v. WHETSTONE.

(Columbia. April Term, 1876.)

[*Executors and Administrators* ⇐125.]

An executor *held* not to be liable for money of the estate drawn by his co-executor out of the hands of the factors of the estate.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 508–522; Dec. Dig. ⇐125.]

[*Executors and Administrators* ⇐124.]

An executor is not liable for the acts of his co-executor to which he has not contributed in some direct and active way.

[Ed. Note.—Cited in Tompkins v. Tompkins, 18 S. C. 21.

For other cases, see Executors and Administrators, Cent. Dig. § 498; Dec. Dig. ⇐124.]

[*Executors and Administrators* ⇐34.]

Whatever control an executrix acquires over the estate by virtue of her office vests in her husband, on their intermarriage, to the same extent as held by her.

[Ed. Note.—Cited in Hamilton v. Levy, 41 S. C. 379, 382, 19 S. E. 610.

For other cases, see Executors and Administrators, Cent. Dig. § 226; Dec. Dig. ⇐34.]

[*Executors and Administrators* ⇐124.]

Each of several executors represents the estate and has the right to receive funds without the concurrence of his co-executors.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 498; Dec. Dig. ⇐124.]

[*Executors and Administrators* ⇐86.]

Where there is no evidence to show that parties to notes due the estate were of doubtful solvency, the executor who had them in his

hands and made no effort to collect them is liable for the amounts due thereon.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 360; Dec. Dig. ⟸ 86.]

Before Reed, J., at Orangeburg, February, 1875.

This was an action by William B. Gates, J. C. Gates and Alice M. Irick, infant children of Christian A. Gates, deceased, by their guardians ad litem, and by Laban A. Irick, husband of the said Alice M. Irick, against William C. Whetstone, as executor of the last will and testament of the said Christian A. Gates, deceased, and John J. Jackson and Barbara E., his wife, for an account. The action was brought October 3d, 1871, and the case made is, briefly, as follows:

Christian A. Gates died in April, 1861, leaving a will, of which he appointed William C. Whetstone executor and Barbara C. Gates, his wife, executrix, and devised and bequeathed his estate, real and personal, to his wife, Barbara E., and his three children, William B. Gates, J. C. Gates and Alice M. Gates.

Barbara E. Gates, the widow of testator, intermarried with John J. Jackson on the 11th day of August, 1863. She died in February, 1872, and Laban A. Irick administered on her estate. Alice M., the daughter of testator, intermarried with Laban A. Irick in November, 1867. She died in August, 1872, and Laban A. Irick administered on her estate.

The testator had some cotton on hand at the time of his death, which was shipped by his widow to Pelzer & Rogers, factors of the estate in the city of Charleston. In the years 1862 and 1863, a considerable amount of cotton was made by the widow in her own right, which was also shipped by her to the same factors and sold by them.

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*On February 18th, 1866, Pelzer & Rogers paid to the defendant, Jackson, $1,500 of the proceeds of the sales of the cotton that had been shipped to them, and one of the questions made in the case was whether the executor, William C. Whetstone, was liable for the amount thus received by Jackson. Much testimony was given upon the question whether the amount paid to Jackson arose from the proceeds of the cotton on hand at the death of the testator, or whether it arose from the proceeds of the cotton made by the widow after his death. A Referee, to whom the accounts of the executors had been referred, reported, as his conclusion of fact, that the money paid to Jackson arose from cotton made by the widow after the testator's death, and he held and so reported that the executor, William C. Whetstone, was not liable to account for it. To the report on this point the plaintiffs excepted.

It further appeared that the testator left a number of notes, which went into the hands of his executor, and that they were all collected by the executor except three—one for seventy dollars given to the testator by Lewis Rust, and two, for $500 in the aggregate, given to him by T. M. Wannamaker. There was no evidence that Wannamaker and Rust were insolvent, nor was it shown that any effort had been made to collect their notes. The Referee reported that the executor was liable for the amount of the three notes and he excepted to the report.

His Honor the presiding Judge sustained the exception of the plaintiffs to the Referee's report. His conclusion of fact from the testimony reported by the Referee was, that the cotton which produced the money paid to Jackson was cotton belonging to the estate of testator, and he held that the executor was liable for it. He sustained the report of the Referee as to the three notes of Rust and Wannamaker, and held the executor liable for them.

The executor, William C. Wannamaker, appealed.

Hutson & Hutson, for appellants.

Izlar & Dibble, contra.

July 26, 1876. The opinion of the Court was delivered by

WRIGHT, A. J. We have carefully examined "the voluminous testimony" submitted, and, looking at it in the different lights in which the respective counsel in the argu-

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ments have regarded it, do *not find much difficulty in attaining a conclusion on the facts entirely satisfactory to ourselves.

The first ground of appeal on the part of W. C. Whetstone (one of the defendants below) submitted error in so much of the decree as finds that the cotton in the hands of the factors, from proceeds of which, on the 18th of February, 1866, a payment of fifteen hundred dollars ($1,500) was made by them to J. J. Jackson, was a part of and belonged to the estate of the testator, C. A. Gates, "not being the profits accruing from such estate during the widowhood of Mrs. Barbara Gates," with whom the said Jackson, in August, 1863, intermarried.

While we agree with the Circuit Judge as to the right of property in the said cotton, we do not concur in the legal consequences which he deduces from it as affecting the payment of the said money to Jackson.

We do not perceive upon what principle Whetstone, the executor, can be made liable for the receipt by the husband of the executrix of money found by the decree to belong to the estate which they both represented. It is true that if an executor, of his own will, turns over to a co-executor a fund in his hands belonging to the estate of his testator, or by his act removes it from his own sole control and subjects it to the common control of himself and his co-executor, he

will, in the language of O'Neall, J., in Administrators of Johnson v. Johnson (2 Hill Eq. 288, [29 Am. Dec. 72]) "be generally responsible for its administration." The whole scope of the English and American authorities referred to in the opinion of the Court in that case and the decision itself extend the doctrine no farther.

In this State the Courts have not held an executor liable for the acts of his co-executor to which he has not contributed in some direct and active way, so as by his interference to afford not only countenance, but co-operation. Such will be found to be the result on an examination of all the cases where the point has been brought into discussion. In Lenoir v. Winn, (4 DeS., 65 [6 Am. Dec. 597]) it was held "that executors and administrators are not liable for each other's acts unless there be connivance or gross negligence." To the same effect is Knox v. Picket, (4 DeS., 92.) In O'Neall v. Herbert, (McM., Eq., 497.) Harper, Chancellor, delivering the opinion of the Court, said: "The general rule of this Court is, that one executor is not liable for the assets which come into the hands of his co-

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executor *unless under particular circumstances, such as having paid them over to him, having joined in a misapplication of them, or having joined in a receipt by which he enables him to receive them." In Gayden v. Gayden, (ib., 435.) the same principle was announced and on the hearing of the appeal, after the case had been again tried on the circuit, the same Chancellor, pronouncing the opinion of the appellate Court, at page 444, said: "It is said in the former opinion of this Court that one administrator is not liable for the acts of another in which he did not concur. As this seems to have misled, and perhaps was calculated to mislead, the parties, we have thought it proper to give the subject a full and thorough examination. In many authorities, as well as in the case of O'Neall v. Herbert, referred to, it is expressly held, both with regard to executors and administrators, that they are not liable for each other's acts. Though at law both may be jointly liable on their bond, yet this Court discriminates and charges each with his own proper defaults."

In Atcheson v. Robertson, (3 Rich. Eq.,) Chancellor Dunkin, delivering the opinion of the Court, at page 137 [55 Am. Dec. 634] says: "If an executor, having received funds of the estate, pays or delivers them over to his co-executor, or joins in a misapplication of them, or joins in a receipt which enables his co-executor to receive them, he may be made responsible; but the general rule of the Court, as declared in O'Neall v. Herbert, is that one executor is not liable for the assets which come into the hands of his co-executor, and the same rule was applied to joint administrators in Gayden v. Gayden.

In Clarke v. Jenkins, (3 Rich. Eq. 341,) Chancellor Wardlaw, delivering the opinion of the Court, said: "Every executor has a several right to receive the assets of the estate, and he who receives is exclusively answerable for the misapplication of them, unless his co-executors have contributed to enable him to get possession of them, or acquiesced in his appropriation of them, contrary to the trusts of the will, knowing of such misapplication."

Whatever control the executrix acquired over the estate by virtue of her office vested in Jackson on their intermarriage to the same extent as held by her.—1 Williams on Executors, 788; 2 ibid, 827. When the cotton was in the hands of the factors, it was held by them "to the credit of the estate of C. A. Gates." Each of the executors had a right to draw against it, and an order for its

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pay*ment did not require the signature of both.—Gage v. Administrators of Johnson, 1 McC., 492. The children were all minors, without guardians, and if Jackson neglected any duty in relation to the money which he received, it was in not investing it in some good and valid security. He and Whetstone stand in the same relation to the money drawn by each from the factors of the cotton proceeds. Whetstone could have no more compelled him to pay to him whatever sum be so received than he, Jackson, could have required Whetstone to account to him for the funds which he had drawn from the same source. No act of Whetstone is shown which contributed to the payment of the money to Jackson, and his mere passive course in withholding his interposition is not enough to render him responsible.

In regard to the notes due the estate, and uncollected, there was no evidence to show that the parties were doubtful, much less insolvent, and the consequence of their loss must fall on the executor, who, having them in his hands, made no endeavor to realize the amounts on them. We agree with the Circuit Judge in overruling the exception of the plaintiffs as to so much of the report of the Referee as recommends that the executor shall not be charged with the one hundred dollars ($100) in the account of 1867, the price of a horse then sold by him, for the reasons given by the Referee in his report. We do not see why the costs of the case should be thrown on the estate. Except as to those of Jackson and wife, which must be paid by them, they must be borne by the appellant, Whetstone.

The case is remanded to the Circuit Court, with leave to the plaintiff, if they desire, to take an order against the said Jackson, for an account of the fifteen hundred dollars ($1,500) received by him from proceeds of the cotton, with interest, and for any other assets of the estate which may have come to his hands, and for any other orders neces-

sary to give effect to the judgment of the said Court hereby and herein modified.

MOSES, C. J., and WILLARD, A. J., concurred.

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8 S. C. *249

*GUFFIN v. INGRAM.

(Columbia, April Term, 1876.)

[*Execution* ⇐155.]

An action cannot be maintained by the successor in office of a Sheriff upon a bond given by a defendant in execution to the Sheriff for the delivery to him or his Deputy of property levied upon under the execution and left with the defendant therein.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 425–433; Dec. Dig. ⇐155.]

[*Execution* ⇐155.]

A bond given by a defendant in execution to a Sheriff for property levied upon under the execution is a mere personal obligation for the indemnity of the Sheriff and not an official bond which passes to his successor in office.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 425; Dec. Dig. ⇐155.]

Before Cooke, J., at Abbeville, January Term, 1876.

This was an action by L. P. Guffin, as Sheriff of Abbeville County, against J. Boyd Ingram and Thomas Stuart.

The case was as follows:

In the year 1871, H. S. Cason was Sheriff of Abbeville County, and had in his office one or more executions against the property of Nathan Ingram, which he had levied upon the property mentioned in the bond upon which this action was brought. The property was left in the possession of the defendant in execution, and, on November 5, 1871, Cason took from him and the defendants above named, J. Boyd Ingram and Thomas Stuart, the bond, of which the following is a copy:

State of South Carolina, Abbeville County.

Whereas H. S. Cason, Sheriff of Abbeville County, by virtue of a legal process to me directed, requiring me to levy on all the property of Nathan Ingram, both personal and real, found on his premises or in his possession, have this day, in obedience to said order, levied upon the following property, to wit:

N. Ingram's—1 mule, (black mare,) 125 bushels corn, about 1,500 pounds fodder, 1 wagon, 2 cows, 1 gun, 15 bushels wheat; also property claimed by J. Boyd Ingram, on which a protest is entered: 2 mules, 2 cows, 2 yearlings, about 2,500 pounds fodder, 200 bushels corn, 6 pork hogs, 4,000 pounds seed cotton; also upon tract of land known as the Home tract; and, also, land (J. B. Ingram claims) known as the Fuller tract.

And whereas we, the undersigned, Nathan Ingram, J. B. Ingram and Thomas Stuart, do hereby acknowledge a levy upon the above named personal property, as also upon the

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real estate, and bind *ourselves to deliver the above property to said H. S. Cason, at Abbeville C. H., at any future time required by said H. S. Cason or his Deputy.

In witness whereof we bind ourselves in the sum of eight hundred and sixty-two dollars, ($862,) should we fail to comply with the above obligation, this fifth day of November, one thousand eight hundred and seventy-one.

(Signed.)	N. Ingram.	[L. S.]
(Signed.)	J. B. Ingram.	[L. S.]
(Signed.)	Thos. Stuart.	[L. S.]

Witness:

Ed. Moore.

Nathan Ingram died intestate and insolvent, leaving sundry judgments against him unsatisfied. After his death, the two parcels of land were sold by the Sheriff as his property. They brought merely nominal prices.

The plaintiff in this action became the successor in office of H. S. Cason. The bond above recited was turned over to him, and on the 11th day of March, 1875, he commenced this action thereon,—having first given notice to each of the defendants that he demanded of him the delivery of the property or payment of the sum mentioned in the bond.

When the plaintiff rested, the defendant moved for a nonsuit on the grounds—

1. That the bond sued on was unauthorized by law.

2. That it was not assignable, and, as a fact, had not been assigned.

His Honor the presiding Judge granted the motion, and the plaintiff appealed.

Perrin & Cothran, for appellants, contended that the bond sued on was good and valid in law.—2 Bl. Com., 340; Bac. Abr., Conditions, K. B.

The bond was not assignable.—Smith v. Cooke & Norris, 2 McM., 58.

The law requires the outgoing Sheriff to turn over to his successor "all original bonds officially taken by him, (Rev. Stat., § 16, Ch. 20,) and the bond sued on is included in those terms. The plaintiff could, if necessary, maintain the action as the trustee of an express trust.—Code, § 136.

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*Thomson & Burt, contra:

1. That the law makes no provision for a Sheriff's taking a bond like that on which suit has been brought; that it is altogther personal and unofficial, and is discountenanced, if not illegal—2 Bay, 67; 3 Hill, 170; 2 Speer, 19.

No provision for postponing the sale of property under an execution.—Rev. Stat., 165, § 42.

2. That the bond is not assignable; nor can it be enforced by this plaintiff, who has no interest in it; that the only parties who can sue on behalf of others are: 1 Execu-

tors and administrators; 2. Trustees of an express trust, with whom, or in whose name, a contract is made for the benefit of another. —Rev. Stat., p. 594, § 136; 3. Persons authorized by statute to sue—of whom a list is given in 1 Tillinghast & Shearman, 459. The Sheriff is not of the number.—1 Waite's Pr., 102-104.

3. The Sheriff may, however, sue in some cases under the attachment law.—Rev. Stat., 624, 627.

4. The Code does not authorize the assignment of any right of action not assignable before.—1 Tillinghast & Shearman, 449; 1 Waite's Pr., 91, and cases cited.

And it is a general rule, capable of practical application, that the party who will be directly benefitted by the successful prosecution of an action, and who will be entitled to receive the damages recovered, is the proper party to be made the plaintiff in the action. —1 Waite's Pr., 89; Hastings v. McKinley, 1 E. D. Smith, 273.

5. The only bonds required to be transferred by the Sheriff to his successor are "original bonds officially taken by him."—Rev. Stat., 160, § 16.

July 26, 1876. The opinion of the Court was delivered by

MOSES, C. J. H. S. Cason, Sheriff of Abbeville County, by virtue of execution in his hands against one N. Ingram, levied on a mule, some corn, a wagon, a gun, two cows, some wheat, also the following property claimed by J. Boyd Ingram, "against which a protest was entered," viz.: two mules, two cows, two yearlings, fodder, corn, six pork hogs and some seed cotton, also a tract of land known as the Home tract, and land (the Fuller tract) claimed by said J. B. Ingram.

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*On the 5th November, 1871, N. Ingram, with J. B. Ingram and Thomas Stuart as his sureties, executed an instrument, under seal, reciting the statement above made, and, acknowledging a levy as well on the personal as real property, bound themselves to deliver the said property to said H. S. Cason, at Abbeville Court House, at any future time required by him or his Deputy; and also bound themselves in the sum of $862 should they "fail to comply with the above obligation."

N. Ingram soon after died intestate and insolvent, with sundry unsatisfied judgments against him. The land was sold and brought the nominal sum of five dollars. On February 5th, 1875, J. B. Ingram and Thomas Stuart were each served with a notice from L. P. Guffin, Sheriff of Abbeville County, referring to the execution of the said instrument to his predecessors in office, and demanding the protection and delivery of the said property, or the payment into his office of the sum stipulated in the said obligation. No delivery having been made, this action was brought against them on 11th March, 1875. After the plaintiff had closed his case a nonsuit was moved for and granted on the ground that there was no right of action in the plaintiff, who could not, therefore, maintain the suit. To set aside the nonsuit is the purpose of the motion now before us.

The bond may be admitted to be a good one at common law. It does not follow because it may not be authorized by any positive statute that it is not valid and of effect between the immediate parties and their representatives. Nor is it necessary to inquire whether the instrument in question was assignable, because it is not claimed to be held by any title derived through an assignment.

The bond itself has none of the characteristics of an official bond. It is not payable to Cason and his successors in office, and on its face is but a personal obligation to him.

It is contended, however, that, by the operation of certain statutes, bonds "officially taken" by a Sheriff are transmitted to his successor. This must be readily conceded, for such is the statutory provision. It nevertheless leaves the inquiry still open, whether this is a bond taken by a Sheriff in his official capacity, or whether it is anything but a mere personal contract, securing him against the loss or risk he incurs by leaving the property levied on in the possession of the defendant in execution. By the levy the title vested in the Sheriff. He might have

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permitted the chattels to have re*mained in the hands of the defendant without any security for its delivery. The bond was but the means of insuring himself against any loss which might ensue from the wrongful conversion of the property by those in whose hands he had left it.

By the 16th Section of Chapter XX of General Statutes, p. 160, following the Act of 1839, (11 Stat. at Large 27,) it is made "the duty of every Sheriff to turn over to his successor all the furniture appertaining to his office, the original writ book and sale book, and also the original execution book, or a correct certified copy thereof, and also all original bonds officially taken by him, all mesne process not served, and all final processes partially or wholly executed;" and by the 55th Section of the same Chapter, (General Statutes, 168,) he is required "to turn over to his successor all money remaining in his hands as Sheriff within one month from the time his successor shall have entered on the duties of his office, and in the same manner as he is required to turn over to his successor the furniture, books, bonds, processes and other papers." When this provision, which was but the re-enactment of the first Section of the Act of 1839, (12 Stat., 788,) was adopted, no transfer of any papers to the succeeding Sheriff was required, except those specially named; the words "other papers" are, therefore, without meaning

and cannot be held to extend to papers not at the time required to be so transferred. Besides, bonds are referred to as distinct instruments in his hands, taken and held by virtue of his office, for they are designated as "original bonds officially taken by him."

Can a bond or any instrument taken by a Sheriff which the law does not require him to accept in discharge of some duty which it imposes attach to it the incidents and elements which belong to that class of bonds which are directed or authorized by law and therefore regarded as official? In the matter of Connor, (12 Rich., 349,) such a bond as the one before us was declared to be only voluntary "and not authorized by law." In Underwood v. Jacobs, (3 McC. 447,) it was held that "no privity exists between a Sheriff and his successor but what is created by statute, and it has never yet been extended to actions accruing to him by contract, tort or any other cause." In the last case it was sought, in an action by a succeeding Sheriff, to make a bidder at a sale of land by a preceding Sheriff liable for the difference on a second sale, he not having complied with the terms of the first. The Court could not see how any interest accrued to the succeeding

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Sheriff from the failure *of the defendant to pay his bid to the Sheriff with whom he had contracted. So, here, what possible interest had Guffin in the bond now sued on? The liability for not taking the property levied on into possession and selling it at the next sales day attached on Cason and the sureties on his official bond. Guffin was in no way bound for the default of Cason in not making the sale as required by law. In fact, the levy by Cason was prima facie satisfaction of the execution on which it was made, and it devolved on him to show how and why it had failed to produce it. Suppose, after the levy, he had delivered the chattels to a third person for safe keeping, and had taken a bond for their delivery on demand, —will it be contended that the relative right and obligations of such a bond would have been at all different from those which are incident to the one before us? and it will scarcely be claimed that a succeeding Sheriff by virtue of his office, could maintain an action on such a bond.

The Code, by its 134th Section, declares that "every action must be prosecuted in the name of the real party in interest, except as otherwise provided in Section 136," which is as follows: "An executor or administrator, a trustee of an express trust, or a person expressly authorized by statute, may sue without joining with him the person for whose benefit the action is prosecuted." As Guffin does not come within the description of persons authorized to sue under this last Section, what possible interest has he as Sheriff in said bond through which he can prosecute an action on it by virtue of the Section first referred to? He is not responsible for the property levied on by his predecessor, which never came into his possession by any transfer or delivery. If the bond had been retained by Cason, and the demand for its possession by Guffin refused, in right of what interest would he have attempted to enforce its delivery by an action? The act of Cason in leaving the levied property in the hands of the defendant, at the risk of conversion by him, has rendered Cason liable for the value of it to the plaintiff in the execution. He took the bond for his security against the consequence of the very wrong which has followed, and has, therefore, besides the nominal interest as the obligee on the face of it, the real interest which its execution was intended to confer.

It may be that the plaintiff in the execution has such an interest in the bond as might enable him to maintain an action in the event of its assignment to him, or, on the refusal

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of Cason to *assign, to compel him to do so, and thus enable him to enforce a security in which he has an interest. With that question, however, we have nothing to do. It is enough that we cannot perceive in what way, by what relation, by what statutory enactment, Guffin can be so connected with this bond as to maintain an action on it by virtue of an official interest which he has in it as the Sheriff.

The motion is dismissed.

WRIGHT, A. J., concurred.

WILLARD, A. J., dissenting. The plaintiff sues as Sheriff upon a bond given to his predecessor in office and turned over to him as Sheriff. The plaintiff was nonsuited, and now moves to set the nonsuit aside. Cason, the late Sheriff, levied on property of N. Ingram, under an execution against his property, and left the property in the possession of the judgment debtor, taking an obligation on the part of Ingram, in which the defendants joined as sureties, to the effect that the property should be returned to the Sheriff at any time on demand. The instrument in question was sealed, and contained a penalty or an ascertained sum of money, and must be regarded as a bond.

It appears that the bond was forfeited; that the property is wasted and lost, and that the judgment debtor has died insolvent.

No question is made as to the right of Cason, the late Sheriff, to sue upon the bond; but it is said that it is not assignable, and has not been, in fact, assigned, and that the present Sheriff had no right of action upon it. Section 16, at page 160, of the General Statutes provides: "That it shall be the duty of every Sheriff to turn over to his successor all the furniture appertaining to his office, the original writ book and sale book, and also the original execution book, or a

correct certified copy thereof, and also all original bonds officially taken by him, also all mesne process not served, and all final process partially or wholly unexecuted."

Section 55, on page 168, of the General Statutes refers to this Section as if the additional words "other papers" were contained in it.

It is clear that the statute intended not only to make all bonds answering the description assignable, but also to make the act of turning them over a good and valid assignment of them. Unless it means this, it is without practical efficiency to accomplish

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the end *intended, namely, to put the new Sheriff in the same position as that occupied by the retiring Sheriff as regards the possession of the means of enforcing the process of the Court.

The only question that remains is, whether the bond in suit is of the class included in those described by the Act.

The Act embraces all bonds taken by him officially—that is in the character of Sheriff. There is nothing in the language or intent of the statute to confine it to bonds which the Sheriff is specially authorized to take by law. Such is not the plain import, while the intent of the statute demands the fullest transfer of all that may be essential to the protection of the judgment creditor.

The bond in suit is undoubtedly within the description, and must therefore be regarded both as assignable and as already assigned.

The nonsuit should be set aside and the cause remanded for further proceedings.

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8 S. C. 256

CLARKE v. HARPER.

(Columbia. April Term, 1876.)

[*Appeal and Error* ⇨248.]

The Supreme Court has no jurisdiction to hear a case on appeal from the Circuit Court unless it appears that some question of law was raised during the trial which is charged to have been erroneously ruled by the Judge, and which was brought by exception or otherwise to his notice before the trial closed.

[Ed. Note.—Cited in Coleman v. Heller, 13 S. C. 494.

For other cases, see Appeal and Error, Cent. Dig. § 1432; Dec. Dig. ⇨248.]

Before Reed, J., at Charleston, November, 1875.

This was an action by George W. Clark against James Harper to recover the amount alleged to be due on a draft for $250, drawn by John B. Harper on the defendant, payable to the order of Stephen Owens, at twelve months, dated January 1st, 1869, accepted by the defendant and endorsed by the payee in blank.

The defense was that the draft was taken by Owens as the agent of the plaintiff; that it was without consideration, illegal, fraudulent and void.

No exception was taken during the trial to any ruling of the Judge, nor to his charge

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to the jury. The jury found for the *plaintiff the amount of the draft, and the defendant moved for a new trial, which was refused.

An appeal was then taken by the defendant to this Court.

Maurice, for appellant.

Smythe, contra.

August 4, 1876. The opinion of the Court was delivered by

WRIGHT, A. J. The appellant in this action asked the presiding Judge to charge the jury in a certain manner. The Judge charged the jury, and no exception was taken to such charge; but, after a verdict had been rendered, the appellant moved on the minutes of the Judge to set aside the verdict and grant a new trial, which was refused, and from that order an appeal is taken to this Court.

During the trial of the cause there were no exceptions taken to the ruling or charge of the Judge by the appellant; therefore no question of law is involved that he has the right to discuss before this Court. This Court, being constituted "a Court for the correction of errors at law," in such cases cannot review on appeal a case where no exception is taken or error of law charged and brought to the attention of the Judge below at the proper time. The cases are so numerous in which this doctrine has been held by this Court that further argument is unnecessary.

The motion to dismiss the appeal must be granted.

WILLARD, A. J., concurred.

MOSES, C. J., concurred and filed the following separate opinion:

MOSES, C. J. I am so far from being satisfied with the law, as laid down by the presiding Judge as the governing principle which was to be applied to the facts by the jury, that I have examined the brief with much care to see if we were at liberty to set the verdict aside by reason of the errors of law averred by the appellant to have been made in the charge. As is said in the opinion of the Court, pronounced by my associate, "this Court is one for the correction of errors at law." In chancery cases it has a more enlarged jurisdiction. What is required to entitle a party to be heard here in a law case on allegations of error in the charge of a

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Circuit *Judge has been declared in numerous decisions to be found in our reports.

A most careful revision of the brief has failed to discover an exception to any proposition expressed in the charge or to any refusal to charge on request made. I do not confine myself to a definite, formal or certain request, but there was nothing brought

to the view of the Court from which the exceptions now insisted on could have been implied.

In South Carolina Railroad Company v. Wilmington, Columbia and Augusta Railroad Company, [7 S. C. 410] (MS. decision, November Term, 1875,) it is said: "It should appear by the record that the Court was apprised that the party intended to rely on the propositions advanced by way of exception. In the present case, that fact appears by the language of the charge itself, and there is a substantial compliance with the rule in question."

In the case now before us I fail to perceive anything in the record from which such an intention can be inferred. I must, therefore, concur in the order to dismiss the motion.

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8 S. C. 258

LYLES v. BOLLES.

(Columbia. April Term, 1876.)

[*Sheriffs and Constables* ⟸121.]

An action will not lie against a sheriff or his sureties for the negligence of the former in failing to take a bond from the defendant for the forthcoming of the chattel sued for in an action of trover under an order made under the Act of December, 1839, unless it appears that the plaintiff in the action of trover recovered a judgment against the defendant therein.

[Ed. Note.—For other cases, see Sheriffs and Constables, Cent. Dig. § 219; Dec. Dig. ⟸ 121.]

[*Judgment* ⟸489.]

A judgment which is void for want of authority in the officer to pronounce it may be impeached collaterally by third parties whenever it comes in issue before the Court.

[Ed. Note.—Cited in Archer v. Long, 38 S. C. 277, 16 S. E. 998.

For other cases, see Judgment, Cent. Dig. § 924; Dec. Dig. ⟸489.]

[*Judgment* ⟸11.]

A judge has no jurisdiction at chambers to make an order for judgment in an action of trover, even though he hears the case with the consent of the parties, and a judgment entered upon such order would be null and void.

[Ed. Note.—Cited in Turner v. Malone, 24 S. C. 406.

For other cases, see Judgment, Cent. Dig. § 14½; Dec. Dig. ⟸11.]

[*Trial* ⟸139.]

Under a general denial in the answer of each and every allegation of the complaint, a nonsuit may be granted upon failure of the plaintiff to prove a case.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 332, 333, 338–341, 365; Dec. Dig. ⟸ 139.]

[*Pleading* ⟸382.]

Under a general denial of the allegations of the complaint, the defendant may give in evidence anything which contradicts, or tends to contradict, the plaintiff's proof, or to disprove the case made by him, but he cannot give in evidence a distinct affirmative defense.

[Ed. Note.—Cited in Paris v. DuPre, 17 S. C. 287; McClendon v. Wells, 20 S. C. 522.

For other cases, see Pleading, Cent. Dig. § 1281; Dec. Dig. ⟸382.]

Before Carpenter, J., at Edgefield, June Term, 1874.

This was an action by M. W. Lyles against Isaac Bolles, late Sheriff of Edgefield county, and L. G. Holloway, John Trapp, *and others, sureties on his official bond, to recover damages for the alleged negligence of the said Isaac Bolles in failing to take a bond from one L. A. Tully in an action of trover which Lyles had brought against him.

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The case was as follows:

The complaint alleged that on March 18, 1868, M. W. Lyles, the plaintiff, commenced an action against one L. A. Tully for the conversion of certain chattels; that on the next day he procured from the Clerk of the Court, S. Harrison, the trover order usual in such cases; that the said Isaac Bolles was at that time Sheriff of said County, and neglected to comply with the order of the Clerk requiring him to take a bond for the production of the chattels sued for; that thereby the plaintiff's demand was lost; that the plaintiff obtained judgment against the said Tully, and issued execution thereon, and that a return of nulla bona has been made on said execution. The complaint demanded judgment against the defendant for the amount of the judgment against Tully, with interest and costs.

The answer denied "each and every allegation of the complaint," and pleaded the Statute of Limitations.

The plaintiff gave in evidence what purported to be the original writ in trover, with an order endorsed thereon, signed S. Harrison, Clerk, requiring the Sheriff to arrest the defendant therein and compel him to give security for the production of the chattels sued for. He also gave in evidence the declaration filed in said action of trover, and a written decision thereon made by Judge Melton at chambers, dated April 12th, 1872, for $844, and interest from March 18, 1868, in favor of the plaintiff. This decision recited that, the defendant having consented to a judgment of $844, "it is therefore ordered that the plaintiff have judgment against the defendant accordingly."

A writ of fieri facias, founded upon said written decision, with a return of nulla bona thereon, dated 29th April, 1872, was next offered in evidence.

The defendant objected to the introduction of all the above stated papers, and especially to the decision at chambers of Judge Melton, upon the ground that a Judge has no jurisdiction at chambers to make order for judgment in an action of trover, and to the writ of fieri facias on the ground that there was no judgment to authorize its being issued

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*At the close of the plaintiff's case the defendant moved for a nonsuit, upon the ground, amongst others, that no judgment in the action of trover had been proved.

The plaintiff contended that no formal entry of judgment is necessary where an order for judgment is made by consent, and that the objection to the want of a judgment could not be raised under the general denial contained in the answer.

His Honor the presiding Judge granted the motion, and the plaintiff appealed on the grounds:

1. That it is not necessary to enter formal judgment upon a written decision made by a Judge by consent of parties plaintiff and defendant.

2. That in order to maintain his action the plaintiff was not bound to prove the entry of judgment.

3. That under the general denial contained in the answer the defendant could not raise the objection of the omission to enter judgment.

4. That such omission was a mere irregularity, and His Honor should have allowed the plaintiff to enter the judgment nunc pro tunc if necessary, to maintain the action.

Bacon, for appellant, contended that the nonsuit should not have been granted under the general denial contained in the answer, and he cited Catlin v. Gunter, 1 Duer, 266; Ayrault v. Chamberlain, 33 Barb., 237; Rappaule v. Stuart, 27 N. Y., 330; Morrill v. Irving Fire Company, 33 N. Y., 429.

Under a general denial, defendant cannot insist that plaintiff is a married woman.—Dillaye v. Parks, 31 Barb., 132. Nor upon the defense of usury.—Fay v. Grinstead, 10 Barb., 32. Nor upon illegality in the contract.—Potts v. Spearman, 3 Dowl. Pl., 630. Nor upon anything which confesses and avoids.—McCrying v. Bull, 16 N. Y., 297.

He also cited Davidson v. Powell, Von Stantf. Eq., 206, 207, and other authorities.

Youmans & Sheppard, contra:

The consent order for judgment at chambers was coram non judice, and is, therefore, null and void.—A. A. 1818, 7 Stat., 324; A. A. 1836, 7 Stat., 340; A. A. 1837, 7 Stat., 344,

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§ 9; Treasurers *v. Bates, 2 Bail., 380–1; Gregg v. Biggam, 1 Hill, 299; Gallman v. Gallman, 5 Strob., 209. It is a mere agreement of the parties.—Allen v. Richards, 9 Rich. Eq., 56; Wiseman & Finley v. Hunter, 14 Rich. Eq., 172. The entire proceeding in Lyles v. Tully may be impeached collaterally by Bolles.—Ingram v. Beck, 2 Rich., 112; Maddox v. Williams, 1 Strob., 23–25; 3 How. U. S. R., 762, and other authorities.

August 4, 1876. The opinion of the Court was delivered by

MOSES, C. J. The complaint charges a liability, arising from the default of Bolles while Sheriff,—on whose official bond the other respondents were sureties,—in not executing an order alleged to have been made by the Clerk of the Court for Edgefield County, in action of trover brought by the appellant against one L. A. Tully, under the twentieth Section of the Act of 21st December, 1839, "concerning the office and duties of Clerks, Registers of Mesne Conveyance and Commissioners of Location."—12 Stat. at Large, 70. The order authorized by the said Act required Bolles, as sheriff, to arrest the defendant "in the action of trover and cause him to enter into bond, with sufficient security, for the production of the chattel sued for, to satisfy the plaintiff's judgment in case he should recover." The whole purpose of the Act was to subject the specific chattel sued for to the satisfaction of the judgment which might be recovered in the action brought for its conversion, without regard to any existing lien by execution against the defendant. The effect was to counteract the common law rule, which, on a verdict for damages in an action of trover, vested the property in the defendant, and thereby rendered it at once liable to any pre-existing execution against him, thus practically destroying all the benefit which the plaintiff anticipated from his recovery.

To sustain the action here against the respondents, it is essential that the appellant should show the recovery of a judgment in the original suit; for, if he failed to obtain one, the alleged default on the part of the Sheriff has worked no damage or wrong to him. The bond to which he was entitled through the order, under the Act, was to secure "the production of the chattel sued for, to satisfy the plaintiff's judgment in case he should recover." If he has failed to recover, no loss can possibly ensue to him from the failure of the Sheriff to execute the order.

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*To sustain the present action, it was as necessary to the appellant to show the recovery of a judgment in his trover suit against Tully as if the action was for the possession of property and a judgment was a link in his chain of title. As held in Gregg v. Bingham, (1 Hill, 302 [26 Am. Dec. 181]) in the language of O'Neall, J., delivering the opinion of the Court, in regard to certain judgments which came in issue collaterally and were averred to operate as an estoppel: "To have this effect against the defendant, he must be either party or privy to them. He is a stranger to the judgments and is concluded by nothing in them. Whatever will avoid them he may show, to prevent them from having operation against him."

The doctrine announced by Chief Justice Marshall in Rose v. Himely, (4 Cranch [241, 2 L. Ed. 608],) and affirmed in Elliott v. Peirsol et al., (1 Peters, [328, 7 L. Ed. 164],) was again declared to be the governing rule of the Supreme Court of the United States on the subject to which it related in Lessee of Hickey v. Stewart, (3 How., 762 [11 L. Ed. 814].) The Chief Justice so fully and yet concisely states the principle that any further citations from the decisions may be

spared. He says: "A sentence professing on its face to be the sentence of a judicial tribunal, if rendered by a self-constituted body, or a body not empowered by its government to take cognizance of the subject it had decided, could have no legal effect whatever. The power of the Court, then, is, of necessity, examinable to a certain extent by that tribunal which is compelled to decide whether its sentence has changed the right of property. The power under which it acts must be looked into, and its authority to decide questions which it professes to decide must be considered."

The order for judgment in Lyles v. Tully by his Honor Judge Melton at chambers was invalid for want of authority to make it, and, as we have seen, may be impeached collaterally by the respondents when it is proposed to affect them by force of it. It has not been attempted to sustain the proceeding by an Act of the General Assembly permitting the exercise of such jurisdiction. As was said by the Court in Clawson v. Sutton Gold Mining Company, (3 S. C., 420): "Whatever may be the power of a Judge in Court, no matter how general his jurisdiction, he is limited at chambers to what by statute he is authorized to do when so sitting." Regarding, then, a judgment against the defendant in the trover case essential to the right of action by the appellant against the Sheriff and his sureties for his alleged

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neglect in not requiring the *bond as directed by the order, and no valid judgment being shown, the only remaining question to be considered is whether the respondents can avail themselves of the deficiency of proof on the part of the appellant by a motion for nonsuit under the general denial in the answer of each and every allegation of the complaint.

It may be true, as said in the argument on behalf of the appellant, that "the answer must allege all those" facts which, when the cause of the plaintiff is "admitted or proved, the defendant must prove in order to defeat a recovery." It must be remembered, however, that here the order on the motion for nonsuit was based upon the failure of the plaintiff to prove his case. The defendants did not offer to prove anything, "which confessed and avoided the action." Under their general denial they would not be allowed to submit testimony in support of a defense which, while it sought to avoid the charge of the complaint, was necessarily forced first to confess it.

The nature and office of the "general denial, and the issues raised by it," have been so fully examined, and the principles by which they are to be governed, as derived both from the language of the Code and the decisions in regard to them, so well discussed by Mr. Pomeroy in the third Section of the fourth Chapter of his work on Remedies and Remedial Rights, that further examination may be well superseded by a mere reference to his conclusions on the subject. The profession is under great obligation to this gentleman for the benefit he has conferred by his late treatise on a system of procedure comparatively new and depending on the constitution of the Courts for the proper practical operation of various of its provisions. After a very minute reference to the cases, he appears to adopt the view of the Supreme Court of New York in the decisions to which he refers in his 660th Section "as describing, in a brief but very accurate manner, the office of the general denial," as follows: "Under a denial of the allegations of the complaint, the defendant may introduce any evidence which goes to controvert the facts which the plaintiff is bound to establish in order to sustain his action. Under the general denial of the Code, evidence of a distinct affirmative defense is not admissible; the only evidence which the defendant is entitled to give is limited to a contradiction of the plaintiff's proof and to the disproval of the case made by him."

The motion is dismissed.

WRIGHT, A. J., and WILLARD, A. J., concurred.

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8 S. C. *264

*Ex parte BARNWELL.

(Columbia. May, 1876.)

[*Mandamus* ⇐103.]

Mandamus does not lie to compel the Treasurer of the State to issue, under the Act of December, 1873, "to reduce the volume of the public debt and provide for the payment of the same," a bond or certificate of stock for one-half the amount of interest claimed by the holder to have accrued after its maturity on a certificate of stock which had been issued under the Act of June, 1838, for rebuilding the city of Charleston, and which by its terms was redeemable in 1870, and bore no interest on its face after that time.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 220; Dec. Dig. ⇐103.]

[*Mandamus* ⇐3.]

Mandamus does not lie to compel an officer to perform an act where it is at least doubtful whether it is his duty, under the terms of the law which is claimed to have created the duty, to perform it.

[Ed. Note.—Cited in State ex rel. Fouche v. Verner, 30 S. C. 279, 280, 284, 9 S. E. 113.

For other cases, see Mandamus, Cent. Dig. § 8; Dec. Dig. ⇐3.]

This was a petition by Catherine O. Barnwell to the Supreme Court for a writ of mandamus against the State Treasurer to compel him to issue to her a bond or certificate of stock for one-half the amount of interest claimed to be due to her by the State on a certain certificate of stock issued under the

Act of June 1, 1838, "for rebuilding the city of Charleston," and which was held by her as guardian.

The facts of the case are fully stated in the opinion of the Court.

Magrath, for petitioner:

The claim of the petitioner is for certain interest which she claims to be due to her as the holder of a certain certificate of stock, and is presented, in the language of the Act of the 22d December, 1873, for "interest orders upon interest due upon certain certificates of stock, as aforesaid, to the date aforesaid." The question for this Court is whether upon a certificate of stock redeemable in 1870, but not redeemed, interest is due to the 1st of January, 1874, when it was redeemed. In other words, can interest be claimed as such on a debt after it is due?

In Langton v. The South Carolina Railroad Company, (2 S. C. 248,) this Court ruled that in a bond bearing interest at six per cent., if default be made in payment, the legal rate of interest will be allowed. In that case the Court said "the principle has been too long established to be the subject of doubt at this day" that it will be allowed,—however hitherto it had been doubted whether it was to be recovered as interest under the contract or as compensation in the way of damages for the detention of the debt. In Wistar, Siter & Price v. Robinson, (2 Bail., 274,) Judge Harper, who pronounced the opinion of the Court, allowed the interest

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*eo nomine. In Ryan v. Baldrick, (3 McC., 498,) Judge Nott said: "Why may not interest be allowed by the name of interest as well as by way of damages? * * * Interest is always given by way of damages * * * on notes of hand, bills of exchange; * * * it may be given under the name of interest. And I see no reason why it may not be given in every case of contract for * * * the payment of money, whether expressed or implied."

In Williams v. Sherman, (7 Wend., 109,) it is ruled that all contracts to pay undoubtedly give a right to interest from the time when the principal ought to be paid.

In Brainard v. Jones, 18 N. Y., (4 Smith,) 37, Judge Comstock said: "After that they were in default, and during the continuance of that default, interest is due from them as in any other case where money is not paid when the creditor becomes entitled to it."

In Aurora City v. West, (7 Wall., 105,) Judge Clifford, for the Supreme Court, said: "Interest, as a general rule, is due on a debt from the time that payment is unjustly refused. * * * Being written contracts for the payment of money, * * * it is quite apparent, on general principles, that they should draw interest after payment of the principal is unjustly neglected or refused. * * * Where there is a contract to pay money on a day fixed and the contract is broken, interest, as a general rule, is allowed."

In Morton, Bliss & Co. v. The Comptroller General, (4 S. C., 448,) this Court said: "Where a sovereign State enters into a contract of borrowing with an individual, it assumes to be bound in all particulars as an individual, under the like circumstances, would be bound—by what is expressed or properly implied by the terms of such contract. The measure of the obligation is that applied to individuals."

The Act "to reduce the volume of the public debt and provide for the payment of the same" was approved December 22, 1873. The first Section provided for the reduction of the principal; the second Section for the reduction of the interest; and the 1st of January, 1874, was designated as the time beyond which interest should not be calculated. The terms of the Act are very plain: "Which have accrued or will accrue on the 1st of January, 1874." The Act makes no distinction between the interest which has accrued or that which will accrue. The coupon, which is the evidence of interest which has accrued, is included in the description of "coupons upon the bonds before mentioned

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which have accrued." *The interest orders upon interest due upon certificates of stock to the date aforesaid are placed in the same position with the coupon.

It is impossible to conceive why the State should acknowledge its liability for the interest upon a bond and not upon the certificate of stock. The coupon of the bond and the interest order for interest on the certificate of stock differ only in the extent to which they are negotiable. The coupon represents interest due on the bond; the interest order represents interest due upon the certificate of stock; and both represent the indebtedness of the State.

The interest upon its indebtedness, as set forth in the first Section of the Act, and for which it had arranged a compromise for its settlement, was, of course, two kinds: coupons and interest orders upon interest due upon certificates of stock "which have accrued" at the time when the Act became of force or which "will accrue on the 1st of January, 1874."

The terms of the Act are as full and precise as they can be. It is the duty of the State Treasurer to receive from his petitioner the interest orders she offers to fund, according to the second Section of the Act referred to; and, as that officer has refused to do so, this Court is now asked to command him to do that which the State has required of him.

Melton, Attorney General, contra, filed a printed brief, in which he contended that, under the terms of the Act of December, 1873, it was not so clearly made the duty of the State Treasurer to issue bonds or certificates

of stock for interest which was claimed to have accrued after the original certificates became due and payable; that mandamus would not lie to compel him to issue such certificates.

The opinion of the Court was delivered by

MOSES, C. J. The petitioner, Catherine O. Barnwell, as guardian, was the holder and owner of a certificate of stock to the amount of $2,957, issued by the State under the authority and in pursuance of the Act of June 1, 1838, "for rebuilding the city of Charleston." (7 Stat. at Large, 156.) It authorized and directed the Governor, "in the name of the State, to issue bonds or other contracts, to be countersigned by the Comptroller General, not exceeding in all the sum of $2,000,000, $1,000,000 of which shall be payable at the expiration of twenty years, and the other million at the expiration of thirty years,

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at a rate of interest not exceeding *six per centum per annum, for the purpose of procuring a loan on the credit of the State to rebuild that portion of the city of Charleston now (then) lying in ruins; that the said bonds or contracts be issued in such form and for such sums, and the principal and interest be made payable at such times and places, as shall be most effectual in procuring the said loan upon the best terms, either in Europe or America; and that the faith and funds of the State of South Carolina be pledged to secure the punctual payment of the said bonds or contracts, with the interest thereon." The certificate held by the petitioner was numbered 587, dated 22d September, 1863, for the sum already stated, bearing interest at six per cent. per annum, payable quarter yearly, and redeemable in the year one thousand eight hundred and seventy. The Act under which the certificate was issued was stated and referred to on its face.

On the 22d of December, 1873, the General Assembly, by an Act entitled "An Act to reduce the volume of the public debt and provide for the payment of the same," (15 Stat. at Large, 518,) by its first Section provided for the funding of all classes of securities held against the State, including the certificates of stock issued under the Act of 1794, which were redeemable at pleasure, the certificates of stock issued under the Act of 1838, redeemable in 1870, within which was comprehended the stock held by the petitioner and other certificates of stock and bonds of the State, issued under various specified Acts, from 1856 to March 1, 1870, and redeemable at different times between 1870 and 1889. With the single exception of the stock issued under the Act of 1838. At the passage of the Act of 1873, interest was due and to become due upon all the stock and bonds to which it referred. The bonds known as the conversion bonds were excluded from the funding provision and were declared null and void.

By the said Section of the Act of 1873, the State Treasurer was authorized and required to receive from the holders willing to surrender the same all the certificates of stock and bonds of the State issued by virtue of any of the said recited Acts, and to issue to such parties in exchange for and in lieu of said bonds and stocks so surrendered other coupon bonds or certificates of stock, as they may desire, equal in amount to fifty per centum of the face value of the bonds or certificates of stock so surrendered.

The second Section of the Act provides for the funding in the like manner of the coupons which have accrued or would accrue on

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*the 1st January, 1874, and "the interest orders upon interest due upon certificates of stock as aforesaid to the date aforesaid."

The petitioner, on presenting her said certificate to the Treasurer, received in exchange therefor another certificate for the sum of $1,478.51 in conformity with the requirement of the said Act. He, however, refused to deliver to her a certificate for one-half of the interest due, as she contends on her original certificate, from the day on which it was redeemable to the 1st day of January, 1874, and she now seeks the aid of the Court, through its writ of mandamus, to compel on the part of the Treasurer the performance of what she avers is a duty prescribed by law and which he has no right to withhold. The respondent for cause alleges that the contract between the State and the holder of the said certificate does not expressly provide for the payment of interest which might accrue after maturity, and he is advised that the State is under no implied obligation to pay it. He submits that no duty is imposed upon him to issue certificates so demanded, wherefore he prays that the said petition be discharged.

From the course of the argument it would appear that the right of the petitioner to the writ depended on the liability of the State for interest after maturity, at the legal rate, where the contract did not so stipulate for its payment. The counsel for the petitioner, in his own language, thus states the proposition, which he submits for the determination of the Court: "The question for this Court is, whether upon a certificate of stock, redeemable in 1870, but not redeemed, interest is due to the first of January, 1874, when it was redeemed?" In other words, "can interest be claimed on such a debt after it is due?" The Attorney General, who represents the respondent, on the other hand did undertake, at great length, to show, both on principle and authority, that interest on a contract with the State was not, as in the case of an agreement between individuals, demandable, as of course, after maturity. He did, however, in a cursory way, contest the

issuing of the writ, because the right of the party to have the thing demanded is not ascertained so clearly that no doubt exists as to the duty of the officer to render it.

In our judgment the single question with which we have to deal is, whether the Legislature, by the Act of 1873, has required the State Treasurer to issue to the holders of certificates of the stock of the class surrendered by the petitioner and substituted by the

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de*livery of other stock or bonds for one-half of their face value coupon bonds or certificates of stock equal in amount to fifty per centum of the face value of the coupons or interest orders so surrendered from the ——— day of ———, 1870, to January, 1874?

The use of the term "interest orders" in the second section of the said Act, in connection with "the coupons upon the bonds," would intimate that to the certificates of stock which issued under it were attached orders for the interest, payable quarter yearly. In point of fact no such orders were attached to the certificates, and when the Legislature, through the Act, speaks of "the surrender" of such certificates, it meant nothing more than that the holder, on receiving his coupon bonds or certificate "of stock" to the amount of fifty per centum for his interest due, should deliver to the Treasurer an order to fund it as required by the Act, so that it might be shown that the interest which had accrued on his old certificate had been paid and satisfied by the delivery of the new one, in conformity with the prescribed directions.

What was the right accorded to the petitioner by the Act and the corresponding duty which it imposed upon the Treasurer? for no matter what was the right, if it was not incumbent on the Treasurer to give it effect by the performance of some duty plainly required of him, the party claiming it must be left to seek its enforcement by some further provision of the Legislature.

"To warrant a Court in granting the writ against a public officer such a state of facts must be presented as to show that the relator has a clear right to the performance of the thing demanded and that a corresponding duty rests upon the officer to perform that particular thing. So the fact that there are such difficulties in the way of performing the duty in question as to render the writ nugatory, if granted, is a sufficient objection to the exercise of the jurisdiction."—High on Extraor. Rem., 32.

"And it may be asserted, as a rule of universal application, that, in the absence of any other adequate and specific legal remedy, mandamus will lie to compel the performance of purely ministerial duties plainly incumbent upon an officer by operation of law, or by virtue of his office, and concerning which he possesses no discretionary powers. Or, in other words, whenever a specific duty is required by law of a particular officer, unattended with the exercise of any degree of official judgment, or elements of discretion, and on the performance of which individual

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rights depend, mandamus *is the appropriate remedy for a failure or refusal to perform the duty."—Ibid, § 80.

In Morton, Bliss & Co. v. the Comptroller General, (4 S. C., 472,) the Court said: "To be entitled to the writ, the relators must show that the respondent is bound to the performance of some specified duty imposed by law, of a ministerial character, and in the performance of which the relators have a legal interest." And again, at p. 473: "A duty is certain when, by law, it must be absolutely performed, and the occasion, mode and term of its exercise are fixed, so that nothing remains subject to the discretion of the officer."

It is not, however, to be understood that a specific duty can only be imposed by terms requiring the performance of some explicit and direct act. It may be created by the imposition on public officers of duties which, though general when regard is had to the whole community, become specific when they affect the legal right of an individual, for the violation or withholding of which no other adequate and sufficient remedy is provided.

The object of the Act of 1873, as its title expresses, was "to reduce the volume of the public debt and provide for the payment of the same." Its provisions extended to the whole public debt of the State, in the shape of bonds or stock, save and except the bonds known as conversion bonds, which were declared null and void.

The stock for which the petitioner held a certificate was not only then past due, but of all the securities recited on which the Act was to bear it was the only class which had matured. All of the other issues continued to bear interest, at least to the time fixed for their redemption. It is clear that in providing by the second Section for the interest, the first was only to apply to the principal. The interest on all the other bonds and stock was still accruing, because the time for their redemption had not arrived. If the stock in question had alone been the subject of the Act, the duty on the Treasurer to allow the interest until January, 1874, and deliver a coupon bond or certificate of stock for half its value would have been clear and express, admitting of no doubt as to the intention of the Legislature, and would have devolved on the Treasurer a duty which the Court would have enforced. Embracing the bonds and certificates not due, and on which interest was still running against the State, leaves the question in so much doubt that to allow the writ would be in direct contra-

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diction "of *a fundamental rule underlying the entire jurisdiction of mandamus, and specially applicable in determining the limits to the exercise of the jurisdiction over public

officers. That rule is, that in all matters requiring the exercise of official judgment, or resting on the sound discretion of a person to whom a duty is confided by law, mandamus will not lie either to control the exercise of that discretion or determine upon the decision which shall be formally given."—High on Ex. Rem., § 62.

The words of the Act, however, leave the intention of the Legislature questionable, and to grant the writ would impose on the Treasurer a responsibility to which he should not be subjected, unless the construction contended for by the petitioner admitted of no doubt. The bonds not yet due carry coupons for the interest until their maturity. On the certificates of stock not yet redeemable, interest, by the promise on their face, is payable until they fall due. The first day of January, 1874, was fixed as the common day on which all the coupons then due were to be substituted by the issue of coupon bonds or certificates of stock (as the holder might desire) "equal in amount to fifty per centum of the face value of the coupons surrendered." So, of the interest of the stock falling due up to and on the said day, no difficulty can arise as to the ministerial duty which devolves on the Treasurer as to such interest; but as to interest on bonds or stocks accruing after the time the principal falls due, the judgment of the Treasurer must be exercised to determine not only whether such interest is due by the State, but whether he is required by the terms of the Act to provide for it by the issue of new coupon bonds or certificates of stock to the amount of fifty per centum of its face value.

The doubt is by no means removed when it appears that the General Assembly, in providing for claims against the State, in many instances, has not only directed the payment of the principal, but also the interest which had accrued on them from the time they fell due. When, therefore, no instruction is given as to the interest, no presumption of any acknowledgment of liability for it should arise against the State from the absence of an express provision in regard to it.

Though the State could not rightfully subject the holder of the bonds or stocks to the alternative of accepting its provisions as the condition of a payment of any portion of

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them, or submitting to *the loss of the whole, still if he does accept what must be viewed in the light of a compromise he must be held to the terms of the Act. A positive and immediate benefit was tendered to him by the stipulation for an annual tax for the payment of the interest and the redemption of the principal, while the loss of the whole was endangered by the proviso to the third Section: "That no tax shall ever be levied to pay the interest or principal on any of the class of bonds or certificates of stock mentioned in the first Section as long as such bonds or certificates of stock remain outstanding in their present form." The creditor was without remedy to enforce his demand against the State, and, though its "faith and funds were pledged to secure the said bonds and certificates," he was without power to require the exercise of the first, and was helpless as to any means of compelling the appropriation of the other to his debt. If he was content to take less than was due on the face of the obligation which he held, and the terms of the Act leave doubtful the amount of interest required to be paid him in bonds or stock by the Treasurer, his only resort is to the honor and good faith of the Legislature. That body, if it has not expressed its proposed purpose so as to carry out the end it contemplated, can declare what it did intend. The Court, however, cannot undertake, by its writ of mandamus, to control the "official judgment" of the Treasurer in a matter where it must be admitted "substantial doubt exists as to the duty, the performance of which it is sought to coerce."

The motion is dismissed.

WRIGHT, A. J., and WILLARD, A. J., concurred.

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8 S. C. *273

*PIERCE, BUTLER & CO. v. JONES & SON.

(Columbia. April Term, 1876.)

[Reported and annotated in 28 Am. Rep. 288.]

[*Compositions with Creditors* ⊂⊃21.]

A written agreement, not under seal, between an insolvent firm and its creditors, whereby the former agree to accept in payment of their several and respective claims twenty-five cents on the dollar, and give clear receipts in full, provided that all the creditors of the firm shall assent to this arrangement, is a valid and binding contract, which discharges the firm, on its compliance with the terms of its agreement, from the residue of its indebtedness to any creditor of the firm receiving the twenty-five cents on the dollar.

[Ed. Note.—Cited in Arnold v. Bailey, 24 S. C. 497; Jaffray v. Steedman, 35 S. C. 41, 14 S. E. 632; Burgiss v. Westmoreland, 38 S. C. 428, 17 S. E. 56; Ex parte Zeigler, 83 S. C. 81, 64 S. E. 513, 916, 21 L. R. A. (N. S.) 1005.

For other cases, see Compositions with Creditors, Cent. Dig. § 50; Dec. Dig. ⊂⊃21.]

Before Carpenter, J., at Edgefield, November Term, 1875.

This was an action by J. J. Pierce, Butler & Co. against Thomas Jones & Son to recover the amount alleged to be due on two promissory notes given by the defendants to the plaintiffs—one for $4,000, dated March 17th, 1873, and payable on the 1st day of November thereafter, and the other for $5,820.08, dated March 16th, 1874, and payable fifteen days after date.

In the complaint it was admitted that there was a credit on March 28th, 1874, on the last mentioned note of $2,471.13.

The defendants by their answer admitted the execution and delivery of the notes, but alleged that they had been satisfied under the terms of the agreement hereinafter mentioned.

The case was referred to a Referee, "to take the testimony and hold the accounting between the parties herein, with leave to report any special matter." He reported, amongst other things, that on the 14th day of February, 1874, the defendants made an agreement with nearly all their creditors for a compromise of their several and respective claims against the defendants of twenty-five cents on the dollar; that the agreement was reduced to writing, and is in the following terms:

"Augusta, Ga., February 14, 1874.

"We, the undersigned, creditors of T. Jones & Son, hereby agree to compromise with the said T. Jones & Son for twenty-five cents on the dollar on the principal and interest of the several amounts due us, and will give them a clear receipt of all indebtedness to us and our assigns: Provided, That all persons who may hold any claim, account, note or other evidence of indebtedness shall assent to this settlement and arrangement."

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*That this agreement was signed by nearly all the creditors of defendants, the plaintiffs included; that T. Jones & Son were insolvent at the time the agreement was made; that the note sued on, dated 16th March, 1874, was given in consolidation of numerous open accounts and small drafts due and payable on and before the 14th day of February, 1874, when the agreement was made, and that said note was given subject to the terms of said agreement.

He further reported that a few small creditors of the firm of T. Jones & Co. had not signed the agreement, but that their claims had been settled with the consent of all the creditors who did sign it, and that T. Jones & Co. had complied with the terms of the said agreement by paying to each of the creditors who signed the same, the plaintiffs included, twenty-five cents on the dollar; and that all the creditors, except the plaintiffs, had in good faith carried out the terms of the said agreement.

He reported that, in his opinion, the agreement of the 14th February, 1874, was a binding contract between the parties, and that the defendants, having complied with the terms of said agreement, were discharged from all liability on the notes sued upon.

The plaintiffs excepted to the report on the ground, inter alia, that the agreement of the 14th February, 1874, was without consideration in law and was null and void, and that the defendants were not discharged by their payment to the plaintiffs of twenty-five cents on the dollar under the terms of said agreement.

His Honor the presiding Judge confirmed the report of the Referee and ordered that the complaint be dismissed and that the defendants have leave to enter up judgment and issue execution for their costs and disbursements.

The plaintiffs appealed upon the grounds:

1. Because His Honor the presiding Judge erred in holding that the agreement of February 14, 1874, was binding upon the parties and conclusive upon their rights, inasmuch as it appears that said agreement was without consideration.

2. Because His Honor erred in holding that a partial payment of a debt, liquidated and payable, and which was acknowledged to be received as payment in full, was a legal satisfaction of the whole debt.

3. Because His Honor erred in holding that a release not under seal in consideration of part payment in money of a debt past due is a discharge of the balance.

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*J. C. Sheppard, for appellants:

We maintain that the payment of a part of a debt liquidated and payable is no consideration for a promise to discharge the balance.

In the case of Eve v. Moseley, (2 Strob., 207,) the Court says: "It is not unreasonable to hold that the partial performance of a contract, which the party is legally and morally bound to perform to its entire extent, without any benefit or possibility of benefit to the other party besides that received from the mere partial performance, is not a sufficient legal consideration for an agreement to relinquish all demand for the performance of the residue of the contract."—See also Chitty on Con., 774; Co. Lit., 264; Story on Prom. Notes, § 410; Story on Con., 689; Bail. on Bills, 365; 1 Johns. Cases 131; 5 East, 230.

Whether the mere intention of the parties at the time of the execution of the said alleged agreement was that the respondents should be discharged from all future liability on account of the notes in action is not the question; the inquiry is whether an acquittance, or promise to acquit at some future time, not under seal, acknowledging the payment of one-fourth of defendants' actual liability, is a good bar.

A parol release of the whole sum on the day, in consideration of the payment of a part, is not satisfaction of the whole, because, as is said in Pinnell's case, (5 Rep., 117,) by no possibility can a lesser sum be a satisfaction to the plaintiff for a greater sum, and, as such, a parol agreement is without consideration—it is void.—Hope v. Johnson & Cavis, 11 Rich., 137; see also Corbett v. Lucas & Dotterer, 4 McC., 323; 2 Strob., 205; 3 Strob., 36; and 5 Coke's Rep., 117.

The alleged agreement, upon which respondents rely, was dated after the day on which the payment of the sums due by defendants to plaintiffs matured, and is but the payment or an agreement thereafter to pay only one-fourth of the amounts then due,

and, in the absence of a seal, which would supersede the proof of consideration, cannot operate as a discharge of the balance.

There are exceptions to the rule established by the above authorities, as where the release is under seal, or where there is something collateral showing that the party relinquishing may derive a benefit which might be an equivalent and consequently a sufficient

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consid*eration; as, for instance, the receipt of a horse, a hawk, a gold ring, or something unliquidated, has been held to be good satisfaction, as these have no settled value and may be estimated by plaintiff even beyond the amount of his debt. But the paper in question does not come within any of the exceptions recognized by our Courts.

Under these adjudications it would appear to be an act of supererogation on the part of appellants, and an offense to the understanding of the Court, to insist that the ruling of the Referee is erroneous. "That this compromise, if perfected and carried out according to its terms and the true intent and meaning of the parties to it, partakes more of the nature of an assignment by a debtor of his property for the benefit of his creditors than of a release or receipt of a part payment of the money in satisfaction of the whole debt; and the doctrine laid down in Hope v. Johnson & Cavis cannot apply to it."

But let us examine. The authority upon which the Referee relied, and upon which respondents mainly depend, is the case of Aiken v. Price, (Dud., 50). By reference to that case it will be seen that the Court distinctly sustains the doctrine laid down in Hope v. Johnson & Cavis, (11 Rich., 137). On page 52 thereof the Court says: "For an agreement to release a debt, whether in whole or part, there must always be a valid and sufficient consideration. In Stroud v. Stroud, decided at this term, it was held that a parol release of a note, after due, there being no consideration, and the note not delivered up, was void and not binding. And it is equally clear and well settled that an agreement or promise to accept a less sum in discharge of a larger is not obligatory."

The decision of the Court clearly was founded upon an application of the principles constituting an exception to the general rule to the facts of the particular case, for, on page 53, the Court states that "The question is between a mere payment of a less sum, which is obviously no satisfaction, and an actual assignment of the debtor's whole estate to trustees, by which the defendant himself is prejudiced and by which the plaintiff is assured of part of his debt and may secure the whole."

And further: "This comes up to what is said by Lord Ellenborough in Fitch v. Sutton, (5 East, 230,) as above quoted, that 'there must be some consideration for the relinquishment of the residue; something collateral to show a possibility of benefit to the party relinquishing his further claim.'"

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*It only remains to consider the force of one other view presented by respondents in support of the Referee's report.

It is contended that the written instrument of 14th February, 1874, did not operate as a release, and was not so intended, but only an agreement by the appellants (amongst others) to remit the residue of their demands by the execution of "clear receipts" upon the performance of certain acts by respondents.

It will suffice, without elaborate discussion of the merits of the position, to quote the remarks of the Court upon that point in Eve v. Moseley: "But when it is held that if the acknowledgment of the receipt of a less sum in satisfaction of a greater is to operate as a release of the residue of the demand, it is ineffectual, because a release can only be made by specialty; the decision is not liable to the objection of being technical otherwise than in maintaining the distinction between parol instruments and specialties. And when it is held that if such an acknowledgment is to operate as an agreement by the creditor to remit the residue of his demand to the debtor, a valuable consideration is necessary to give effect to the agreement, the decision is supported by the same reason which makes such consideration necessary to the validity of all parol contracts."—2 Strob., 207; see also 6 Adol. & Ell., 121; Seymour v. Minton, 17 I. R., 169; 4 Gill & John., 305.

Indeed the principle for which appellants contend has never been impeached. Individual judges have often expressed dissatisfaction with the rule, and it might be desirable, and even beneficial, in particular instances to modify its application; but no case can be found which is in direct and avowed conflict with it, and it is now too well settled, by an unbroken current of decisions running through three centuries, to be shaken. The rule itself may have its foundation in insufficient reason, but it is fortified by the injunction stare decisis, and omnis innovatio plus novitate perturbat quam utilitate prodest (Broom Leg. Max., 61,) is a maxim the wisdom of which no one will question.

It is respectfully submitted that the Circuit Judge erred in his opinion and rulings upon the law of the case and that his judgment should be reversed.

Addison, Butler, contra.

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*October 23, 1876. The opinion of the Court was delivered by

MOSES, C. J. This was an action on two several promissory notes drawn by the respondents in favor of the appellants—one for $4,000, dated 17th March, 1873, payable 1st March following; the other for $5,820.-

03, dated 16th March, 1874, payable fifteen days after date. The last was the aggregate of open accounts and small drafts due before 14th February, 1874, and is, alike with the first, subject to the operation of the alleged agreement to be hereafter referred to.

On the 14th February, 1874, the said J. J. Pierce, Butler & Co., with other creditors of the said Thomas Jones & Son, executed a written agreement in the following words: "We, the creditors of T. Jones & Son, hereby agree to compromise with the said T. Jones & Son for twenty-five cents on the dollar on the principal and interest of the several amounts due us, and will give them a clear receipt of all indebtedness to us and our assigns, provided that all persons who may hold any claim, account, note or other evidence of indebtedness shall assent to this settlement and arrangement." It appeared that each of the said creditors had received the sum for which, by the agreement, they had stipulated "to give a clear receipt of all indebtedness."

The report of the Referee states that all the other creditors had acted in good faith in regard to its stipulation, and this must be held to include all the creditors of the respondents, for the agreement was on the condition that all persons who might hold any claim, &c., should assent to it; and if any other creditor had refused to enter into the compromise it was to the interest of the appellants to show it, for in that event the non-compliance with the proviso on which they were to be bound might have operated to discharge them from its effect.

The agreement was set up by the respondents as a discharge of all the balance due upon the notes held by the appellants, by their acceptance of the payment of the one-fourth due thereon. The Circuit Judge sustained the defense on the ground submitted and dismissed the complaint.

The appeal seeks to reverse his judgment, and charges error of law therein.

It is contended, on behalf of the appellants, that a promissory note, at maturity, is not satisfied by the acceptance of a part of the

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*amount due in discharge of the remaining balance, and that this principle must apply to exclude the defense relied on by the parties who now submit the said agreement as a bar to the recovery of the remaining portion of the notes.

The English and American cases, (and in the last may be included those in the Courts of this State,) it may be said, generally concur in the doctrine announced in Pinnell's case, (5 Rep., 60, p. 117,) "that payment of a lesser sum on the day in satisfaction of a greater cannot be any satisfaction of the whole, because it appears to the Judges that by no possibility a lesser sum can be a satisfaction to the plaintiff for a greater sum." While many eminent Judges have not hesitated to notice and descant on the seeming inconsistency of the rule which permits the acceptance of anything,—"a horse, a hawk, a robe,"—no matter how inconsiderable the worth, to operate as a discharge of a debt largely exceeding in amount the value of the article so received, and still withholds a like effect to a payment in money unless for the whole sum due, they have felt bound to conform to the decisions which have confirmed it, extending as they do through a long succession of years. An agreement to accept a lesser sum in discharge of a greater is not allowed its proposed purpose for the want of a sufficient consideration to support it. It is therefore permitted to have full effect whenever such payment is made and accepted under such circumstances and at such time as a good, valid consideration for the promise and assumption of the creditor. While, therefore, the principle contended for is fully sustained by the authorities cited, and precludes the agreement from operating in a technical sense as accord and satisfaction, or a release, it fails in its application to the case here, because there was a sufficient consideration to sustain it as a valid and binding contract.

In Fitch v. Sutton, (5 East, 232,) Lord Ellenborough, giving full force to the general rule to carve out an exception to it, said: "There must be some consideration for the relinquishment of the residue,—something collateral to show a possibility of benefit to the party relinquishing his further claim,—otherwise the agreement is nudum pactum."

Mr. Chitty in his work on Promissory Notes, at p. 606, thus states the principle applicable to the case before us and by which it must be governed: "Although in general a creditor who separately agrees to take less

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than his entire demand is not legally *bound by such agreement for want of adequate consideration, yet where several creditors, on the faith of each others stipulation, enter into an arrangement of that nature, whether by deed or unstamped memorandum, each is legally bound by it, and he cannot either privately receive or sue his debtor for a larger dividend than the rest." So in Good v. Cheeseman, 2 B. & Adol., 328. There "A debtor unable to meet the demand of his creditors, they agree with him in writing to accept payment by his covenanting to pay two-thirds of his annual income to a trustee and give a warrant of attorney as collateral security. The creditors never nominated a trustee, though the debtor appeared willing to perform his part of the engagement. One of the creditors brought an action against the debtor for his demand." It was held "that the agreement, though not properly an accord and satisfaction, was still a good defense on the general issue, as it constituted a valid new contract between the creditors and debtors, capable of being immediately enforced, and the con-

sideration for which to each creditor was the forbearance of the rest, and as there appeared no failure on the part of the debtor." Lord Tenterden, C. J., said: "Then is not this a case where each creditor is bound in consequence of the agreement of the rest? It appears to me that it is so, both on principle and on the authority of the cases in which it has been held that a creditor shall not bring an action where others have been induced to give him a composition with the debtor, each party giving the rest reason to believe that in consequence of such engagement his demand will not be enforced. This is in fact a new agreement substituted for the original contract with the debtor, the consideration to each creditor being the engagement of the others not to press their individual claims." On the same principle it had been held in Cockshatt v. Bennett, (2 T. R., 762,) that where creditors of an insolvent entered into a composition for their respective demands and one of them before he executed it obtains from the debtor a note for the residue of his claim, it is void in law as a fraud on the rest of the creditors. Lord Kenyon, C. J., said: "These plaintiffs, in fraud of their engagement, entered into a contract with the respondents which prevented their being put in that situation which was the inducement to the other creditors to sign the deed and to relinquish a part of their demands. The contract in the present case affected all the other creditors by rendering abortive all that they had intended to do for the bankrupt in compounding for their debts."

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*In Boothby et al. v. Sowden, (3 Camp., 174,) where all the creditors of one in embarrassed circumstances signed an agreement to give time for the payment of their respective demands by installments, and to take his notes for the amount, Lord Ellenborough held that there was sufficient consideration for each of the creditors entering into the agreement that it was subscribed by all the others.

In Steinman et al. v. Magnus, (11 East, 394,) the same learned Justice had before said: "Where other creditors have been lured in by the agreement to relinquish their further demands upon the supposition that the party will be discharged from the remainder of his debts, that makes all the difference in the case, and the agreement will be binding."

In Fitch v. Sutton: "Our opinion proceeded upon the precise terms of the case as stated to us in the report of the evidence. If the evidence had gone a little further it would have altered our decision."

The appellants in the case before us secured through the agreement an advantage of which they possibly may have been deprived by the application by the debtors of their assets among their creditors in different proportions, giving to them a less share than to others, or, in fact, they might have made a preference to one creditor to the exclusion of all the rest, provided it was not undue and fraudulent. The appellants secured by the agreement at least twenty-five per cent. of their debt, when, if they had not entered into it, they stood the chance of losing the whole. There is another view to be taken of the defense which must bar the recovery. The agreement, we must assume, by the proviso which it contains, was assented to by all the creditors of the firm with whom it was made. Each, in consideration of the receipt of twenty-five per cent. of his demand, consented to accept it as a compromise, by which he released all the balance of his debt. It was founded on the principle of equality—all were to share alike. If the appellants recovered in their action it would be a fraud on the other creditors who were induced to accept the proportion fixed by the agreement on the express stipulation that it was to be entered into by all the creditors, and binding so far as to prevent either from obtaining from the assets of the debtors more than the prescribed proportion. Each creditor for his act "had the undertaking of the rest as a consideration for his own undertaking."

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*The principle which governed the decision in Aiken v. Price, (Dud., 52,) applies in full force here.

The motion is dismissed.

WRIGHT, A. J., and WILLARD, A. J., concurred.

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8 S. C. 282

HANCOCK v. CASKEY.

(Columbia. Nov. Term, 1876.)

[*Partition* ⟸109.]

Where lands are sold under an order from the Probate Court for partition and there is no reservation of the crops growing thereon, either in the order of sale or in the conveyance to the purchaser, such crops pass with the land conveyed and become the property of the purchaser.

[Ed. Note.—Cited in Tittle v. Kennedy, 71 S. C. 9, 50 S. E. 544; Marion County Lumber Co. v. Tilghman Lumber Co., 84 S. C. 510, 66 S. E. 124, 877.

For other cases, see Partition, Cent. Dig. § 376; Dec. Dig. ⟸109.]

[*Judgment* ⟸670.]

Where lands are sold under a decree for partition, without reservation of the growing crops, a guardian ad litem of the infant defendants is estopped from claiming such crops as his property.

[Ed. Note.—Cited in Forbes v. Bowman, 87 S. C. 508, 70 S. E. 165.

For other cases, see Judgment, Cent. Dig. §§ 1181, 1185; Dec. Dig. ⟸670.]

Before Mackey J., at Lancaster, October Term, 1876.

This was an action by Burrell R. Hancock against John D. Caskey, J. M. Caskey and Wylie Q. Caskey to recover damages for a certain quantity of oats alleged to have been the property of the plaintiff, and, on the first day of July, 1874, to have been wrongfully taken by the defendants and converted to their own use.

The case was as follows:

The oats which were alleged to have been converted by the defendants were grown upon a tract of land which, in 1873, "belonged to and was held in common by Thomas H. Clyburn and the following named children of Missouri Hancock, deceased, wife of plaintiff, to wit: Henry C. Hancock, George S. Hancock, J. J. Hancock, Thomas Hancock, S. A. Hancock, Gassey Hancock and B. P. Hancock, the same being also children of plaintiff, Burrell R. Hancock, the same being the land conveyed by Henry Hancock to J. C. Campbell in trust for Missouri Hancock, deceased."

In 1873 Thomas H. Clyburn commenced proceeding against the children above named of Missouri Hancock, deceased. Burrell R. Hancock was appointed guardian ad litem of some of the defendants, who were infants, and filed answers on their behalf. In January, 1874, the land was sold by the Sheriff

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under a decree made in *the proceedings for partition, and was purchased by Thomas H. Clyburn, who shortly afterwards sold and conveyed the land to the defendants. Neither in the decree for partition nor in the deed of conveyance by the Sheriff to Thomas H. Clyburn, nor in the deed of conveyance by Clyburn to the defendants, was there any mention of oats growing upon the land, or reservation of the same from sale. It was shown that the plaintiff, Burrell R. Hancock, was in possession of the land in the year 1873, and that the oats which the defendants took possession of and claimed as their property under the conveyance from Clyburn to them were sown by the plaintiff and were growing upon the land when it was sold for partition.

The defendants, by their counsel, requested the presiding Judge to instruct the jury "that the oats in question, growing on the land, if there was no reservation of the same in the order of sale or in the deed to the purchaser, did pass to the purchaser, Thomas H. Clyburn, with the land conveyed under the order of sale aforesaid." The request was denied, and the defendants excepted.

His Honor instructed the jury "that the crop in question was the property of B. R. Hancock, who produced it as a tenant at will." To which instructions the defendants excepted.

The jury found for the plaintiff thirty-seven dollars damages, and the defendants appealed.

Kershaw, Allison & Connors, for appellants:

First. What was the character of plaintiff's possession?

a. He was not a tenant, because he was not in by virtue of an express agreement; and no agreement can be implied with his infant children, and tenancy cannot otherwise arise. —Taylor Landlord and Ten., 9, § 14.

b. He held possession in right of his children as quasi guardian.

At common law he would have held as guardian in socage.—2 Kent, 222.

But that relation has gone into disuse and does not exist in this State.—State v. Tidwell, 5 Strob. L., 8.

Natural guardianship only extends to the person of the child and gives no control over the estate.—Anderson v. Darby, 1 N. & McC., 369; 2 Kent, 223.

If one intrudes into possession of an infant's property he is liable as if he were guardian.—Goodhue v. Barnwell, Rice Eq., 199.

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*He holds as guardian or bailiff of the infant.—Harvin v. Reggs, Rich. Eq. Cas., 291. His possession, therefore, was the possession of the infant heirs.

Second. What effect had the judgment in partition on plaintiff's rights?

a. A judgment in partition establishes the title to the land partitioned and is conclusive upon any adverse claim of title or possession existing at the date of its rendition. The law requires the Court to ascertain and determine the rights of the parties and makes it the duty of the parties to declare their adverse claims.—Freeman on Judgments, § 304.

The proceedings in partition are conclusive upon parties and their privies.—Rabb v. Aiken, 2 McC. Ch., 118.

Plaintiff's privity was complete. He was privy to the case and to the estate.

Growing crops standing upon the soil when the latter is conveyed pass as part of the realty, and any exceptions rest upon reservations to be made by the vendor.—4 Kent, 468.

The judgment and sale under it is a conveyance by record, and the reservations might have been made appear by plaintiff had any right existed.

Third. Assuming that he was a tenant, plaintiff has not established his right. The onus was upon him to show the character of his tenancy and establish his claim in abrogation of defendants' title. It will not be presumed in his favor that he was tenant at will.

Fourth. If he were tenant at will, he is not entitled, because he put an end to his own tenancy by surrendering possession.

If tenant at will terminate his own tenancy, he is not entitled to emblements.—Taylor on Landlord and Tenant, §§ 535, 543.

Fifth. He is not entitled, because there is no privity between him and defendants. Defendants acquired the freehold with the grow-

ing crop without any reservation or qualification of his right, express or implied.

It follows that the charge of the presiding Judge was erroneous.

Clarke, contra.

Burwell R. Hancock was tenant and entitled to notice to quit. Had he such notice as the law requires? He had not.—See Ex-

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ecu*tors of Goddard v. R. R. Co., 2 Rich., 347; State v. Stewart, 5 Strob., 31; Floyd v. Floyd, 4 Rich., 23.

Who was entitled to the emblements? Burwell R. Hancock, the tenant.—See 4 Kent, pages 73 and 110.

The opinion of the Court was delivered by

WILLARD, A. J. This action is for the recovery of personal property, consisting of oats growing on a tract of land purchased by the defendants at the time of such purchase, and subsequently harvested and claimed by the defendants. Plaintiff, to establish his right of recovery, presents the following state of facts: The land on which the oats were grown was sold under an order of sale for partition in January, 1874, and purchased by Thomas H. Clyburn, who sold it to the defendants. No reservation of the growing crops was made in the sale for partition. The plaintiff, B. R. Hancock, was a party to the proceedings for partition as guardian of his infant children, who appear to have been treated as either having the fee of the land, or, as cestuis que trust, entitled to its beneficial use as tenants in common with Thomas H. Clyburn, who became the purchaser at partition sale. Their exact title is not disclosed, but as the case is made before us we must assume that it was only as standing in that right that he can be regarded as affected by the proceedings for partition. The present action appears to be brought by the plaintiff in his individual right, and not as guardian for his children. The first exception to the charge of the Judge is based upon the refusal of the Judge to charge "that the oats in question growing on the land, if there was no reservation of the same in the order of sale or in the deed to the purchaser, did pass to the purchaser, Thomas H. Clyburn, with the land conveyed under the order of sale aforesaid." The second exception is to a charge that the crops in question were the property of B. R. Hancock, who produced them as tenant at will. There was no evidence to warrant the statement of facts thus charged. There was no direct proof of the fact, and if it was an inference competent to be drawn from all the facts and circumstances disclosed, then it was the province of the jury and not of the Judge to draw such inference. But whatever may have been the relation of B. R. Hancock to the growing crop, it is enough to know that he was bound by the partition proceedings as a party, and had he held the title to the land he could not have interposed a claim to the growing crop after assenting to

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the sale of *the land without reservation of the growing crop. There is no principle that allows one selling land without reserving growing crops to make such a demand against a purchaser in possession. Regarding the children as standing in that position to the land, the plaintiff, as their guardian, is equally precluded from asserting in their behalf such a right. Had the plaintiff held an individual claim to the growing crops that might affect the title of a purchaser under the order of sale for partition, he was bound to bring it forward before the order of sale was made, and, having failed to do so, is estopped.

Both exceptions appear to be well taken, and there should be a new trial.

WRIGHT, A. J., concurred.

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8 S. C. 286

THEW v. PORCELAIN MANUFACTURING COMPANY.

(Columbia. Nov. Term, 1875.)

[*Judgment* ⇐581.]

The decision in this case at April Term, 1874, (reported 5 S. C., 416,) not only set aside the confession of judgment made by Bullock, as the President of the company, but it also set aside and annulled the debt or demand on which the confession was founded. It follows that the plaintiff is estopped by that decision from any further proceeding to enforce the said debt or demand.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1025; Dec. Dig. ⇐581.]

[*Judgment* ⇐385.]

A proceeding to vacate a judgment of the Supreme Court, on the ground that the Court had exceeded its jurisdiction, must be by direct application to the Court itself and not by motion in the Court below.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 726; Dec. Dig. ⇐385.]

[*Appeal and Error* ⇐90.]

[An order that a judgment be vacated and set aside is an order final in its nature, and "involving the merits"; and the ruling of the circuit court in refusing it is a proper subject of appeal.]

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 608; Dec. Dig. ⇐90.]

Before Carpenter, J., at Edgefield, 1875.

After the decision of the Supreme Court in this case, at April Term, 1874, (reported 5 S. C., 415,) setting aside the judgment by confession given by Bullock, as President of the Southern Porcelain Manufacturing Company, to Thew, the plaintiff, a motion was made in the Court below that the defendant be required to plead or demur to the declaration upon which the confession of judgment was made. The motion was refused, and Thew, the plaintiff, appealed.

Bonham, Aldrich, for appellant.

Carroll, Bacon & Addison, contra.

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*February 17, 1876. The opinion of the Court was delivered by

WRIGHT, A. J. However erroneous may be the decisions of this Court, they cannot be held by the Court below to be utterly and absolutely void. This position is amply sustained by the high and controlling authorities cited on behalf of the respondents.

If by its decision in this case, at its April Term in 1874, this Court has exceeded its jurisdiction, that decision, it may be admitted, may be set aside. But the proceeding for that purpose must be direct and must be instituted here in this Court which rendered that decision.

It is indisputable that it cannot be done collaterally and by mere motion in the Court below. At law a judgment of the Circuit Court can only be set aside for error upon motion to be made in the Court by which such judgment was rendered.—Ingram v. Belk, 2 Rich., 111.

In analogy to this well-established rule, it seems to follow that a judgment of this Court can only be avoided by a proceeding to be here instituted.

It is assumed, on the part of the appellant, that the appeal in this case heard and determined by this Court at its April Term, in 1874, was an appeal from the order of Judge Carpenter of March 10th, 1874.

Such presumption is wholly without foundation. It is true that the appeal referred to as first presented by the respondents herein was in terms an appeal from that order.

That appeal this Court promptly declined to entertain, because the order in question, not being final in its character, was not the subject of appeal. In the course of the discussion upon that point, the remark was made by the Court that the appeal referred to ought to have been an appeal, not from the order of 10th of March, 1874, but from the ruling of the Circuit Judge refusing the motion to vacate the judgment.

Thereupon it was proposed by the counsel for the respondents herein that the notice and grounds of appeal should be regarded as if framed conformably to the suggestion of the Court; that all errors and omissions therein be waived, and, as all the material facts were presented to the Court, that the case should be heard upon the respondents' grounds of appeal, "that the Circuit Judge ought to have ordered that the said judgment be vacated

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and set aside, and, *he having failed to do so, that such order ought now to be made by this Court."

The proposition thus submitted was acceded to, and in the presence of the Court, by the consent of the appellant herein, the respondent in that proceeding.

The consent of the Court was not withheld, and the appeal was heard upon the general ground mentioned, which involved the whole merits of the case. The rules of procedure in this Court are undoubtedly subject to its control, and, with its permission, may be waived by consent of parties.

It is too clear for argument that the order moved for on the 10th March, 1874, that the judgment referred to be vacated and set aside, was an order final in its nature and "involving the merits," and that the ruling of the Circuit Judge in refusing it was, therefore, a proper subject of appeal.

The circumstances adverted to as attending the hearing of that appeal, it is true, are not recited in the decision thereupon pronounced by this Court.

Nor is this Court "bound to set forth on the record the facts upon which its jurisdiction depends."

"A Court which is competent by its constitution to decide on its own jurisdiction" may exercise it to a final judgment without setting forth in their proceedings the facts and evidence on which it is rendered.

The general rule seems to be "that nothing shall be intended to be out of the jurisdiction of a Supreme Court but that which specially appears to be so."—1 Smith's Leadg. Cas., (Am. Notes,) 822, 827; Grignon's Lessee v. Astor, 2 How. 319 [11 L. Ed. 283]. It follows, therefore, that by its decision upon the appeal in this case, at its April Term in 1874, this Court has in nowise transcended its jurisdiction, and by the effect of that decision the order of the Circuit Judge of 10th March, 1874, has undoubtedly been superseded and wholly avoided.

The decision of this Court in April, 1874, which has been referred to in express terms, ordered and adjudged that the judgment confessed by Rufus B. Bullock in this action be vacated and set aside.

But it remains to be considered whether, by that decision, it was not adjudged that Bullock was wholly without authority to contract, on behalf of the respondents herein, the debt secured by that confession of judgment.

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The motion to vacate the judgment was *based upon the grounds: 1. That Bullock had no authority to contract that debt on the credit of the respondents; 2. That if so authorized, yet he was without authority to secure the same by confession of judgment; and 3. That the judgment by confession, if even authorized by the respondents, was null and void by the operation and effect of the Act of the General Assembly of 1785. Each and all of these questions are fully and distinctly considered and adjudged in the decision of this Court, which has been referred to.

That such is the meaning and legal effect of that decision is apparent upon the paper itself. It requires, to be understood, no aid from the notice of motion, the return to the order to show cause or the evidence adduced at the hearing. It is an utter misconception to suppose that nothing else has been adjudged than that the judgment referred to be va-

cated and set aside. "It is not necessary that the point on which it is sought to estop should have been the only one in issue." "The estoppel of a judgment extends to the whole matter in dispute in the cause in which it is rendered, and, therefore, to every point decided between the parties in the course of the proceedings which led to the judgment."—1 Smith's Leadg. Cas., (English Notes) 590, (Am. Notes) 674.

It results that the debt or demand which the appellant seeks to enforce by requiring the respondents to plead, answer or demur to his declaration in this action, has already been adjudged by this Court to be without legal force or obligation as against the respondents.

The appellant is, therefore, estopped from again asserting by any legal proceedings that demand, and it is ordered that the appeal be dismissed.

MOSES, C. J., concurred.

WILLARD, A. J. I concur with the majority of the Court to the extent of holding that the defendants were not bound to plead to the writ after the confession of judgment was set aside. It appears that the writ was issued as matter of form merely in order to carry into effect the terms of the confession previously made. Had the writ been issued and served in the first instance for the purpose of actual prosecution and a declaration filed, and subsequently had a judgment by confession been entered upon setting aside the confession for want of authority to make it, I think the defendants would be bound to plead to the declaration. But that does not appear to be the case before us.

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8 S. C. * 290

*WITTE v. WILLIAMS.

(Columbia. April Term, 1876.)

[*Bills and Notes* ⟸332.]

Bills of exchange, drawn by A B on C D, with blanks for the dates, times of payment and names of payees, were left by the drawer in the hands of drawee for certain purposes, who afterwards, in fraud of the rights of the drawer, filled up the blanks, accepted the bills and transferred them before maturity to a bona fide holder for valuable consideration without notice of the circumstances under which they were drawn and left in the hands of the drawee: *Held*, In an action on the bills against the drawer, that the holder was entitled to recover.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 816; Dec. Dig. ⟸332.]

[*Bills and Notes* ⟸365.]

The bona fide holder of a negotiable instrument, transferred before due for a valuable consideration, and without notice of any defect which would render it void between antecedent parties, has a right to recover upon it, notwithstanding its want of validity as against one or more of such parties.

[Ed. Note.—Cited in Walker & Trenholm v. Kee, 14 S. C. 145; Hand v. Savannah & C. R. Co., 17 S. C. 256; First Nat. Bank v. Anderson, 28 S. C. 149, 5 S. E. 343; Ehrlich v. Jennings, 78 S. C. 273, 58 S. E. 922, 125 Am. St. Rep. 795; Fretwell v. Carter, 78 S. C. 536, 59 S. E. 639; Citizens Trust & Savings Bank v. Stackhouse, 91 S. C. 461, 74 S. E. 977, 40 L. R. A. (N. S.) 454.

For other cases, see Bills and Notes, Cent. Dig. §§ 944, 958, 959; Dec. Dig. ⟸365.]

[*Bills and Notes* ⟸144, 499.]

The acceptor of a bill of exchange, having it in his possession, may, before maturity, transfer it to a bona fide holder, and no presumption of payment arises from the fact of his possession before maturity.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 367, 1696; Dec. Dig. ⟸144, 499.]

[*Bills and Notes* ⟸3.]

A bill of exchange is not invalid as a regular and formal bill of exchange because it is payable to the drawee.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 14; Dec. Dig. ⟸3.]

Before Reed, J., at Charleston, January Term, 1876.

This was an action by Charles O. Witte against Mrs. Sally C. Williams.

The complaint alleged two causes of action, as follows:

First, for a first cause of action—

1. That on the 4th day of December, 1868, at Charleston, in the State aforesaid, the defendant made and delivered to the plaintiff her bill of exchange in writing, dated on that day, and directed the same to certain persons, under their firm name of J. & J. D. Kirkpatrick, to pay to the order of this plaintiff $2,500 twelve months after the date thereof, for value received.

2. That then and there the said J. & J. D. Kirkpatrick, upon sight thereof, accepted said bill.

3. That at maturity the same was duly presented to said J. & J. D. Kirkpatrick for payment, but it was not paid, of all which due notice was given to the said defendant.

4. That no part thereof has been paid except the following amounts, viz.:

January 10, 1870, $259; June 7, 1870, $489.81; April 13, 1871, $497.35, making in all the sum of $1,246.16; but that in this last mentioned amount is included the sum of $188.43 for interest on the said bill to the 13th day of April, 1871; and that there is, therefore, now due on the said bill the sum of $1,442.27, with interest thereon from the 13th of April, 1871.

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*And the plaintiff further says that he is the lawful owner and holder of the said bill, and the defendant is justly indebted to him therefor in the sum of $1,442.27, with interest thereon from the 13th day of April, 1871, and $2.35 costs of protest.

Second, for a second cause of action—

That on the 15th day of December, 1868, the defendant, at Charleston aforesaid, made her other bill of exchange in writing and directed the same to J. & J. D. Kirkpatrick,

at Charleston aforesaid, and thereby required the said J. & J. D. Kirkpatrick to pay to the order of the said J. & J. D. Kirkpatrick the sum of $2,500 three hundred and sixty-five days after the date thereof, which period elapsed before this suit was brought, and then and there delivered the said bill to the said J. & J. D. Kirkpatrick, who endorsed the same and delivered it to the plaintiff; and the said plaintiff further says that the bill was duly presented to the said J. & J. D. Kirkpatrick for acceptance, and that the said firm duly accepted the same, and at maturity that said bill was duly presented for payment but was not paid, of all which the defendant had notice.

And the plaintiff further says that he is now the lawful owner and holder of the said bill, and the defendant is justly indebted to him therefor in the sum of $2,500, principal, together with interest thereon from the eighteenth day of December, 1869, and $2.35 costs of protest.

The answer is as follows:

The defendant, answering the complaint herein, says:

First, for a defense to the first alleged cause of action—

1. Defendant denies all those allegations which are contained in paragraph 1.

2. Defendant alleges that on or about the 15th of June, 1868, she made and delivered to James D. Kirkpatrick, doing business under the name of J. & J. D. Kirkpatrick, a person other than the plaintiff, with whom defendant had business transactions, a certain bill of exchange in writing, signed by defendant, but not dated, and directed the same to the said J. & J. D. Kirkpatrick, and thereby required the said J. & J. D. Kirkpatrick to pay to the order of ——— $2,500 ——— months after the date thereof; and defendant denies that she has any knowledge

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or information *sufficient to form a belief whether or not said bill of exchange was subsequently dated 28th December, 1868, and made payable to the order of the plaintiff, and thereafter duly transferred and delivered to him by the lawful holder or holders thereof.

3. Defendant alleges further that said bill of exchange was delivered by her to the said J. & J. D. Kirkpatrick to cover advances of money made, or about to be made, to her by the said J. & J. D. Kirkpatrick, which advances defendant had paid and made good to the said J. & J. D. Kirkpatrick before the date of the alleged transfer and delivery of said bill of exchange to the plaintiff; and that this said bill had in fact been paid before such alleged transfer and delivery.

4. Defendant alleges that if the plaintiff is in fact the holder of said bill of exchange it was transferred and delivered to him by the said J. & J. D. Kirkpatrick as security for an indebtedness from the said J. & J. D. Kirkpatrick to the said plaintiff, and that the plaintiff well knew at the date of said transfer that the firm of J. & J. D. Kirkpatrick had long ceased to exist or transact business under such firm name, and that the said James D. Kirkpatrick, who had formerly done business as J. & J. D. Kirkpatrick, had formed a partnership with George W. Witte, and that at the date of the alleged transfer and delivery he was doing business under the firm name of Kirkpatrick & Witte.

Second, and for a defense to the second alleged cause of action, defendant says:

1. She denies that on the 18th day of December, 1868, she made her other bill of exchange in writing and directed the same to J. & J. D. Kirkpatrick, as alleged in plaintiff's second cause of action.

2. And for a further defense to said second cause of action defendant makes the same defense as the defense hereinbefore made to the first cause of action.

On March 14, 1872, an order was signed by the Court, with the consent of the attorneys, appointing Samuel Lord, Esq., Referee, and referring the case to him.

On April 14, 1875, the Referee submitted his report, as follows:

This case was referred to me with instructions to pass upon the issues of law as well as of fact involved therein.

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*I find, as matter of fact, that for many years prior to 1865 John Kirkpatrick and James D. Kirkpatrick carried on a large factorage and commission business in Charleston, under the style of J. & J. D. Kirkpatrick. John Kirkpatrick died in 1865 and J. D. Kirkpatrick continued the same business, under the same firm name, until August 15th, 1868, when the following notices were given, by advertisement and otherwise, to wit:

1. Dissolution.—The firm of J. & J. D. Kirkpatrick is dissolved from this date. The business of the firm will be attended to by the undersigned, in liquidation.

(Signed,) James D. Kirkpatrick.

2. The subscribers have this day entered into a copartnership for the transaction of a factorage and commission business at No. 6 Accommodation Wharf.

(Signed,) James D. Kirkpatrick.
Geo. W. Witte.

The plaintiff had notice of these advertisements.

In July, 1867, J. & J. D. Kirkpatrick owed the defendant on open account about $18,000. At her request this account was closed by her taking their note at twelve months for $15,000 and their holding $3,000 subject to her order.

The defendant received money from the firm after this, from time to time, until about the 15th June, 1868. At this date she had over drawn her account about $6,000, exclusive of the $15,000 not yet due. In consequence of this over draft, at the request of

J. & J. D. Kirkpatrick, she delivered to them three drafts, or bills of exchange, directed to the firm, one for $1,000, and the other two for $2,500 each, leaving blank the dates, time of payment and name of payee. When Kirkpatrick ceased to do business under the name of J. & J. D. Kirkpatrick, the defendant's account was made up, the $6,000 over draft was credited upon the $15,000 note, and a new note for the balance—namely, $8,881—was signed by J. & J. D. Kirkpatrick, and delivered to her, but the defendant omitted to take out of Kirkpatrick's hands the two drafts for $2,500 each. On the 4th and 15th of December, 1868, Kirkpatrick fraudulently filled the blanks in these drafts, accepted them in the name of J. & J. D. Kirkpatrick, and passed them off to the plaintiff, who paid over the proceeds to Kirkpat-

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rick, taking from him *certain other collateral securities. With the money thus realized, Kirkpatrick paid a debt which he had contracted under the name of J. & J. D. Kirkpatrick to Lewis F. Robertson, for which Mrs. Williams, the defendant, was not responsible. When the drafts were first seen by the plaintiff, the blanks had already been filled up. The drafts not having been paid at maturity by the acceptor, this action was brought to recover against the defendant, as drawer, the amount due thereon. His right to do so has been resisted by the defendant on various grounds, but it seems to me that the plaintiff is entitled to a decree, unless the evidence shows that he had notice, at the time the drafts were discounted by him, of the fraud perpetrated by Kirkpatrick on the defendant. Actual notice is not pretended, and the only question is, did the plaintiff know such facts as should have put him on inquiry? It is conceded that, if the drafts had been discounted prior to the date when Kirkpatrick ceased to do business under the name of J. & J. D. Kirkpatrick, there would have been nothing to have awakened the plaintiff's suspicions; but it is urged that the fact that the drafts were drawn on J. & J. D. Kirkpatrick showed that they were intended to aid him in carrying on the business he had conducted under that name, and not to aid him in its liquidation, and that, therefore, the plaintiff must have known that Kirkpatrick, in issuing these drafts several months after he had ceased to do business under the name of J. & J. D. Kirkpatrick, was making an improper use of them. There would be much force in this argument if the drafts had been dated prior to the 18th August, 1868, or if the plaintiff had known that when they were signed by the defendant the dates had been left blank; but, according to the testimony, when the plaintiff first saw these drafts the dates and the time of payment had already been filled up. In the absence of all information to the contrary, therefore, he had a right to presume that the drafts had been signed by the defendant on the days of their respective dates, to wit: the 4th and 15th of December, 1868, and had then been placed, for the first time, in the hands of Kirkpatrick. It is difficult to see how the plaintiff could have supposed that drafts dated in December, 1868, were given to enable Kirkpatrick to carry on a business which he had abandoned six months previously. It seems to me that the only inference which the plaintiff could reasonably have drawn from the facts within his knowledge was that the defendant had, in December, 1868, drawn these drafts on J. & J. D.

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Kirk*patrick to pay some debt due by her to that concern, or to lend her name to Kirkpatrick to aid him in liquidating the business which he had previously carried on under that name. He had every reason to believe, therefore, that in discounting the drafts to enable Kirkpatrick to pay off a debt contracted by him under the name of J. & J. D. Kirkpatrick he was applying them to the very purpose for which they had been made.

I see nothing in the circumstances of the case to affect the plaintiff with notice of Kirkpatrick's fraud, and am, therefore, of opinion that he is entitled to recover against the defendant the amount now due upon the drafts.

The defendant excepted to the report on the following grounds:

1. For that said Referee reported that the only inference which the plaintiff could reasonably have drawn from the facts within his knowledge was that the defendant had, in December, 1868, drawn the drafts sued on, on J. & J. D. Kirkpatrick, to pay some debts due by her to that concern, or to lend her name to Kirkpatrick to aid him in liquidating the business which he had previously carried on under that name, and that the plaintiff had every reason, therefore, to believe that in discounting the drafts to enable Kirkpatrick to pay off a debt contracted by him under the name of J. & J. D. Kirkpatrick he was applying them to the very purpose for which they had been made; whereas he ought to have found and reported that the only legal inference which the plaintiff could have drawn from the facts within his knowledge was that Kirkpatrick held the drafts for "acceptance," and that he had not the right to transfer them for his own benefit; that is to say, that he had possession of the drafts for a special purpose, and not as owner. There was no apparent ownership in J. & J. D. Kirkpatrick, or apparent right to transfer the drafts to the plaintiff.

2. For that said Referee reported that there was nothing in the circumstances of the case to affect the plaintiff with notice of Kirkpatrick's fraud, and the plaintiff is therefore entitled to recover against the defendant the amount now due upon the drafts; whereas he should have found and reported that inasmuch as the drafts were drawn upon "J. & J. D. Kirkpatrick," and Kirkpatrick had

ceased to do business under that name when plaintiff discounted the drafts, of which fact plaintiff had notice, and, moreover, that inasmuch as the drafts were in the possession of

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the drawee, the plaintiff ought *not to recover as a bona fide holder for value of the bills in suit. That the plaintiff did have actual notice of such facts as should have put him on inquiry.

3. For that said Referee reported that it is conceded that if the drafts had been discounted prior to the date when Kirkpatrick ceased to do business under the name of J. & J. D. Kirkpatrick there would have been nothing to have awakened the plaintiff's suspicions; whereas the defendant maintains that the fact of the drafts being in the possession of the drawee, whether before or after maturity, was in itself sufficient to have put the plaintiff on inquiry; that plaintiff had no right to assume that Kirkpatrick's title to the drafts was other than that indicated by the instrument itself, or that he had any other or different rights than the law would imply from the form and character of the instruments and in the ordinary course of business, and, according to mercantile usage, these drafts could only have been in Kirkpatrick's possession either for acceptance or after they had been paid, and in neither case would he have had the right to transfer them. In the first case he would have had possession for a special purpose, to wit, "acceptance," and in the latter they would have been functus officio and not capable of being again put in circulation. The law will not presume the drafts to have been made for the accommodation of the drawees; the onus was on plaintiff to prove that fact, if such was the case. On the contrary, however, the Referee has found and reported that the drafts ought to have been delivered up to the defendant in August, 1868, and that afterwards "Kirkpatrick fraudulently filled the blanks in these drafts, accepted them in the name of J. & J. D. Kirkpatrick, and passed them off to the plaintiff."

On January 8th, 1876, His Honor Judge Reed filed his decree on the report and exceptions as follows:

Reed, J. This cause came up for hearing and trial on the pleadings, the report of the Referee, and exceptions thereto.

This action is brought upon two alleged bills of exchange, dated 4th and 15th December, 1868, for $2,500 each, drawn by the defendant on, and accepted by, "J. & J. D. Kirkpatrick," one payable to the order of J. & J. D. Kirkpatrick and the other to the order of the plaintiff.

The Referee has found, as matters of fact, that J. D. Kirkpatrick carried on a factorage

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business under the name of J. & J. D. *Kirkpatrick until August 15th, 1868, when he entered into a copartnership with George W. Witte, for the transaction of a factorage and commission business, under the style of Kirkpatrick & Witte, and that the plaintiff had notice of these facts; that when Kirkpatrick ceased to do business under the name of J. & J. D. Kirkpatrick the defendant's account with him was made up, and that thereupon the instruments now sued on should have been delivered up to the defendant, but that she omitted to take them out of Kirkpatrick's hands; that at this time the dates, times of payment and names of payees were not filled up. That on the 4th and 15th December, 1868, Kirkpatrick "fraudulently filled the blanks," accepted them in the name of J. & J. D. Kirkpatrick, and in this shape they were presented to the plaintiff by Kirkpatrick, the acceptor, and thereupon plaintiff discounted the said instruments, paid over the proceeds to Kirkpatrick, and took from him certain collateral securities, and Kirkpatrick applied the proceeds to the payment of a debt which he had contracted under the name of J. & J. D. Kirkpatrick, for which the defendant was in nowise responsible.

The plaintiff claims that said instruments are bills of exchange, and that he is a bona fide holder for value of the same. His right to recover depends upon his establishing these facts. The defendant does not except to the facts found by the Referee, but to the legal inferences drawn from those facts, assuming that both instruments are bills of exchange. As the Referee has stated it, the only question is, did the plaintiff know such facts as should have put him on inquiry?

Actual notice of Kirkpatrick's fraud is not pretended, but did the plaintiff know such facts as should have put him on inquiry? I am of opinion, from all the facts found by the Referee, that the plaintiff did have notice of such facts as ought to have put him on inquiry, and that he does not occupy the position of a bona fide holder of negotiable paper who has acquired title in good faith for a valuable consideration, from one capable of transferring it, and without notice of any defect in his title or right to transfer.—Central Bank of Brooklyn v. Hammett, (50 N. Y.,) 158. And, moreover, I am of opinion that one of the instruments is not a bill of exchange; it is a bill drawn by the defendant on J. & J. D. Kirkpatrick, requesting said drawee to pay to his own order a particular sum of money, and such an instru-

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ment is not entitled to be *deemed a bill of exchange, for every bill of exchange presupposes a duty of the drawee to pay the money to some other person than himself.—Story on Bills, § 35. Therefore, it is adjudged and decreed that the defendant's exceptions to the Referee's report be sustained, and that the judgment be entered for the defendant.

The plaintiff excepted to the foregoing decision and appealed therefrom upon the following grounds:

1. Because the plaintiff became the holder of negotiable papers for value before they

were due without knowledge or notice of fraud in the inception or in the issue of them, and is not affected by any fraudulent use of them by Kirkpatrick.

2. Because His Honor erred in deciding that the only question is: did the plaintiff know such facts as would have put him on the inquiry? And in holding that he did have notice of such facts as ought to have put him on the inquiry, and that he, therefore, does not occupy the position of a bona fide holder of negotiable paper.

3. Because the title of a purchaser of negotiable paper for value before it becomes due, in the origin or use of which fraud is charged, can only be affected by mala fides on his part, of which there is no pretense in this case, and is not affected because he failed to make inquiry, even if he failed to make such inquiry through negligence.

4. Because the circumstances of this case were not such as to put the plaintiff on the inquiry.

5. Because the defendant, having entrusted these papers now in suit to the possession of Kirkpatrick, with blanks in them, is bound by his acts respecting them, and in this respect she made him her agent.

6. Because no objection having been made on the trial before the Referee, or in the exceptions to his report, that one of the instruments sued upon was not a bill of exchange, it was too late to make the exception at the hearing.

7. Because both of the instruments sued upon have all the essential characteristics of bills of exchange.

8. Because, at all events, this is an objection strictly technical, and the Court will allow the mistake, if any, to be corrected by an amendment of the pleading to correspond with the proof, especially as such amendment can in no way operate as a surprise to the defendant.

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*Simonton & Barker, for appellants, filed a printed argument, in which the views taken in the opinion of the Court were presented and discussed at considerable length, and in which the authorities contained in the opinion, with many other authorities, were cited.

Hayne & Son, contra, also filed a printed argument, in which, after stating the case, they proceeded as follows:

Plaintiff claims to recover as against the drawer of these instruments as a bona fide holder for value of negotiable paper. Respondent maintains that, as against her, plaintiff does not occupy the position of a bona fide holder of negotiable paper.

1. "A bona fide holder of negotiable paper is one who has acquired title in good faith for valuable consideration from one capable of transferring it, or from one in possession of the paper with an apparent right to transfer it, and without notice of any defect in his title or right to transfer."—Central Bank of Brooklyn v. Hammett et al., 50 N. Y. Rep., (Ct. of Ap.,) 5 Sickels, 159.

2. "One who obtains the transfer of negotiable paper before maturity for value without notice of any defect in the title of the apparent owner acquires and has all the rights of a bona fide holder by title derived from the actual owner. The possession of a bill or note payable to bearer, or endorsed in blank by one not a party to the instrument, is presumptive evidence of ownership. But possession of such an instrument by a party to it only authorizes a presumption of such rights and obligations as are indicated by the instrument itself. The actual relations to each other of the several parties to the instrument are presumed to be such as the law declares in the absence of any circumstance to take the instrument out of the general rule and vary the liability of the parties as between each other."—Ib., p. 159.

3. "An individual negotiating for the purchase of a bill or note from one having it in possession, and whose name appears upon it, must assume that the title of the holder, as well as the liability of all the parties, is precisely that indicated by the instrument itself; that is, he cannot assume that the person in possession has any other or different rights, or that the liability of the parties is other or different from that which the law would imply from the form and character of the instrument."—Ib., 160.

4. Appellant acquired title to the bills in suit from the drawee and acceptor, the person primarily liable for the payment of the

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*debt, and "the bills could only, in the ordinary course of business, and according to mercantile usage, have been in the possession of the transferrer either for acceptance or after they had been paid, and in neither case would he have had the right to transfer them. In the first case he would have had possession for a special purpose, and not as owner, and in the latter they would have been functus officio and not capable of being again put in circulation."—Ib., 160.

5. There was then no apparent ownership in Kirkpatrick, or presumptive right to transfer, and plaintiff did not acquire and have by reason of the transfer all the rights of a bona fide holder who had derived title from the actual owner.

7. "If the paper had been made for the accommodation of the drawee, and to be used by him, that fact should have been proved. The law will not presume the paper to have been made except in the ordinary course of business and according to commercial usage."—Ib., p. 160. The evidence shows that the use made of the bills was a "fraud perpetrated by Kirkpatrick on the defendant."

8. Inasmuch, then, as appellant does not occupy the position of a bona fide holder of negotiable paper, he is affected by the fraudulent use of the bills by Kirkpatrick if the

circumstances of the case are such as ought to have put him on the inquiry, and the Circuit Judge did not err in holding that the only question is: did the plaintiff know or have notice of such facts as should have put him on inquiry?

9. "What circumstances will amount to actual or constructive notice of any defect or infirmity in the title to the bill so as to let it in as a bar or defense against a holder for value has been a matter of much discussion. It was agreed on all sides that express notice is not indispensable: but it will be sufficient if the circumstances are of such a strong and pointed character as necessarily to cast a shade upon the transaction and to put the holder upon inquiry."—Story on Bills, § 194.

10. If the Circuit Judge did not err in holding that the question in this case is: did the plaintiff know or have notice of such facts as should have put him on inquiry? then, from the facts and circumstances of the case, as found by the Referee, the legal inference necessarily follows that "the plaintiff did have notice of such facts as ought to have put him on inquiry, and that he does not occupy the position of a bona fide holder of negotiable paper who has acquired title in good faith, for valuable consideration, from

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one *capable of transferring it, and without notice of any defect in his title or right to transfer."

11. The fact that the respondent, the drawer of the bills, put them in possession of Kirkpatrick, the drawee, with blanks in them, did not constitute him her agent to negotiate the bills, and she is not bound by his fraud in this respect.

12. The judgment of the Court below is fully sustained by the principles of law applicable to the undisputed facts of the case.

October 23, 1876. The opinion of the Court was delivered by

MOSES, C. J. It is now settled, by a current of authorities that a bona fide holder of a negotiable instrument transferred before due for a valuable consideration, and without notice of any defect which would render it void between antecedent parties, has a right to recover upon it, notwithstanding its want of validity as against one or more of such parties.

The convenience and necessities of commerce, which require that instruments so generally used as an apt and ready substitute for coin should be protected by the same rule which, in the absence of fraud, confers a title to coin by its mere possession. The restrictions with which the principle which had before prevailed was burdened through the decision in Gill v. Cubbitt (3 B. & C., 466,) so affected the use of negotiable securities, and the purpose and interest they were to serve, that, after dissatisfaction with the rule which it established had been, from time to time, expressed by the Judges, its authority was finally overthrown by the decision of the Court in Goodman v. Harvey, (4 A. & E., 870.) It would be a useless consumption of time to trace the succession of authorities by which the Courts of England have adopted the principle which, as already stated, may now be regarded as fixed. The opinion of the Court in Goodman v. Simonds (20 How., 343 [15 L. Ed. 934],) contains an interesting and exhaustive reference to the cases and a comment upon them in learned and expressive diction. To the same effect are the American cases within our reach: Conroy v. Warren, 3 Johns. Cas.; Woodhull v. Jones, 10 Johns., 231; Bay v. Coddington, 5 Johns. Ch., 54; Belmont Br. B. v. Hoge, 35 N. Y. 69; Knight v. Pugh, 4 W. & S., 415; Brown v. Street, 6 ib., 221; Chapman v. Rose, 56 N. Y., 137; Thurston v. McCown, 6 Mass., 428. The principles which governed the decisions in the following cases in this State show that they are founded on the same ac-

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cepted *doctrine: Jackson v. Heath, 1 Bail., 355; Mims v. Whiddon, 2 Bail., 451; Sims v. Lyles & Street, 1 Hill., 39 [26 Am. Dec. 155]; Administrators of Lee v. Ware, 1 Hill, 313; Schaub v. Clark, 1 Strob., 299 [47 Am. Dec. 554].

Error is charged by the appellant on the part of the presiding Judge in holding that the only question is: "Did the plaintiff know such facts as should have put him on the inquiry?" and in further holding "that he did have notice of such facts as ought to have put him on the inquiry, and that he, therefore, does not occupy the position of a bona fide holder of negotiable paper who has acquired title in good faith, for a valuable consideration, from one capable of transferring it, and without notice of any defect in his title or right to transfer." It is enough to say that the rule which the Judge below thus applied as the one by which his judgment was governed, so far as it was founded on the existence of notice sufficient to put the appellant on inquiry, is in conflict with the authorities which we have above cited. It is in conflict, too, with the decision in Murray v. Lardner, (2 Wall. 110 [17 L. Ed. 857],) which affirms Goodman v. Simonds, and declares, as the settled law of the Court, that "suspicion of defect of title, or the knowledge of circumstances which would excite such suspicion in the mind of a prudent man, or gross negligence on the part of the taker at the time of the transfer, will not defeat his title. That result can be produced only by bad faith on his part." If the rule adopted by the presiding Judge is to prevail, by what standard can the required prudence be measured, so that it may be introduced as a necessary element in the constitution of a principle of law? And if no such standard can be found, how could a rule wanting the

essential quality of certainty, with any show of reason, be properly applied to a class of instruments of such general use in the commercial business of the country?

While the respondent does not rely upon the ground on which, in part, the Circuit Judge rested his judgment, she contends that the plaintiff cannot maintain his action, because, as against her, he does not occupy the position of a bona fide holder of a negotiable paper. In other words, she claims that his title was not derived from one in possession of the paper, with an apparent right to transfer it, his title having been derived through the drawee of the bills.

The instruments were transferred to Witte without any knowledge on his part of the circumstances under which they came to the

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*hands of J. D. Kirkpatrick, who alone, from the death of John Kirkpatrick, the senior partner, had carried on the business in the name of the old firm of J. & J. D. Kirkpatrick, and without any notice of his fraud in regard to the drawer, Mrs. Williams. They were transferred, too, long before maturity by the drawee, in whose possession she had left them, with the dates, time of payment and names of payees not filled up. These were inserted by J. D. Kirkpatrick on the very day on which, for valuable consideration, they were discounted by Witte.

The acceptor of a bill stands in the same relation to it as the maker does to his note. If the presumption of payment does not arise from the possession of a maker of a note endorsed by another before maturity, why should it arise on a bill before due in the hands of an acceptor? In Aiken v. Cathcart (3 Rich., 133 [45 Am. Dec. 764],) the maker transferred the note before due with the name of payee blank, and yet the endorsers were held liable. It is not an unusual thing for the maker to present his note endorsed by others to a bank and obtain its discount. The very fact of a bill being found in the possession of the acceptor before maturity rather leads to the inference that it was left there for a purpose with which the idea of payment would be entirely inconsistent. In the usual course of business the bill is withdrawn by the holder from the drawee on his becoming acceptor and not again presented to him until demand for payment. The knowledge by Witte of the dissolution of the firm was no notice of any wrong, much less fraud, committed by Kirkpatrick. The bills were signed by the respondent and addressed to J. & J. D. Kirkpatrick for acceptance, with every assurance to Witte, from the face of the paper, that they had been executed on the days on which they bore date. Does it lie in the mouth of the drawer who so addressed the bills to say that a third party should not have had any dealing in regard to them because the firm on which they were drawn had been before dissolved? Why may not Witte have well supposed that the object of the drawer was to raise funds for the liquidation of debts due by the firm, or for some legitimate business purpose in which it was concerned? The bills, too, as between the drawer and drawee, had been executed on a valuable consideration.

Mr. Byles, in his work on Bills, p. 166, referring as authority to Attenborough v. Mackenzie, (25 L. J. Exch., 244,) says: "A transfer by the acceptor before maturity does not

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extinguish the bill; *the acceptor may reissue it before it is due, and the parties whose names are on the bill will be liable to a subsequent holder."

In Hamer v. Steele, (4 Exch.,) Wilde, C. J., says: "But we think it is no objection to the negotiability of a bill that it has during currency, before it was payable, become the property of one of the acceptors. Until the time of payment arrives, the contract of the acceptor is unperformed and incapable of being performed. And the right to sue upon it may be transferred with the property in the bill by any lawful owner of it. It is no objection to such transfer, or to an action brought by one claiming under it, that the party making the transfer would be incapacitated to sue if he had retained the bill till maturity."

In Morley v. Culverwell, (7 M. & W., 174,) the drawer of a bill of exchange before it became due agreed with the acceptor that on his giving a certain mortgage security for the amount, he, the drawer, should deliver up to him the bill of exchange as discharged and fully satisfied. The acceptors accordingly executed the mortgage and received the bill uncanceled: Held, That the drawer was liable on the bill to a party to whom the acceptor afterwards endorsed it for value before it became due. At page 181, Lord Abinger said: "The defendant, the drawer of the bill, agrees with the acceptor, while it is running, to deliver it up to him, in consideration of his having the security of a mortgage of property of the acceptor, and gives up the bill accordingly without striking out his name as drawer. Before the bill becomes due a party who is ignorant of this transaction discounts it for the acceptor, and before it becomes due transfers it for value to the plaintiff, who is also ignorant of the transaction. The question then is, whether the discharge of a bill by the acceptor, by an arrangement with the drawer before it is due, can affect the bill in the hands of an innocent holder for valuable consideration? I think it cannot. The contract of the drawer and each endorser is, that the bill should be paid by the acceptor at its maturity—not before it is due; that it shall be paid according to its tenor and effect, that is, when it becomes due. If upon its being discharged before it becomes due

the drawer inadvertently leaves his name upon the bill, he is but in the ordinary case of a party who has a bill in negotiation with his name upon it against his intention. It is in the hands of an innocent holder who has no notice that it has been discharged."

It is contended that Witte is not a bona fide holder of a negotiable paper for valuable consideration, because he did not acquire

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*title from one capable of transferring it, or in possession of it, with an apparent right to transfer it, and without notice of any defect in his title or right to transfer. The case of the Central Bank of Brooklyn v. Hammett et al. (50 N. Y., 158,) is referred to as authority for the position. The principle that governed the decision there may be admitted as correct, to wit: That the possession of such an instrument by a party to it only authorizes a presumption of such rights and obligations of the several parties as are indicated by the paper itself. Contrary to the conclusion which we have reached, as we think, both on principle and authority, as to the presumption arising from the possession of a bill by the acceptor before due, it holds that it could only have been in his possession "either for acceptance or after it had been paid, and in neither case would he have had the right to transfer it." In our view the restriction which would be thus imposed on the presumption arising from the possession by an acceptor of a bill before maturity is not in accordance with the rules pertaining to negotiable securities, and, if adopted, would so affect their operation as to deprive them of many of the valuable purposes which they afford the public as a most convenient medium of exchange.

It may not be out of place to say that in the case just referred to Peckham, J., dissented from the conclusions of his brethren.

The loss of Mrs. Williams is to be attributed to her own neglect. By leaving the drafts with Kirkpatrick, with blanks in the dates, names of payees and time of payment, against all wrong intention on her part, she afforded him the means of perpetrating a fraud either on herself or some innocent third party. Between them, who should bear the loss? Does not every dictate of right sanction the rule of law applicable to agencies, which declares "that where one of two innocent parties must suffer through the fraud and negligence of a third party, the loss shall fall upon him who gave the credit or enabled such person to commit the wrongs?"

The presiding Judge, without any exception to the report of the Referee to the character of the instrument sued upon, holds that one of them is not a bill of exchange because drawn on J. & J. D. Kirkpatrick, requesting the drawees to pay to their own order a certain sum of money, while a bill of exchange presupposes a duty on them to pay to some other than themselves. The only authority relied on in support of the position is found in Story on Bills, § 35. With the accustomed deference that is due to so distinguished a jurist as the late Mr. Justice Story, we are

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obliged to say that *the proposition is not sustainable on either principle or authority. We are the more emboldened to say so because, in the same Section, the learned writer thus expresses himself: "Nay, the drawer may at once become drawer, payee and drawee: as, for example, if he should draw a bill on himself, payable to his own order at a particular place, naming no drawee, and then should endorse it over, the endorsee might sue him as acceptor of the bill or as maker of a promissory note, at his election." And in Section 36 he says "the drawee and the payee may be also one and the same person." But in Wildes v. Savage, (1 Story, 29 [Fed. Cas. No. 17,653],) he lays down the rule in direct contradiction to his affirmation cited by the presiding Judge to sustain his own conclusion. We quote the very words of Justice Story: "The argument is that the bill is not a regular bill of exchange because it is drawn by Russel & Co., payable to Wildes & Co., who are the drawees of the bill. * * * An instrument is not the less a bill of exchange because all the parties to it in the character of drawers, payees and drawees are not different persons. A bill drawn by a person payable to his own order has always been deemed to be a bill of exchange in the commercial sense of the phrase, and it would not cease to be such a bill if it should be endorsed by the drawer payable to the drawee. Now, such a bill so endorsed differs in nothing substantially from the present bill. In truth, where the bill is negotiable, and contains a drawer, a payee and a drawee, it is, in a commercial sense, a bill of exchange, although one or more of the parties shall fill a double character."

Mr. Chitty, in his work on Bills, page 25, says: "It is not, however, necessary that there should be three parties to a bill; there are sometimes only two; as where a person draws on another payable to his own order; and, indeed, a bill will be valid where there is only one party to it, for a man may draw on himself payable to his own order. In such cases, however, the instrument may be treated as, in legal operation, a promissory note, and declared on accordingly, but in practice it is usual to declare upon the instrument as if it were a bill not admitting the identity of drawer and drawee." The objection thus taken by the presiding Judge to one of the bills cannot prevail, and, in conformity with our views herein expressed, the judgment must be set aside and the case remanded to the Circuit Court for a new trial. It is so accordingly ordered.

WRIGHT, A. J., and WILLARD, A. J., concurred.

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*GREENVILLE AND COLUMBIA RAILROAD COMPANY v. MAFFETT.

(Columbia, April Term, 1876.)

[*Bankruptcy* ⇐421.]

A surety on a bond given by an agent of a railroad company for the faithful performance of his duties as agent is not released by his discharge in bankruptcy from liabilities accruing under the bond after the estate of the surety is settled up by his assignee; but from liabilities accruing before that time he is released by his discharge.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 786; Dec. Dig. ⇐421.]

[*Bankruptcy* ⇐421.]

A discharge in bankruptcy releases the bankrupt only from such claims against him as are provable against his estate at the time it is settled up by his assignee.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 772–774, 776, 777, 779–781, 783–786, 788–790; Dec. Dig. ⇐421.]

[*Bankruptcy* ⇐320.]

A bond for the faithful discharge of his duties by an agent is a continuous indemnity, binding the sureties from time to time as breaches occur; and until there is a breach there is no debt of the surety, either existing or to become due, which can be proved against his estate in bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 479, 480; Dec. Dig. ⇐320.]

Before Moses, J., at Newberry, August, 1875.

This was an action by the Greenville and Columbia Railroad Company against Levi Bates Maffett, Robert Maffett and David Kibler.

The case, as agreed upon by counsel and set forth in appellants brief, is as follows:

1. Levi Bates Maffett, as principal, and Robert Maffett and David Kibler, as his sureties, executed their bond to the Greenville and Columbia Railroad Company on the 15th day of September, A. D. 1856, in the penal sum of $3,000, conditioned for the faithful performance of his duties as the agent of the obligee at Prosperity or Frog Level station by the said L. B. Maffett.

2. Among the duties undertaken in said bond by the said L. B. Maffett, as agent, were those of "collecting all dues for freight and passage, and accounting for and paying the same to the Auditor and Treasurer of said company," and of "discharging faithfully every duty now appertaining or hereafter to be assigned to his office."

3. L. B. Maffett continued to act as agent of the plaintiff until the day of February, A. D. 1872, when he was removed.

4. The indebtedness of the said L. B. Maffett at the date of his removal amounted, after allowing all proper credits, to $1,803.47.

5. David Kibler, one of the sureties above named, filed his petition in voluntary bankruptcy, in the District Court of the United States for the District of South Carolina, on the 27th day of February, A. D. 1868. He received his discharge in bankruptcy on the 7th day of November, A. D. 1868. His estate in bankruptcy *was settled up by John T. Peterson, his assignee, in September, 1870.

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6. L. B. Maffett was in arrear, as agent, continuously to the plaintiff, for a long period before his removal, and before the filing of David Kibler's petition in bankruptcy, as shown by the monthly balances struck at the office of the plaintiff, at Columbia, S. C.; certainly as far back as the month of December, 1866.

7. L. B. Maffett was indebted, as agent, to the plaintiff in the sum of $806.57 at the time of the filing of Kibler's petition in bankruptcy; on 31st October, 1868, in the sum of $845.23; on 30th November, 1868, in the sum of $877.45; on 31st August, 1870, in the sum of $1,250.86; on 30th September, 1870, in the sum of $1,249.30—the amount of indebtedness varying from month to month, but there being always an indebtedness, between $471.33, the lowest, and $1,951.99, the highest, between the month of December, 1866, and the month of February, 1872, the date of his removal.

8. A balance was struck at the chief office of the railroad, at Columbia, at the end of every month, on the accounts between the railroad and its agents, and the balance so found, whether for or against the agent, was forwarded at once to each agent.

9. There was a similar balance struck each week between the railroad and its agents, respectively, and from these, after giving the agents opportunity to correct errors, the monthly balance was made up.

10. It was the rule of the railroad company that an agent should promptly pay over, at the chief office in Columbia, the balance found to be due by him at the end of each month to the company.

11. The railroad company was aware of the bankruptcy of David Kibler, and endeavored to procure from L. B. Maffett a new bond and a settlement of L. B. Maffett's deficits; and for this purpose the President of the company sent one Burr J. Ramage, one of its agents, to L. B. Maffett at the close of 1869 or early in the year 1870.

12. The plaintiff sought, in this action, an account of the agency of L. B. Maffett, and demanded judgment against all the defendants for the sum of $1,873.47, as the balance due from Maffett, as agent, on 29th February, 1872, with interest from that date.

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*13. No defense was made by Robert Maffett, and none by L. B. Maffett, except for a discount of seventy dollars, which was allowed by the Referee and by the Circuit Judge; and a judgment was recommended by the Referee and ordered by the Circuit Judge against those two for the sum of $1,803.47, with interest from 29th February, 1872.

14. The statements of monthly balances, above given, due from L. B. Maffett, as

agent, to the plaintiff, are part of those submitted by the plaintiff in his bill of particulars in this action and taken from the plaintiff's books.

15. David Kibler pleaded his discharge in bankruptcy in bar of the whole claim set up by the plaintiff against him.

16. The Referee allowed that plea, and recommended a judgment in favor of David Kibler against the plaintiff, and his costs.

17. The Circuit Judge, hearing the case upon exceptions to the Referee's report, made by the plaintiff, sustained the report so far as it related to the amount due by L. B. Maffett at the time of the filing of David Kibler's petition in bankruptcy, and, therefore, decided Kibler to be discharged from $806.57 of the amount claimed by the plaintiff, but held him liable for the default of L. B. Maffett after that date, amounting to $996.90, and gave judgment against him (Kibler) for that amount and costs.

18. This appeal is brought to procure the reversal of so much of the Circuit Judge's decree as gives judgment against David Kibler for the sum of $996.90 and costs, and to procure the release of the said David Kibler from all liability to the plaintiff and from the costs of this action.

David Kibler, one of the defendants, appealed on the following grounds:

1. Because His Honor erred in holding the said defendant liable for any debt or default of the defendant, L. B. Maffett, as agent of the plaintiff.

2. Because if the said defendant, David Kibler, is liable for any debt or default of the said L. B. Maffett, as agent of the plaintiff, His Honor erred in holding him liable for any such debt or default as occurred prior to September, 1870, the date of the final settlement of the said David Kibler's estate in bankruptcy by his assignee.

3. Because His Honor erred in holding that the said David Kibler was released by his discharge in bankruptcy only from certain

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*breaches of the bond of the said L. B. Maffett, on which he, the said David Kibler, was surety, and not from the whole bond.

Suber & Caldwell, for appellant:

A discharge duly granted in bankruptcy releases the bankrupt from all debts, claims, liabilities and demands which might have been proved against his estate, except such debts as were created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary character.—Bankrupt Act of 1867, §§ 33 and 34.

The appellant, David Kibler, not coming within any of the three exceptions above mentioned, inasmuch as he was not a fiduciary but only a surety on the bond of a fiduciary, L. B. Maffett, it follows that his discharge in bankruptcy released him from all debts, claims, &c., which might have been proved against his estate in bankruptcy.

A debt, claim, liability or demand is provable in bankruptcy whenever,—1st, the obligation subsisted at the time of the filing of the bankrupt's petition; 2d, when the amount owing under or upon the obligation can be ascertained and fixed before the declaring of the final dividend, whether the liability be absolute or contingent.—Bankrupt Act of 1867, § 19; Houston v. The State, 34 Texas, 542; Jones & Calhoun v. Knox, 46 Ala., 53; McMinn v. Allen, 67 N. C., 131; United States v. Davis, 3 McLean, 483.

The liability of the surety of a fiduciary is therefore a contingent liability, provable against the estate of the surety in bankruptcy, whenever the fiduciary has in his hands money or property for which he is bound to account to his cestui que trust.—Jones & Calhoun v. Knox, 46 Ala., 53; or whenever the fiduciary, being a public officer or an agent, is guilty of a default or a breach of his bond, given for the faithful discharge of his duties.—McMinn v. Allen, 67 N. C., 131; United States v. Davis, 3 McLean, 483.

In this case the fiduciary, L. B. Maffett, was continuously in arrears with his cestui que trust, the plaintiff, from the month of December, 1866, till his removal in 1872. The amount of his indebtedness in February, 1868, (the time of the filing of the appellant's petition in bankruptcy) being $806.57.

The default of the fiduciary, L. B. Maffett, at the time of the appellant's going into bankruptcy was not only provable in point of law, but the plaintiff had the information

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which enabled them *to prove the amount of the default against the appellant's estate in bankruptcy at all times between the filing of the appellant's petition and the settlement of his estate in September, 1870; because the plaintiff, the railroad company, struck a balance every week of accounts between it and its agents, and from these weekly balances, after giving the agents opportunity to correct errors, a balance was struck at the end of each month and forwarded to the agent, as is shown by the testimony of C. V. Carrington, an officer of and witness for the plaintiff, and by the account filed by the plaintiff with the Referee in this case.

The railroad company have only themselves to blame for the default of the agent, L. B. Maffett, after the bankruptcy of the appellant, for they knew of such bankruptcy, and partly, at least, on that account, endeavored to procure a new bond from L. B. Maffett, about the close of 1869 or beginning of 1870, yet did not remove him from office. And, being guilty of such laches, it would be intolerable injustice to allow them to derive a benefit from it by making good the defaults of their agents out of the property of an innocent and helpless surety.

L. B. Maffett, the agent of the plaintiff, and the principal on the bond complained upon, being a defaulter of long standing at the time of the filing of David Kibler's petition in

bankruptcy, the condition of the bond was already broken, and the bond constituted a debt provable against the estate of the bankrupt to the extent of the breach. But the claimant in that case, being in the position of a creditor suing upon his demand, must have presented the bond itself against the bankrupt's estate. The bond is, therefore, deemed forfeited as to the bankrupt, and must be presented as an entirety against his estate, and cannot be withdrawn and kept open against him—except, of course, in the three cases excepted in Section 33 of the Bankrupt Act above referred to, to wit: in the cases of the debt being created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in a fiduciary capacity.

Justice Saffold says, in Jones & Calhoun v. Knox: "We think it is the contract or obligation to be liable for the default of the guardian that the discharge in bankruptcy relieves from, and not merely the liability when fixed."

The general and fundamental principle of the bankrupt law is to release a debtor from his debts upon his making a surrender of

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*his estate and otherwise complying with the requirements of the Act. There is, therefore, violence done to the law whenever it is held that a discharge in bankruptcy is not a release from a debt, except in cases expressly or by necessary implication excluded from the benefit of the Act. And it especially contravenes the policy of the law, as exhibited in the amendment of 22d June, 1874, to hold a surety liable for a debt of his principal, occurring after his bankruptcy, which he could not prevent, and which arises after he is entitled to a release from his debts. For that amendment, while it requires for the discharge of a bankrupt that his assets shall equal thirty per cent. of the claims proved against his estate as principal debtor, unless by the consent of one-fourth of his creditors in number and one-third of them in value, yet does not require his assets to bear any proportion to his debts as surety, whether creditors consent to his discharge or not.—Rev. Stat. U. S., § 5112; Bump on Bankruptcy, (7th ed.,) 632.

But if the appellant's discharge in bankruptcy did not effect his release from all liability for the defaults of his principal, it certainly operated to release him from all indebtedness arising from such defaults down to the date of the declaring a final dividend in his (the bankrupt's) estate, viz., in September, 1870; for, under Section 5069 of Revised Statutes of United States, "if the bankrupt is bound as drawer, endorser, surety, bail, or guarantor, upon any bill, bond, note, or any other specialty or contract, or for any debt of another person, and his liability does not become absolute until after his adjudication of bankruptcy, the creditor may prove the same after such liability becomes fixed and before the final dividend is declared." The deficit of L. B. Maffett amounted, on 31st August, 1870, to $1,250.86, and on 30th September, 1870, to $1,249.30. The appellant should, therefore, in any event, be released from the sum of $1,250.86, the amount of the deficit at the time of the settlement of his estate, and not merely from $806.57, the amount of the deficit at the filing of his petition in bankruptcy.

The position taken by the plaintiff, and by the Circuit Judge in his decree, that the bond in question was a continuing obligation, and held the appellant liable for defaults committed by his principal after his, the appellant's, discharge in bankruptcy, and after the settlement of his estate, is not sustained by the bankrupt Act or by the authorities. The Act

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excepts from the benefit of a discharge *a debt for rent after the bankruptcy of the lessee; and the decision in Steinmetz v. Ainslie follows the Act, because it holds that rent is a daily accruing debt for a daily furnished consideration, and, therefore, the continuing to occupy and use premises after one's bankruptcy creates a debt not existing at the time of the institution of the proceedings, and, therefore, not released by a discharge. And a debt for storage, continued after the commencement of proceedings in bankruptcy, is of the same character, and hence the decision in Robinson v. Pesant. The principle is fully expressed in In re May & Kerwin, 9 Bank. Reg., 419, S. C.; 47 How. Pr. R., 37: "Rent for the time after commencement of proceedings in bankruptcy is not a provable debt. Where an article is purchased, the consideration is, or is assumed to be, executed; while, in the case of rent, the consideration is assumed to be not executed, but executory, the use and occupation being in futuro." And it is decided in In re Webb & Co., (6 Br. Reg., 302,) "that the landlord's right to rent against the bankrupt's estate expires on the day of adjudication."—Bump on Bankruptcy, (7th ed.,) 514, 515.

Baxter, contra:

1. The discharge of the appellant in bankruptcy worked no cancellation of the bond conditioned for the performance, by Levi B. Maffett, of his duty to the plaintiff as their agent, but only discharged the appellant from liability for breaches thereof anterior to the commencement of appellant's proceedings in bankruptcy, but not from liability for subsequent breaches.—Bush v. Cooper's Administrators, (18 How. U. S., p. 82,) referred to in James's Bankrupt Law, p. 143.

2. "On a continuing contract, where the liability is incurred from day to day or month to month, a discharge in bankruptcy cannot be pleaded as a bar to any part of the liability incurred after the date of the commencement of proceedings in bankruptcy."—In Court of Appeals, N. Y., Robinson v. Peasant, reported in 8 Nat. Bank. Reg., p. 426. In the

case cited, the suit was for the recovery of money due for storage, for which the defendant was held liable, so far as the storage was subsequent to his discharge in bankruptcy, but not otherwise. The contract created by the bond, the subject of the present suit, is clearly upon its face and in its nature a continuing contract; and the judgment of the

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Court *below is in exact conformity with the case cited as well as the case of Steinmetz v. Ainslie, (4 Denio, 573,) in which the same principle was applied to a suit for rent under the bankrupt Act of 1841.

The judgment of the Court below is further, but negatively, sustained by the case of Jones & Collum v. Knox, (Supreme Court of Alabama,) reported 8 Nat. Bank. Reg., 559. The defendant pleaded his discharge in bankruptcy in bar of a recovery in favor of a minor for breaches on guardianship bond whereon the defendant was surety.

The discharge was held a complete bar to the recovery, because the liability had become fixed and susceptible of proof before the commencement of the proceedings in bankruptcy; but, if otherwise, would the discharge have been held such a bar? Surely not.

3. "In order to ascertain which debts are extinguished by the bankrupt's discharge, the real test is, what debts are provable under the bankruptcy?"—James's Bankrupt Law, 141. By the bankrupt's discharge, in its very terms, he is only discharged from debts provable under the bankruptcy proceedings. According to this test, from the breaches of Levi B. Maffett's bond, made by him before the bankruptcy of his surety, David Kibler, the appellant, the Court held the appellant discharged, wherein all parties acquiesce; but for the breaches of said bond made after the bankruptcy of the appellant, he, with the other defendants, was held liable. Were the subsequent breaches provable at the commencement of the bankruptcy? The bond was in force until Levi B. Maffett's removal, and the contract created thereby was continuing until that time, long after the discharge. The breaches subsequent could not possibly be proved.

October 31, 1876. The opinion of the Court was delivered by

MOSES, C. J. The position assumed for the appellent, David Kibler, that his discharge in bankruptcy operated as a full release of his obligation to the respondent of 16th September, 1856, cannot be maintained. It regards the bond as creating a debt against all the obligors through its penalty, which could only be enforced at law by an action of debt, in which a final judgment would be obtained for its full amount, and therefore it is urged that proof of any existing demand under it, in a Court of bankruptcy, extends to, covers and discharges the whole obligation, though, even at law, the amount to be collected would be restricted to the sum real-

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ly *due. But an action on a bond, though only for the payment of money, is not necessarily confined to one of debt on the penalty. Covenant may be brought on the condition. In 2 Robinson's Pr., p. 58, it is said: "Covenants the performance whereof is secured by a penalty are susceptible of a two-fold remedy. 1st. An action of debt for the penalty, after the recovery of which the plaintiff cannot resort to the covenant, because the penalty is a satisfaction of the whole. 2d. An action of covenant in which the plaintiff, waiving the penalty, proceeds on the covenants and may recover more or less than the penalty—toties quoties." If the respondent had offered, in the Court of Bankruptcy, proof of the liability of the appellant as surety on the bond for the faithful discharge by the principal of the duties incumbent on him as such agent, its extent would not have been measured by the penalty but by the amount then due through the default of the said L. B. Maffett, for whom the said Kibler stood bond as surety.

By Section 5119 of the Revised Statutes of the United States, (corresponding with the 34th Section of the bankrupt Act,) "a discharge duly granted shall, subject to the limitations imposed by the two preceding Sections, release the bankrupt from all debts, claims, liabilities and demands which were or might have been proved against his estate in bankruptcy." If the debt is provable, it has been uniformly held that the action is barred although it was not actually proved.

By Section 5014 of Revised Statutes, "the filing of the petition shall be an act of bankruptcy and the petitioner shall be adjudged a bankrupt."

It is laid down, both in James and Bump, the latter at page 232, referring to the authorities so deciding, "that a certificate of discharge is a bar only to debts and demands which were or might have been proved, but not as against personal covenants and engagements which were not provable. If a demand is not provable it is not barred by the certificate."

At the time of the adjudication of Kibler as a bankrupt a present right of action accrued to the company for the defalcation in the account of the agent by which a certain sum due could be ascertained. This was provable. It was "a legal debt subsisting before the bankruptcy." If the other surety had on the same day offered to pay to the company whatever sum was then due by reason of the said bond, could any further

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amount have lawfully been de*manded of him? If the company could have then proved for more than such amount, by what form of oath could the claim have been verified? For what was the bankrupt actually liable

when he filed his petition? Not for the penalty of the bond, but the loss in money to the company by the default of the agent. Even in an action of debt on a penalty of a bond other than for the payment of money the plaintiff may be required to submit the condition to a jury to assess the debt or damages actually due, and the execution shall be levied accordingly, though the judgment for the penalty shall stand as a security for the sum so assessed with costs.—7 Stat. at Large, 280. The company could have proved whatever demand it then had against the bankrupt, and the Circuit Judge properly held that as to these he was discharged.

We do not, however, concur with him in holding that Kibler was liable to the extent fixed by the decree. If it was competent for the company to have proved, before the final discharge, claims against the bankrupt, through his bond, though arising after his adjudication, on the same principle by which he is held released from the claims existing at the time of filing his petition he will be discharged from such after-accruing demands.

The 5069th Section of the Revised Statutes provides that "when the bankrupt is bound as a drawer, endorser, surety, bail or guarantor upon any bill, bond, note or any other specialty or contract, or for any debt of another person, and his liability has not become absolute until after the adjudication of bankruptcy, the creditor may prove the same after such liability has become fixed and before the final dividend has been declared." The bond in question created a continuing liability. It did not stipulate for payment of specified sums at stated periods. It was to endure while Maffett was retained as agent at the depot named, or until notice from Kibler or his co-surety that he would not be further bound. Each and every succeeding default created a new demand, from which arose a new cause of action.

The debts actually due at the time of filing the petition created an absolute liability. Those wherein the bankrupt was bound in the character specified in the said Section, and which became absolute after his adjudication but "before the final dividend was declared," are provable by the force and effect of the provision referred to. Not so, however, with a debt fixed by a default after

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*such time. The discharge cannot operate upon it, because it arises after the period within which claims are allowed by the Act to be proved.

In re Loder (4 B. R., 190 [Fed. Cas. No. 8,457],) it was held that "a claim against a bankrupt or drawer, endorser, surety, bail or guarantor cannot be proved before the liability has become fixed. Until that time it is not regarded as a debt due and payable, or even as a debt existing, but not payable until a future day, so as to be provable."

In Loring v. Kendall, (1 Gray, 305,) Fowler v. Kendall, (44 M., 448,) [we quote from Bump on Bankruptcy, 735,] it is said: "The discharge does not release a surety from liability on a bond given by an officer for the faithful performance of his duties where the breach occurred after the discharge was granted."

In the same case of Fowler v. Kendall it was held that "a bond to secure the faithful performance of official duties is a continuing indemnity, and every breach of it is a good cause of action, affording a remedy when, and only when, each severally occurs."

It appears by the brief that on the 31st August, 1870, the deficit of Maffett, the agent, amounted to $1,250.86. In the following month the estate of the bankrupt (Kibler) was settled up by the assignee. To that time, in our view, the claim was provable, and the bankrupt is, therefore, released from it by his discharge.

The deficiency for which the sureties were liable on the removal of Maffett in February, 1872, was $1,803.47. Of this amount, the bankrupt is discharged from the said $1,250.86, the sum which was provable before the last dividend was declared, leaving $552.61, with interest from 29th February, 1872, for which, with the costs, the respondent may take judgment.

The decree below is so accordingly modified.

WRIGHT, A. J., and WILLARD, A. J., concurred.

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*FRASER & DILL v. CHARLESTON.

(Columbia. April Term, 1876.)

[*Evidence* ⇐352.]

In an action against the City Council of Charleston by creditors of J. W., deceased, to recover from it the value of certain city stock standing on the transfer stock book of the City Treasurer in the name of J. W. at the time of his death, which the plaintiffs alleged had been illegally transferred to others after his death, the transfer stock book of the City Treasurer is not competent evidence in behalf of the defendant to show that the transfer had been made by the authority of J. W., given before his death by endorsements on the original certificates, it appearing from the testimony that the original certificates from which the entries in the book were made were in the possession of the defendant.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1398; Dec. Dig. ⇐352.]

[*Evidence* ⇐238, 317.]

The statement of the executor of J. W. on the inventory of the estate that the certificates of the stock held by J. W. were hypothecated in his lifetime and since his death were transferred by the parties holding them: Held not to be competent evidence for the defendant.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 883, 1178; Dec. Dig. ⇐238, 317.]

[*Evidence* ⇐354.]

The books of a municipal corporation are competent evidence on behalf of the corporation itself to prove its laws and ordinances of a public nature, which by its charter it is authorized to make, but entries in its books of a private nature are not competent.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1457; Dec. Dig. ⇐354.]

[*Appeal and Error* ⇐1106.]

Where in "a case of chancery" the solicitor for the defendant omitted to offer certain material written testimony under the mistaken notion that it was not necessary under the state of the pleadings to produce it, the Supreme Court, on a petition filed during the argument, remanded the case to the Circuit Court to give the defendant an opportunity to offer the testimony.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4386–4398, 4585; Dec. Dig. ⇐1106.]

Before Reed, J., at Charleston, June, 1875.

This was an action in the nature of a creditors bill by Fraser & Dill and Mary F. Davis against William Whaley as executor of Joseph Whaley, deceased, the City Council of Charleston and others.

The complaint alleged that the plaintiffs were creditors of Joseph Whaley, deceased, and that since his death they had recovered judgments against his executor, and one of the objects of the bill was to subject certain stock of the city of Charleston which it was claimed belonged to the said Joseph Whaley at the time of his death to the payment of his debts.

By an order, dated September 12, 1874, G. W. Dingle, Esq., was appointed Special Referee in the cause to inquire and report upon the facts, with leave to report any special matter.

On April 13th, 1875, the Referee submitted his report as follows:

Pursuant to an order of Court made in this case and filed on the 12th day of September, A. D. 1874, whereby it was referred to me as Special Referee to report upon the facts, with leave to report any special matter, I respectfully report:

That, having been attended by the attorneys and counsel for plaintiffs and defendants, I proceeded to the examination of the matter referred.

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*I find that Joseph Whaley departed this life on the 26th day of January, A. D. 1872, having first made and duly executed his last will and testament, bearing date the 4th day of February, A. D. 1869, wherein he appointed his daughter, Maria Evans Morris, of the State of New York, executrix, and his grandnephew, William James Whaley, and his son, William Whaley, executors.

That said will was duly admitted to probate on the 12th day of February, A. D. 1872, and on the 13th day of February, A. D. 1872, the said William Whaley qualified thereon as executor. That subsequent, to wit, on the day of , A. D. 1874, the said William James Whaley also qualified as executor under the said will, and by an order of this Court of 13th August, A. D. 1874, was made a party to these proceedings, with leave to plead, answer or demur in twenty days.

That the said William Whaley, having qualified as executor, took possession of the real and personal estate of the testator, and filed an inventory of the estate on the 16th May, A. D. 1874.

Assets of Estate of Joseph Whaley.

Real Estate.

I find that the real estate of the testator consists of a large and valuable plantation or tract of land on Edisto Island and a house and lot on Edingsville. Since the death of the testator this plantation has been planted and managed by the executor, William Whaley.

Personal Estate.

1. Bond of William Whaley to Joseph Whaley, with mortgage of house and lot corner of Broad and Orange streets.

This bond bears date 1st May, A. D. 1866, is conditioned for the payment of $25,000, and is secured by a mortgage of the lot of land and the buildings Southwest corner of Orange and Broad streets, city of Charleston. The mortgage bears date the 20th March, A. D. 1868, and was recorded in the office of the Register of Mesne Conveyance on 7th April, 1868, in Book G, No. 15, page 305. Mrs. Rachel L. Whaley, wife of William Whaley, renounced dower on 22d May, 1871, which renunciation is also recorded.

The mortgage recites the satisfaction by Joseph Whaley, for the convenience of William Whaley, of a prior mortgage of the same premises from William Whaley to him.

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*This bond and mortgage are in the possession of C. C. Puffer, Esq., Receiver of the assets of the Bank of the State, and was produced by him at the reference in response to a subpœna duces tecum. The present Receiver of the Bank of the State assets claims to hold the said bond and mortgage as a security for a loan made by a former Receiver to Mr. William Whaley. They are endorsed in blank in the name of Joseph Whaley, in the presence of N. H. Porter. As the Receiver of the bank is not a party to these proceedings, the issue made in the complaint as to the bond and mortgage, viz.: that the hypothecation of the same be adjudged void as against the creditors of the estate of Joseph Whaley, and be declared a valid lien upon said premises for the benefit of said creditors, could not be further investigated.

City Stock.

I find that the City Treasurer issued to Mr. Joseph Whaley, in his name, certificates

of city stock at the dates and for amounts as below specified:

On 12th July, 1852, certificate No. 7, of the issue of June, 1852, for.....	$23,000
This certificate was renewed January 16, 1866.	
On the 11th February, 1857, certificate No. 113, of the issue of March, 1856, for..	64,122
And on the 14th February, 1866, certificate No. 12, of the issue of 1866, for past due interest, for.....	5,220
Making in all.....	$92,342

On the 11th July, 1871, the certificate No. 113, for $64,122, was divided into the following certificates, issued in the name of Joseph Whaley:

Certificate No. 381, for.....	$34,122	
Certificate No. 382, for.....	5,220	
Certificate No. 383, for.....	4,780	
Certificate No. 384, for.....	4,000	
Certificate No. 385, for.....	6,000	
Certificate No. 386, for.....	5,000	
Certificate No. 387, for.....	5,000	$64,122

The certificate No. 381, for $34,122, was further divided into the following certificates, issued in the name of Joseph Whaley:

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*Certificate No. 393, for	$10,000	
Certificate No. 394, for.....	10,000	
Certificate No. 395, for.....	8,000	
Certificate No. 396, for.....	6,122	$34,122

It is alleged by the City Council, and so appears on the transfer book of the City Treasurer, that on the 13th September, 1871, shortly prior to the death of Mr. Joseph Whaley, $6,000 of the above stock, certificate No. 385, had been transferred. Deducting this amount, I find that at the time of the death of Mr. Joseph Whaley, 26th January, 1872, there stood in his name on the books of the City Treasurer city stock to the amount of $86,342, par value.

Mr. Corbin, on behalf of the City Council, defendant, admitting this amount of city stock in the name of Joseph Whaley at the time of his death, offered in evidence the transfer stock book of the City Treasurer to show to whom this stock had been transferred.

The books so offered in evidence is a record of transfers of stock: it is required by ordinance of the city, and is kept as required by ordinance. It shows the date and issue of certificates of stock to be transferred, the name of the owner of the stock, the number of the certificates, and the amount it represents, to whom transferred, the number of the new certificate to be issued, and the amount of such certificate. The entries are made from the certificates; the certificate transferred is endorsed as transferred to another number and canceled, and the endorsement is signed by the Mayor of the city and the City Treasurer. The canceled certificate is then filed away and carefully preserved.

The plaintiffs objected to the proof of the transfer of stock by the transfer book, or in any other way than by the production of the original certificate thereof—

1. Because the transfer book is not the primary and best evidence of the transfer; and

2. Because the transfer must be proved by the original certificate, endorsed and delivered, as required by city ordinance, the production of the original certificate being necessary to show the genuineness and validity of such transfer.

I sustained the plaintiffs' objection to the introduction of this evidence to prove the transfers of the stock—my ruling being excepted to by Mr. Corbin—and I find, accordingly, that no transfer of the city stock, amounting to $86,342, par value, standing in the name of Joseph Whaley at the time of

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his death, nor any *authority to make transfers of said stock, has been proved; and that said stock is a portion of the assets of the estate of the said Joseph Whaley, and to be administered as such; that said stock is represented by certificates numbered 7, 12, 382, 383, 384, 386, 387, 393, 394, 395 and 396, of the amounts and descriptions as above set forth.

Judgments Against William Whaley, Executor of Joseph Whaley.

From an examination of the records from the office of the Clerk of the Court of Common Pleas for Charleston County, I find that the following judgments have been entered up against William Whaley, executor of Joseph Whaley, at the dates and for the amounts and on the causes of action as below specified:

1. Judgment in favor of George E. Gibbon, dated 15th November, 1873, on note of William Whaley, endorsed by Joseph Whaley, for	$	1,210 25
This judgment was made a lien on 24th February, 1874.		
2. Judgment in favor of Richard Lathers, dated 2d January, 1874, on joint and several bond of William Whaley and Joseph Whaley, in the penalty of.....		24,000 00
3. Judgment in favor of George W. Williams & Co., dated 24th February, 1874, on note of William Whaley, endorsed by Joseph Whaley, for.....		710 00
4. Judgment in favor of R. K. Scott, dated 30th May, 1874, on transcript of judgment, for.....		5,373 01
5. Judgment in favor of J. E. Burke, dated 8th June, 1874, on note of William Whaley, endorsed by Joseph Whaley, for.....		662 66
6. Judgment in favor of T. Grange Simons, dated 8th June, 1874, on note of William Whaley, endorsed by Joseph Whaley, for..		370 75
7. Judgment in favor of Fraser & Dill, dated 8th June, 1874, on note of William Whaley, endorsed by Joseph Whaley, for.....		2,069 76
8. Judgment in favor of Mary F. Davie, dated 8th June, 1874, on note of William Whaley, endorsed by Joseph Whaley, for.....		1,400 83

9. Verdict recovered in the Court of Common Pleas, March Term, in the case of Edward H. Gadsden and Rebecca H. Gadsden, his wife, against William Whaley, executor of Joseph Whaley, for.. 15,129 00

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*Claims Against the Estate of Joseph Whaley.

By an order of this Court of the 12th August, 1874, it is provided that all claims against the estate of Joseph Whaley proved under the previous order of the Court calling in creditors in the case of the People's Bank against William Whaley, executor of Joseph Whaley, be considered as proved and established in this case.

I respectfully report that the following statement of claims has been furnished me by Jacob Williman, Esquire, Clerk of the Court, as proved before him in the first mentioned case:

M. L. Wilkins, note January 9th, 1872	$ 600 00
M. L. Wilkins, note December 11th, 1871	700 00
Charles T. Mitchell, note December 18th, 1871	4,290 00
Charles T. Mitchell, note January 12th, 1872	2,135 00
Theodore D. Jervey, note June 1st, 1874	2,387 00
Theodore D. Jervey, note November 10th, 1871	1,300 00
J. Drayton Ford, note January 13th, 1872	1,901 33
R. W. Disher, note December 1st, 1871	450 00
Fanny Williams, note January 5th, 1872	1,900 00
George A. Trenholm, note November 7th, 1871	1,700 00
Jacob Steiber, note December 22d, 1871	1,200 00
Jacob Steiber, note January 1st, 1872	1,000 00
William Ravenel, balance account..	610 52
William Ravenel, balance account..	14,735 38
G. L. Buist, note	1,000 00
People's Bank, bond January 31st, 1871	2,500 00
People's Bank, note January 3d, 1872	750 00
People's Bank, note January 4th, 1872	2,200 00
People's Bank, note January 24th, 1872	650 00
A. Simonds, for National Bank, note January 10th, 1872	5,000 00

On behalf of the City Council, I am requested to report when Joseph Whaley became a holder of the city stock, and of what issue, as shown by the books of the Treasurer, and what disposition appears to have been made of said stock, as shown by the books of the City Treasurer, and when such disposition was made.

I have above reported the amount and the issue of city stock issued to Joseph Whaley and the date of the receipt of said stock.

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*From the books of the City Treasurer, it appears, as above stated, that on the 13th September, 1871, prior to the death of Mr. Joseph Whaley,

Certificate No. 385 for	$ 6,000 00
was transferred to South Carolina Loan and Trust Company.	
Certificate No. 396 for	6,122 00
was transferred on the 13th February, 1872, to H. G. Loper, Cashier of the People's National Bank.	
Certificate No. 7 for	23,000 00
Certificate No. 395 for	8,000 00
Certificate No. 12 for	5,220 00
were transferred on the 19th February, 1872, to H. G. Loper, Cashier of the People's National Bank.	
Certificate No. 394 for	10,000 00
was transferred to D. Ravenel, Cashier of the Citizens' Savings Bank, on 19th February, 1872.	
Certificate No. 383 for	4,780 00
was transferred on the 28th February, 1872, to M. Triest.	
Certificate No. 382 for	5,220 00
Certificate No. 384 for	4,000 00
were transferred on the 23d April, 1872, to the Commissioners of the General Sinking Fund of the city of Charleston, and	
Certificate No. 386 for	5,000 00
Certificate No. 387 for	5,000 00
Certificate No. 393 for	10,000 00
were transferred to the said Commissioners of the General Sinking Fund of the city of Charleston on the 18th July, 1872.	

I am further requested to report in whose name the said city stock now stands, as appears from the books of the City Treasurer; and as to so much of the stock as has been purchased for the General Sinking Fund, I am requested to report from whom it was purchased, when purchased, and for what price purchased.

I respectfully report:

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*That it appears from the books of the City Treasurer that the said city stock, formerly in the name of Joseph Whaley, (892,-342,) now stands on said books in the following names:

Commissioners of General Sinking Fund of the city of Charleston...	$82,542 00
This includes certificate No. 385, for $6,000, transferred before the death of Mr. Whaley.	
Robert Hunter	1,000 00
C. F. Hencken	1,000 00
W. G. Bennett	820 00
William Stone	500 00
W. G. DeSaussure, trustee	4,580 00
D. Paul, trustee	200 00
F. Campbell	1,000 00
S. L. Coffin	700 00
	$92,342 00

From the account sales of city stock purchased for the Commissioners of the General Sinking Fund, submitted in evidence, and the testimony of the City Treasurer, it appears that

On the 23d April, 1872, P. J. Coogan, City Treasurer, purchased of James H. Wilson, broker, $9,220 city stock, in the name of Joseph Whaley, at 51c	$ 4,702 20

On the same day Mr. Coogan purchased from the same broker $6,122 city stock, in the name of H. G. Loper, Cashier People's National Bank, at 51c	3,122 20
On the 23d May, 1872, Mr. Coogan purchased from the same broker $14,000 city stock, in the name of H. G. Loper, Cashier, due in 1866, at 51c	7,140 00
And $23,000 city stock, due in 1877, in the name of H. G. Loper, Cashier, at 55c	12,650 00
On the 18th July, 1872, F. J. Pelzer, Esq., purchased for the same account from J. Fraser Mathewes $20,000 city stock, in the name of Joseph Whaley, at 53½c	10,700 00

Making in all $72,342 city stock, for which was paid the sum of $38,314.

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*I am further requested by the attorney of the City Council to report that as to the transfer of said stock after the death of Joseph Whaley, that it was done in good faith by the City Treasurer at the time the stock was presented, and without knowledge on the part of the Treasurer of the death of Joseph Whaley.

I respectfully report that as to the notoriety of the death of Colonel Joseph Whaley, the evidence submitted by plaintiffs established the following facts:

That on the 27th January, 1872, the invitation to the funeral of Colonel Joseph Whaley appeared in the News and Courier, a daily paper of the city of Charleston, together with an editoral notice of his death.

That his death was duly reported to the Registrar of the city, with certificate of the attending physician, and duly registered on the mortuary records of the Board of Health —a department of the city government—as required by city ordinance.

In the News and Courier of the 19th February, 1872, appeared the notice of William Whaley, qualified executor, calling upon all persons having demands against the estate of the late Colonel Joseph Whaley to present them, properly attested. Mr. Stephen Thomas, who was City Treasurer at the time of the death of Mr. Whaley, knew of his death, as also Mr. William L. Campbell, Clerk in the City Treasurer's office.

Mr. Coogan took possession of the office of City Treasurer, to which he had been elected, in March, 1872. On the 2d April, 1872, the interest on $29,220, city stock in the name of Joseph Whaley, was drawn by William Whaley, as executor, and on the 2d July, 1872, interest on $20,060, city stock in the name of Joseph Whaley, was drawn by Andrew Simonds, Esq., per order of William Whaley, as executor.

I had before me no evidence of bad faith on the part of either of the City Treasurers above mentioned, but I find, as a conclusion of fact, that the death of Colonel Joseph Whaley was sufficiently advertised to affect the City Council with notice thereof.

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*Claim Against the Bank of Charleston.

I find that William Whaley, executor of Joseph Whaley, recovered judgment against the Bank of Charleston National Banking Association amounting to		$34,833 80
On the 10th May, 1874, Mr. J. B. Campbell, attorney for the executor, received from the bank, on account of this judgment		5,000 00
And on the 22d May, 1874, the balance due on the judgment was paid over, under the execution, to C. C. Bowen, Esq., Sheriff of Charleston County, said balance amounting to		$29,833 80

The amount in the hands of the Sheriff ($29,833.80) was appropriated as follows:

Mr. D. H. Chamberlain, of counsel for plaintiff, was paid by order of the executor	$ 4,500 00	
Messrs. Simonton & Barker, attorneys for Richard S. Lathers, on account of his judgment	9,247 00	
Mr. James B. Campbell, attorney for the executor, on account of his compensation, under agreement between him and the executor	13,266 80	
Mr. J. B. Campbell, for costs	275 00	
W. J. Gayer, for costs	100 00	
Sheriff's commissions and costs	345 07	
Clerk of Court costs	100 00	
		27,833 87
Leaving in the hands of the Sheriff a balance of		$ 1,999 93

Two of the judgment creditors, George E. Gibbon and George W. Williams & Co., having given notice to the bank not to pay the fund, this balance is held by the Sheriff, to abide the decision of the Court as to the right of said judgment creditors to be paid out of said funds.

I find that William Whaley, the executor, is insolvent.

I file herewith a copy of the testimony taken in the case.

The City Council of Charleston excepted to the report on the following grounds:

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*1. Because the said Referee refused to admit the transfer book of city stock kept by the City Treasurer of the city of Charleston as evidence to prove the fact of the transfer of stock which had stood in the name of Joseph Whaley on said books; whereas the said Special Referee should have admitted said books in evidence to prove the fact of transfer of said stock. That transfers of said stock were made appears by the report of said Special Referee, wherein he states what disposition has been made of said stock.

2. Because the Special Referee erred in finding that no transfer of city stock, amounting to $86,342, par value, standing in the name of Joseph Whaley at the time of his death, and that no authority to make such

transfer, had been proved, and that said city stock is a portion of the assets of the estate of the said Joseph Whaley, and to be administered as such, and that said stock is represented by certificates numbered 7, 12, 382, 383, 384, 386, 387, 393, 394, 395 and 396, of the amount and description set forth in his said report; whereas the said Special Referee should have found and reported that, as a matter of fact, said stock, amounting in par value to $86,342, had been transferred as follows:

Certificate No. 396, for	$ 6,122 00
was transferred February 13, 1872, to H. G. Loper, Cashier of the People's National Bank.	
Certificate No. 7, for	23,000 00
Certificate No. 395, for	8,000 00
Certificate No. 12, for	5,220 00
were transferred on the 19th February, 1872, to H. G. Loper, Cashier People's National Bank.	
Certificate No. 394, for	10,000 00
was transferred to D. Ravenel, Cashier of the Citizens' Savings Bank, February 19, 1872.	
Certificate No. 383, for	4,780 00
was transferred on 28th February, 1872, to M. Triest.	
Certificate No. 382, for	5,220 00
Certificate No. 384, for	4,000 00
were transferred 23d April, 1872, to the Commissioners of the General Sinking Fund of the city of Charleston, and	
Certificate No. 386, for	5,000 00
Certificate No. 387, for	5,000 00
Certificate No. 393, for	10,000 00
were transferred to the said Commissioners of the General Sinking Fund of the city of Charleston, July 18, 1872.	

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*The said Special Referee should also have found and reported, as a matter of fact, that the stock formerly owned by said Joseph Whaley, and numbered as aforesaid, and amounting at the time of his death to $86,342, was, at the date of his said report, held by the following named persons:

Commissioners General Sinking Fund city of Charleston	$76,542 00
Robert Hunter	1,000 00
C. F. Hencken	1,000 00
W. G. Bennett	820 00
William Stone	500 00
W. G. DeSaussure, trustee	4,580 00
D. Paul, trustee	200 00
F. Campbell	1,000 00
S. L. Coffin	700 00
	$86,342 00

That for $72,342 of the stock purchased by the Commissioners of the General Sinking Fund of the said City Council of Charleston the defendant paid the sum of $38,314.

3. Because said Special Referee should have found and reported that said city stock, amounting to $86,342, is not a portion of the assets of the estate of said Joseph Whaley, deceased.

4. Because the said Referee erred in not finding and reporting, as a matter of fact, that said $86,342 of city stock had been hypothecated by said Joseph Whaley in his lifetime, as alleged in the plaintiffs' complaint, and not denied by defendants, or either of them.

5. Because the said Referee erred in finding, as a matter of law, that the City Council of Charleston had not the authority to transfer the said city stock which had stood in the name of Joseph Whaley, and which he had hypothecated, during his lifetime, to the holders and pledgees thereof.

The decree of the Court is as follows:

Reed, J. On hearing the report of the Referee in this cause, and the exceptions of the defendants, the City Council of Charleston, thereto, and upon argument of counsel.

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*1. It is ordered and decreed that the report of the Referee be confirmed and the exceptions of the said defendant, the City Council of Charleston, be overruled.

2. It is ordered and decreed that G. W. Dingle, Esq., be appointed a Receiver to take possession of all the property of the estate of the late Joseph Whaley, and of all the profits and proceeds thereof, and to administer the same under the orders of this Court, in the place and stead of the executors of the said Joseph Whaley,—the said G. W. Dingle first giving security before the Clerk of this Court, in the sum of $10,000, duly and fully to account for and to pay what he shall receive as this Court shall direct.

3. That upon the said G. W. Dingle giving the said security for the faithful performance of his duties, the said William Whaley and William James Whaley shall account for and pay over to the said G. W. Dingle, hereby appointed Receiver, all moneys in their hands, and turn over to him all property whatsoever of the said estate that may have come into their hands and possession, and account for all moneys and assets of the estate which they may have received and expended as such executors.

4. It is further ordered and decreed that upon giving the said security hereinbefore required the said G. W. Dingle, Receiver, shall take possession of the plantation or tract of land on Edisto Island and the house and lot in Edingsville, and shall take such steps as may be necessary to the preservation and gathering in of any crop or crops that may have been planted on the said plantation. And all persons who are in possession of the said plantation claiming title thereto under or by the said William Whaley and William James Whaley, executors of the said Joseph Whaley, are hereby ordered to deliver possession thereof to the said Receiver; and any and all persons who may be in possession as tenants under the same are hereby ordered to attorn to and pay their rents in arrear, and the growing rents, when due, to the said Receiver. And it is further ordered that upon the written request, or with the assent in writing of a majority of the creditors of the said Joseph Whaley who have proved and established their claims as reported by

the Referee in this case, that the said G. W. Dingle, Referee, do have leave and authority to sell the said plantation and lot upon the usual terms and usual notice; and in case of such sale, he is hereby ordered and directed to hold the proceeds thereof subject to the further order of the Court.

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*5. It is further ordered and decreed that upon giving the said security the said G. W. Dingle do proceed to set up the mortgage given by William Whaley to Joseph Whaley of the lot No. 99 Broad street, mentioned in the report of the Referee, and do take legal proceedings to foreclose the same.

6. It is further ordered and decreed that so much of the city stock found by the Referee to have stood in the name of Joseph Whaley at the time of his death, and since transferred by the said City Council of Charleston to the Commissioners of the General Sinking Fund of the city of Charleston, be adjudged and decreed to belong to the estate of the said Joseph Whaley and subject to the payment of his debts, and that the said City Council of Charleston be adjudged and decreed to cancel or cause to be canceled the certificate of such stock so standing in the name of Joseph Whaley at the time of his death and since transferred to the said Sinking Fund; and that the said Council cause new certificates therefor to be made out in the name of G. W. Dingle, Receiver; and that the said G. W. Dingle, Receiver, do hold the said stock as part of the assets of the estate of the said Joseph Whaley, subject to the further order of this Court.

7. It is further ordered and decreed that the said City Council of Charleston do account with the said Receiver for so much of the said city stock found by the Referee to have stood in the name of Joseph Whaley at the time of his death and since transferred by the said City Council of Charleston to other persons, and do pay the said Receiver the market value of the said stock at the time of the said transfers, with interest thereon from the time of the said transfers to the time of the said payment.

8. It is further ordered and decreed that the said City Council of Charleston do account with the said G. W. Dingle, Receiver, for all dividends or interest due and payable by the said City Council of Charleston upon the said city stock found to have stood in the name of Joseph Whaley at the time of his death, whether the said dividends and interest have been paid to others or not, and do pay over the same to the Receiver.

9. It is further ordered and decreed that the said Receiver do inquire into and report in what order and rank the debts of the said Joseph Whaley, reported by the said Referee as proved and established in this cause are to be paid.

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*10. It is further ordered and decreed that the said Receiver shall be entitled to two and one-half per centum on all moneys received by him, and two and one-half per centum on all moneys paid out by him as commissions.

11. And, lastly, it is ordered and decreed that the said G. W. Dingle, Receiver, do report to this Court on the first day of the next term for all his actings and doings in this cause as such Receiver; and that the parties to the cause do have leave to move in term or at chambers for any further orders in the cause.

The City Council appealed.

[For subsequent opinions, see Whaley v. Charleston, 8 S. C. 344; Fraser v. Same, 11 S. C. 486; 13 C. C. 533; 19 S. C. 384.]

Corbin & Stone, for appellant.

McCrady & Son, and Miles, for plaintiffs, contra.

Buist & Buist, John Phillips, Magrath, for the executor.

December 12, 1876. The opinion of the Court was delivered by

MOSES, C. J. The only question presented by the appeal arises out of the exception of the City Council of Charleston, one of the defendants in the cause, to so much of the Circuit decree as establishes the right to certain city stock in Colonel Joseph Whaley at the time of his death and requires the said Council to account for so much of the same as it has sold and transferred. The material point, so raised, involves the competency of the evidence offered in support of the defense, upon which the appellant relied in exoneration of the liability charged by the complaint and fixed by the decree.

It is, therefore, necessary, in a brief manner, to look to the issues made by the pleadings between the Council and the respondents, and particularly to the character of the complaint and the relief which it demanded of the former.

It was a complaint in the nature of a creditor's bill, filed by certain creditors of Joseph Whaley who had obtained judgments against William Whaley, his executor, in June 1874, on behalf of themselves and all other creditors of the said testator who shall in due time come in and seek relief by and contribute to the expenses of the action against other of his creditors, and the said executor alleging the death of the said Joseph Whaley on 26th January, 1862, leaving a last will and testament, on which the said

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William *Whaley qualified as executor on the 13th day of February following, with charges of waste and maladministration by the said executor, who was alleged to be utterly insolvent. It contained the usual prayer of relief common to a proceeding of the like nature. The averments charging a liability on the said City Council and connecting them with the case may be stated as follows:

That no inventory was filed by the execu-

tor until the 16th day of May, 1864, more than two years after he qualified. "That in the inventory then filed by him he states that the estate of the said Joseph Whaley consists as follows: 1. Claim against Bank of Charleston, &c. 2. Certain bond, secured by mortgages, &c. 3. City stock standing in the name of the testator, but all of which was hypothecated by him in his lifetime, and since his death transferred by the parties holding it to their own names, $97,000. 4. Realty, plantation, &c."

It further alleges, on paragraph 9. "that the City Council of Charleston claim to have purchased certain portions of the said stock standing in the name of the said Joseph Whaley at the time of his death, and have transferred to and hold the certificates thereof as the property of the said city, and have transferred other portions thereof to other parties. That these plaintiffs claim that all the city stock standing in the name of Joseph Whaley upon the books of the treasury of the city of Charleston at the time of the death of the said Joseph Whaley still belongs to his estate and is liable for his debts and should be administered according to law."

Wherefore the plaintiffs, as against the said Council, demand judgment "that the said city stock standing in the name of the said Joseph Whaley at the time of his death be adjudged to belong to the said estate of the said Joseph Whaley and subject to the payment of the debts of the same, and that proper administration thereof be decreed."

The City Council by their answer say, that from the records in the office of the City Treasury, on the several days stated in the schedule to said answer annexed, there was standing on the records of city stock in the said office a registry of stock in the name of Joseph Whaley amounting in all to $92,342, as will appear by the said schedule. But they aver, on information and belief, that the whole of the said stock was, on the order and by the authority and direction of the said Joseph Whaley, given before his decease, duly transferred, a portion of it to the Com-

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missioners of the General *Sinking Fund of the City Council of Charleston. That during his lifetime he endorsed the several certificates of stock set out in the said schedule, and delivered the same, so endorsed, to sundry persons or corporations as collateral security for loans by them to him made. That such transfer, in conformity with the power given to the holder of such stocks, on the books of the City Treasurer was valid and proper, and that no damage or loss accrued to him, or his estate after his death, thereby for which the said corporation is liable.

And, for a second defense to the action, the Council say that the said testator in his lifetime constituted certain persons and corporations named his attorneys or agents to transfer the stock standing in his name on the books of the Treasurer of said city, as per schedule annexed. That said persons or corporations, as such attorneys or agents, caused the said stock to be transferred, as in said schedule set out, and new certificates were issued therefor; but at the time of making the said transfers and issuing the said certificates the Council did not know of the death of the said Joseph Whaley; that all its actings in the premises were in good faith, and that no liability therefor can attach to it. Wherefore, it demands judgment and costs.

From the notes of the proceeding before the Referee, accompanying his report, it appears beyond all doubt that on 26th January, 1862, there was standing on the books of the City Treasurer stock in the name of the testator to the amount of $86,342. The Referee not only reports this as an established fact, but adds: "The counsel on behalf of the City Council defendant, admitting this amount of city stock in the name of Joseph Whaley at the time of his death, offered in evidence the transfer stock book of the City Treasurer to show to whom this stock belonged." This book, which is required by an ordinance of the city to be kept, is thus described in the testimony of the Clerk of the City Treasurer, a witness introduced by the defense, and his statement of its character is set forth in the report. "The book shows, in general, the date and issue of certificates of stock to be transferred, the name of the party, owner of the stock, the number of the certificate and the amount of money it represents, to whom transferred, the number of the new certificate to be issued and the amount of the certificate." The Referee adds: "The entries are made from the certificates, the certificates transferred are en-

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dorsed as transferred to *another number and canceled, and the endorsement is signed by the Mayor of the city and the City Treasurer. The canceled certificate is then filed away and carefully preserved."

Exception was taken by the respondents to the competency of the book as evidence of the transfer. It was insisted that it could only be made by the production of the original certificate, endorsed and delivered as required by the city ordinance, the production of such certificate being necessary to show the genuineness and validity of the transfer. The exception was sustained and the judgment of the Referee confirmed by the Circuit Court. In this consists the error charged by the appeal and brought here for correction.

It is urged by the appellant that, "under the pleadings, it was not for the City Council, in the first instance, to submit proof of authority from Joseph Whaley to make the transfer, and that it was incumbent on the respondents to show that the transfer was void for the want of proof of such authority." This assumes that the respondents are estopped from requiring proof of the transfer

of the stock by the statement of William Whaley, the executor, in the inventory, "that it was hypothecated by the testator in his lifetime and since his death transferred by the parties holding it in their own names."

The declarations of William Whaley, the executor, cannot bind or conclude the creditors of the estate averring a demand against a debtor to it, much less in a matter in which he had no part as executor and as to assets which the statement implies never came to his hands. Even his evidence in a contest as to the stock would not be competent to show the disposition made of it by his testator, because it is susceptible of proof by testimony of a higher character. Would the executor have been a competent witness in this case, after the fact had been established that at the death of his testator certain stock of the city stood on its books in his name, to prove a transfer of it by his mere statement to that effect?

It is evident from the whole complaint that the respondents did not admit the truth of the statement in the inventory as to the transfer of the stock and did not intend to be bound by it. On the contrary, it is clear, from the allegations through which they sought relief against the Council for the stock, that it was through the right of the testator to it at the time of his death, and its liability, as his property, to respond to the demands which they hold against him as creditors.

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*The ninth Section of the complaint above set forth at length repels the assumption of the acceptance of the statement of the executor as true; and the purpose of contesting it is further made manifest in the demand of judgment "that the said city stock standing in the name of the said Joseph Whaley at the time of his death be adjudged to belong to the said estate of the said Joseph Whaley and subject to the payment of the debts of the same, and that proper administration thereof be decreed." So far from considering themselves bound by the statement of the executor, it is distinctly and entirely ignored, and their demand rested on allegations in direct opposition to the conclusion sought to be inferred from it.

It is manifest, too, from the whole scope and effect of the answer, that the real issue as to the stock was the right of ownership in it at the death of the testator, and the course of the parties at the reference, without objection, as to the order of proof, renders plain their understanding of the effect of the proceedings, and on whom was cast the onus of proving the right to the stock at the death of the testator, and on whom it then devolved to prove that all his title to it, whatever it may have been, was transferred in his lifetime by some adequate act of his own. The respondents proved that at his death there was stock standing on the books of the City Treasurer in his name to the amount of $86,342. The counsel for the city, then, "admitting this amount so standing at the death of Joseph Whaley, offered in evidence the transfer book of the City Treasurer, to show to whom the stock had been transferred." The parties certainly must be supposed to know the relation in which they respectively stand to the issues raised by the pleadings, and the Court would hesitate long before it would draw a conclusion inconsistent with such a presumption.

Even if the City Council is right in its assertion in the argument that the onus was on the respondents to establish their right by proof of a negative, to wit, that the stock had never been transferred by the testator, can it avail itself of error in the course allowed on the reference by its own consent and sanction? Can it claim here any exception to the order of proof pursued at the reference, when it was not only without objection on its part, but when, after proof that the stock stood in the name of the testator at his death, it not only admitted the fact but assumed and undertook to show how he became divested of his title?

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*We must now necessarily consider the question made as to the competency of the transfer book as evidence for the purpose for which it was submitted. How was the transfer book made up? From the certificates themselves, which, according to the proof, are canceled, filed and carefully preserved by the corporation. The primary evidence is thus traced to the party offering the book, and is withheld. The offer of what must be considered secondary evidence, though in writing, if made up by the party tendering it, is obnoxious to the familiar principle that "the highest proof the nature of the thing is capable of must be produced." The record of the transfer cannot be of as high a character as the transfer of the certificate itself, and certainly it acquires no greater force when offered in the interest of the party by whom it is made up and in whose custody it is kept.

It is claimed that the book is evidence to prove all that it purports to contain, because it is a book of a public corporation, and, as such, is competent in favor of the city to show the disposition of stock against one in whom the title is admitted to have once stood. The proposition contended for, to the extent now proposed, cannot be admitted. It is true the books of such a corporation, so far as they relate to its public and general laws,—laws which it is authorized to enact for the purpose of the due execution of the duties and obligations imposed by its charter; laws in furtherance of the design the Legislature had in view when it gave it corporate existence; laws which are necessary to enforce the powers delegated by the Act of its incorporation,—may be proved by their

books in due form kept and produced from their proper custody. They may be received in evidence as the record of the exercise of the power of legislation granted to the corporation by its charter. Not so, however, with a book of the nature of the one in question, which in no way partakes of the character of those to which we have just referred.

Even as regards "an entry in a public book of a corporation," Mr. Grant, in his work on Corporations, p. 318, says: "In order to be evidence for the corporation, or for a defendant justifying in right of the corporation, it must be of a public nature; and, therefore, the corporation will not be allowed to make evidence for itself by entries in the public books of facts going to support its title in any case to any claim or demand, even though the entry be made in a formal style and be signed by the corporate officers whose duty it was to make such entries."

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*In Rex v. Mathershall, (Str., 93,) it was held that "corporation books concerning the public government of a city or town, when they have been publicly kept and the entries have been made by a proper officer, are received as evidence of the facts contained in them."

"The books of a corporation containing their public acts are very proper evidence, yet some account ought to be given of them, —where kept, &c.—Case of Thetford, 12 Vin. Abr., pl. 16.

In Marriage v. Lawrence, (3 B. & Ald., 142,) "an entry in the public books of a corporation is not evidence for them unless it be an entry of a public nature."

It is competent for the Legislature to declare what shall be proof of a title to public stocks. Thus, in the cases of the East India Company, the Bank of England, the South Sea Company, and other like institutions, Parliament has declared by statutes that their books shall be evidence of title to their stock and of its transfer.

A municipal corporation may not exceed the legitimate bounds of its charter by declaring how and in what manner and by what regulations its stock may be transferred. One purchasing stock subject to regulations as to the form of the certificate by which it is to be held and the mode in which it is to be transferred buys with full notice of them; they enter into and become part of the contract, and bind all who are either original holders or claim through a pledge or transfer of it. The City Council of Charleston, exercising this right, has, accordingly, by ordinance, prescribed the form of the certificate of its stock and the mode of its transfer. The ordinance of 16th June, 1852, (under which a portion of this stock was issued to Joseph Whaley,) [City Ordinances published in 1854, p. 127,] after setting forth the form of the certificate, directs the mode in which the transfer shall be made by the holder, viz: "He shall endorse on the back of the certificate the amount to be transferred, the person to whom the transfer is to be made, to which the name of the person transferring it is to be affixed. The City Treasurer, before he issues any new certificate, shall endorse on the back of the certificates the number and amount of the certificate to be issued from the old certificates, and in whose favor; and when such statement shall be signed by the City Treasurer, and countersigned by the Mayor, such certificate shall be deemed canceled, and it shall then be filed for reference and examination in the office of the City Treasurer. The City

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Treasurer shall make *out new certificates agreeably to the statement endorsed on the old certificate, taking receipts and making entries in the transfer book in conformity to said receipts and statements. Said new certificates shall be signed by the City Treasurer and countersigned by the Mayor."

The ordinance of 1856, under which other of the stock was issued, prescribes the same formalities as to certificate and transfer.—City Ordinances published in 1859, p. 24; and City Ordinances published in 1854, p. 94. The ordinance of 1866, under which the remainder of the stock was issued, directs "that the certificate shall be in the usual form, and the stock transferred at the Treasurer's office."—C. O. published in 1871, p. 11. The mere entry in the book cannot of itself operate as a transfer of the stock. This, to be effectual, must be in the mode required by the ordinance. In the words of a witness, the clerk of the Treasurer, "the book is a record of transfer of stock in the city office." According to the testimony the original certificates are in the possession of the Council, and if they claim through a transfer they must show that it is in the form prescribed by themselves. The registry of a deed (unless when so permitted by statute) is never received as evidence if the party offering it has control of the original. The Council cannot withhold the primary evidence and resort to that which is only secondary. Although fully satisfied that the result which we have reached is in accordance with the principles by which alone the question made must be determined, still we are impressed with the reasons set forth in the petition of the appellants by their counsel, offered during the argument, asking that the case may be remanded, and the opportunity thus afforded them of submitting the original certificates of the stock, which they aver they hold, in proper form transferred.

The petition, which is attested by the oath of one of their counsel, affirms that the corporation and their counsel were misled by the allegations of the complaint as to the course and character of the proof necessary to maintain their defense. The amount in-

volved is a very large one, and the Referee in his report states that there was no evidence of bad faith submitted in regard to the transaction against the officers of the corporation. This is "a case of chancery," and in regard to one of that character, as was said in Sullivan v. Thomas, (3 S. C., 546,) "the jurisdiction and powers of this Court are as full as those of the late Court of Appeals and Court of Errors."

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*In Gist v. Gist, (Bail. Eq., 349,) Chancellor Harper, in delivering the opinion of the Court, says: "In strictness, this claim comes too late. It ought to have been made before the Master on the reference. It was not done, and there was neither any exception to his report on that ground nor was the point made at the hearing in the Court below. Still, however, I suppose it to be within the competency of this Court, if any claim or ground of defense has been casually omitted to be made, to afford the parties an opportunity of trying its merits; and the Court is always reluctant, whilst the case is in its power, to exclude any apparently just claim or defense."

Though the present application is not founded on precisely the same grounds which moved the Court in that case, yet it may be fairly included within the reason which induced its action. The alternative here is between fixing a heavy debt on the city, from which it avers it can free itself by testimony in its possession, and affording them the opportunity of sustaining their allegation. The respondents will have the right of contesting the evidence when offered, and the delay resulting will be short. The ends of justice, in our view, demand the course which we shall direct.

It is, therefore, ordered and adjudged that the case be remanded to the Circuit Court. That on the payment by the said City Council of Charleston of all the costs of the respondents so far accrued the said Court do refer the case to the Referee for the purpose of allowing the said Council to offer evidence of their right to the stock which on the death of Joseph Whaley stood in his name, or to show how he may have been divested of his title thereto, the respondents to be at liberty to offer testimony in rebuttal. If the costs so ordered to be paid are not paid within forty days of demand for the same by the respondent or their attorneys, the motion to be considered dismissed and the decree of the Circuit Court affirmed.

WRIGHT, A. J., concurred.

WILLARD, A. J. The action is in the nature of a bill by creditors of Joseph Whaley, deceased, against William Whaley, his executor, alleging the insolvency of the executor. The City Council were made defendants for the purpose of charging them with having transferred, without authority, stock of the said city standing in the name of Joseph

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Whaley at his death, in part to themselves and in part to third persons claiming to own the same. The city answered, alleging "that all of the city stock standing in the name of Joseph Whaley upon the books of the city treasury was by him pledged, as collateral security, for loans made to him, and the same has by the pledgees since his death been transferred upon the books of the City Treasurer; that the Commissioners of the Sinking Fund have purchased a portion of said stock.

A reference was ordered and testimony taken before the Referee, and a report, containing findings of fact and law, made by the Referee, to which exceptions were taken by the City Council. These exceptions were disallowed, and a decree made, among other things, establishing the right of the plaintiffs to the stock standing in the name of Joseph Whaley at his death.

The facts of the case are rendered involved and obscure by the course of proceeding before the Referee. In the natural order of proof, the plaintiff would have offered the transfer book of the City Council in order to prove the amount of stock standing in the name of Joseph Whaley at his death and the fact alleged that such stock had been subsequently transferred to the Commissioners and to third persons; for if the complaint as against the City Council is to be regarded as of the same nature as an action by the owner of stock against a corporation issuing such stock for an unlawful transfer of the same to a stranger, it would be incumbent on the plaintiffs to prove the fact of such illegal transfer, and, for that purpose, the transfer book kept by the corporation would be competent. It appears, however, that this proof was offered by the City Council and objected to by the plaintiffs on the ground that the transfer book was not primary evidence of such transfer. The book was excluded. No further direct testimony was offered by either party of a transfer ever having been made by the City Council, and the Referee accordingly found that no transfer of the stock standing in the name of Joseph Whaley at the time of his death nor any authority to make transfers of said stock had been proved.

This finding still stands in form, and it regulates every averment in the complaint on which the plaintiffs sought to recover against the City Council, except the single averment that they hold certain certificates of stock formerly belonging to Joseph Whaley as the property of the city. The stock here referred to is that purchased for the Commissioners of the Sinking Fund. If this averment is regarded as proved, then the case would stand as follows: Joseph

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*Whaley had standing in his name stock of

the city, the certificates of which are in the possession of the City Council, untransferred, and claimed by them as the property of the city.

The allegation of the answer is to the effect that the stock claimed by the plaintiffs as held by the City Council was purchased of persons to whom the stock was hypothecated by Joseph Whaley.

The report is based on an account sales of city stock purchased for the Commissioners of the Sinking Fund submitted in evidence. It appears by this account sales that the Commissioners of the Sinking Fund had at various times purchased certain certificates of stock standing in the name of Joseph Whaley and certain standing in the name of H. G. Loper. The decree is also based in part, apparently, on the account sales.

The question then arises, do the inferences capable of being drawn from the account sales warrant the report and decree based upon it?

Under the evidence the case stands as follows: The City Council have purchased and hold certain certificates of stock, such purchases being made in the due course of business by a broker. It does not appear in what hands the certificates were at the time of such purchase. It is to be presumed that the persons, whoever they were, who sold through the broker to the Commissioners of the Sinking Fund held the proper certificates showing a prima facie right to their possession and to dispose of them, and that such certificates were transferred to the Commissioners of the Sinking Fund, though not transferred on the books of the corporation. From all that appears, the City Council were bona fide purchasers for value, and without notice, of certificates in the customary form. The presumptions are clearly with the City Council, and the burden was fairly imposed upon the plaintiff of showing an infirmity in the title resulting from notice or other cause.—State Bank v. Cox, 11 Rich. Eq., 344, [78 Am. Dec. 458]; McNeil v. Bank, 46 N. Y., 325; Bank v. Lanier, 11 Wall., 369 [20 L. Ed. 172].

Had it been made to appear that the City Council had transferred the stock thus purchased upon the books of the corporation, then the burden would have devolved upon them of showing the authority on which such transfer was made, for in that case the liability would have arisen not as purchasers of certificates but as having made an unauthorized transfer. But this report finds

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that *the stock never was transferred. The report, after excluding the testimony derived from the books of the city treasury, sets forth the contents of those books evidently for the purpose of showing the nature and effect of the evidence thus excluded. This portion of the report cannot be referred to as affording ground for affirmative conclusions of fact consistently with the ruling excluding the source from which it is derived as incompetent.

The only evidence, then, on which the conclusion of the Referee must be regarded as resting is that afforded by the account sales, which we have already considered as not being sufficient in itself to affect the title of a bona fide purchaser for value and without notice of a defect in the certificates of stock.

The evidence would not then support the final conclusion of the Referee that all the stock standing in the name of Joseph Whaley at his death was assets and should be accounted for as such.

The decree, while refusing to set aside the Referee's report, is entirely inconsistent with it. It finds, affirmatively, that the stock standing in the name of Joseph Whaley at his death had been since transferred to the Sinking Fund and to third persons. The decree virtually sets aside the conclusions of the Referee that the transfer of the stock was not proved, and in effect adjudges it proved, and predicates an affirmative judgment on the fact that such transfer had been proved. The proper course in such case was to afford the parties an opportunity to make further proofs.

The hearing before the Referee was defective in consequence of the improper exclusion of the transfer book. When that book was ruled out, counsel for the city were under no obligation to prove authority to transfer if there was no proof of the fact of transfer, and they had a right to expect that an opportunity to introduce other testimony would be afforded should it be made to appear that such error had been committed. It is not to be doubted that the Circuit Court had full authority to set aside the report and sustain the conclusions of the Referee upon a totally different view of the evidence. The question is, whether the case called for the exercise of such powers. It is evident that the case was not in a condition for final judgment. The facts were not developed. Both parties had access to those facts. Any agent of the corporation could have been sworn by either side. The production of any documentary proofs in possession of the City Council important to the case might have been compelled by the plaintiffs. In addition

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to this, *the amount of the judgment will necessarily be very large—the nominal amount of stock being upwards of $80,000—and will fall upon the citizens. The defect of the proofs was capable of being traced in part to the erroneous ruling of the Referee. It is evident that the proper course was to throw upon counsel the whole responsibility of the recovery of a judgment of such magnitude by affording them the fullest opportunity to supply the defect of testimony. Denying this opportunity, that responsibility would not wholly rest on counsel. As we can

see clearly what decree should have been made, it is our duty to make it accordingly.

It is evident that substantial justice has not been done by the circuit decree, and it should be set aside, together with the report, and the case opened for further testimony and proceedings thereon.

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8 S. C. 344

WHALEY, In re FRASER & DILL v. CHARLESTON.

(Columbia, April Term, 1876.)

[*Appeal and Error* ⇐439.]

After an appeal to the Supreme Court, and pending the appeal, the Circuit Court has no jurisdiction in the case, and cannot entertain a motion to enlarge the time to answer or to relieve a party of the judgment taken against him through his mistake, inadvertence, surprise or excusable neglect.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2197; Dec. Dig. ⇐439.]

[*Appeal and Error* ⇐329; *Creditors' Suit* ⇐53.]

Where, in an action in the nature of a creditor's bill for the settlement of the estate of an insolvent testator, a decree was made for the sale of the real estate of the testator for the benefit of his creditors, remaindermen under the will who were not parties to the cause were allowed, pending an appeal, to come in by the Supreme Court, in order to protect their interest, and for that purpose the sale was suspended.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1836; Dec. Dig. ⇐329; Creditors' Suit, Cent. Dig. § 210; Dec. Dig. ⇐53.]

This was an appeal from the refusal of the Circuit Judge in the next preceding case to grant a motion made on behalf of William Whaley, executor of Joseph Whaley, deceased, and of his children, William Whaley, Jr., Washington A. Whaley and Joseph Whaley, —the three last named being minors.

The will of the testator devised his real estate—which by the decree of the Circuit Judge was ordered to be sold—to his son, the said William Whaley, for life, and after his death to his children above named.

The case will be sufficiently understood from the opinion of the Court.

[For prior opinion, see 8 S. C. 318. For subsequent opinions, see 11 S. C. 486; 13 S. C. 533.]

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*October 23, 1876. The opinion of the Court was delivered by

MOSES, C. J. On 29th June, 1875, a decree was made by the Circuit Court in a case in which Fraser & Dill and Mary E. Davie were plaintiffs and William Whaley, executor of Joseph Whaley, the City Council of Charleston and others were defendants. The complaint was in the nature of a bill by the creditors of the said testator, alleging waste and insolvency against the executor, praying the appointment of a Receiver for the estate, that certain stock of the city of Charleston standing in the name of the said Joseph Whaley at the time of his death should be accounted for by the said corporation, and for such other relief as the creditors in right of their respective demands were entitled to against the property of the testator. On 12th September, 1874, on motion of the counsel for the plaintiffs, and with the consent of the defendants, who had answered, it was referred to a Referee "to inquire and report upon the facts, with leave to report any special matter." The consent of the solicitor for executor of Joseph Whaley was also in writing given to the order. Service of the summons and complaint was made on William Whaley, the executor, on July 9, 1874. An order against him for judgment by default was entered on the 12th January, 1875, after a notice of three days that application for such an order would be made, and he was ordered to account before the Referee for his actings and doings as executor. No exceptions were taken to the report of the Referee, save on behalf of the defendant the City Council of Charleston. These were overruled, and on 29th June, 1875, judgment was pronounced by the Court in regard to the various matters embraced in the report. On July 1, 1875, notice of appeal was in due form presented by the counsel of the City Council of Charleston. A notice without date or any evidence of the time of its service was given to the counsel of the plaintiffs, the City Council and various of the creditors of the said testator that the said William Whaley, "executor, in proper person and as attorney for the remaindermen, would, on 25th September then next, at chambers, move to vacate the decree pronounced by Judge Reed on 29th June, 1875, in the case stated, and ask leave to file his answer and accounts:—failing that, he would renew his motion before the Supreme Court." On September 22, 1875, an order was made by the Circuit Judge, "on motion of William Whaley, in proper person and attorney for

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the remaindermen under *the will of Colonel Joseph Whaley," granting leave "to file their application, with its exhibit, to vacate the decree made on the 29th June last in the above cause."

The application on the part of the executor and the remaindermen under the will was submitted to the Judge in the form of a motion on November 8th, 1875, "to open the decree heretofore made in the cause," and, after a hearing, it was refused. An appeal was taken and his refusal is brought to this Court as error. The remaindermen claim an interest under the will of the testator in his real estate on Edisto Island and Edingsville, after the termination of the life estate of their father, the said William Whaley, therein; and they, with him, seek to open the decree and to allow the executor to plead, answer or demur to the said complaint. The

claim is asserted under the 196th and 197th Sections of the Code of Procedure. The first has reference only to amendments and correction of mistakes which "do not change substantially the claim or defense," and the last confers upon the Court power to enlarge the time to answer, and, in its discretion, within one year after notice thereof, to relieve a party of a judgment "taken against him through his mistake, inadvertence, surprise or excusable neglect." It might be enough here to say that when the motion was made before the Circuit Judge, the case, by appeal, had been transferred from his jurisdiction, and all his authority over it was, at least, suspended. If the judgment had remained subject to any charge or modification by his order we do not see in the brief any evidence of "such mistake, inadvertence, surprise or excusable neglect" as would have justified his intervention.

The chief objection to the decree urged in the application is that several of the orders which it embraces may affect interests of persons who were not made parties to the cause. So far from this being a sufficient objection on the part of the executor, the omission complained of may operate to his advantage, for the judgment can only bind those who are parties to it. If, therefore, proceedings against other persons may be requisite to give legal effect to any of the matters included in the decree, the executor must necessarily be a party thereto, and he may thus have an opportunity of making a defense which he has lost here by his own default.

While, therefore, we must dismiss the motion made by the appeal, a matter is brought to our consideration upon which we have authority to act as on an original motion sub-

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mitted to us in a case *pending in this Court and of which notice has been brought to the parties in the cause.

It is clear that so much of the decree as directs a sale "of the plantation and lot" for the benefit of the creditors of the testator proposed a sale of the fee simple interest which he held at the time of his death. The brief shows that the remaindermen too are all infants, and, though the sale under the order might not transfer whatever interests they may have in the premises, it is safer for all that any chance of future litigation should be avoided, and it is the duty of the Court, so far as it can, when it directs a sale to define the interest upon which it is to operate. The minors should be parties to a proceeding for the sale of the real estate, which they may be prevented from enjoying under the will of their ancestor, by the necessity of its responding to its debts. They should have the opportunity of submitting any exceptions to the sale which they may make available to prevent it.

The principal cause in which intervention was made by the said application having been at this time remanded to the Circuit Court for the hearing of further testimony, the sale of any property directed by the decree therein in which the said minors may have an interest under the will of the said Joseph Whaley will be suspended until they are made parties thereto on the action of the plaintiffs and the further order of the Court.

WRIGHT, A. J., and WILLARD, A. J., concurred.

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8 S. C. 347

LIVINGSTON v. WELLS.

(Columbia. April Term, 1876.)

[*Guardian and Ward* ⇐164.]

A settlement between guardian and ward—father and daughter—made as soon as the ward became of age, sustained by the Court as just, fair and proper, although no account was rendered nor statement of the amount due made, and although the ward received from the surety of her guardian, who was her uncle, by way of compromise, railroad bonds to an amount much less than the sum actually due by the guardian, —it appearing that the estate of the ward had been lost without the fault of the guardian and that he was insolvent.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. § 546; Dec. Dig. ⇐164.]

[*Trusts* ⇐219.]

Simple interest only charged against a trustee upon the balance due in 1859, at the foot of his account, although it was claimed that the interest due at the end of each year bore interest.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 305, 314–317; Dec. Dig. ⇐219.]

[*Trusts* ⇐219.]

The general rule that interest, as against a trustee, runs only from the end of the year applied.

[Ed. Note.—Cited in Johnson v. Henagan, 11 S. C. 94, 120.

For other cases, see Trusts, Cent. Dig. § 316; Dec. Dig. ⇐219.]

[*Appeal and Error* ⇐900.]

[Cited in Watson v. Young, 30 S. C. 150, 8 S. E. 706, to the point that the presumption in favor of the correctness of a decree may be rebutted on consideration arising from the evidence.]

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3667–3669; Dec. Dig. ⇐900.]

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*Before Carpenter, J., at Richland, January, 1876.

These were two actions by Ella A. Livingston against Jacob H. Wells and also against Thomas J. Robertson, as executor of John Caldwell, deceased.

The case was as follows:

In 1859 the plaintiff, then an infant, was entitled to two funds—one an interest in the estate of her deceased mother, in which she, as a distributee of her mother, had an absolute estate, and the other an interest under the will of her deceased uncle, William P. McConnel, in which she had an estate

for life for her sole and separate use with limitations over.

On the 19th day of March of that year the defendant Jacob H. Wells was duly appointed guardian of the estate of the plaintiff, and gave bond as such guardian in the penal sum of $36,000, and on the same day he was duly appointed trustee of the estate of his daughter, under the will of her said uncle, and gave bond as such trustee. John Caldwell and Richard Anderson were the sureties of Jacob H. Wells on both bonds. John Caldwell died in 1870, leaving a considerable estate, and also leaving a last will and testament, of which the defendant, Thomas J. Robertson, was the executor.

Richard Anderson had died some time before insolvent and leaving no estate.

The plaintiff became of age on the 8th day of September, 1869, and six days thereafter she executed and delivered to her father a receipt, of which the following is a copy:

"Received, Columbia, September 14, 1869, from Jacob H. Wells, $25,099.32 in full payment of all balances, dues, moneys and demands of every nature and kind whatsoever as my guardian to this date, I now being of the full age of twenty-one years, and said guardianship having ceased. This receipt is an acquittance in full to said guardian of all liabilities whatsoever on account of said guardianship. Ella A. Wells."

"Attest: J. P. Thomas."

The object of the action in one case was to set aside the above receipt as fraudulent and void, and for an account by the defendants of the guardianship estate of the plaintiff, and in the other for an account of her trust estate.

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*After the said receipt was executed, Jacob H. Wells applied to the Court of Probate for Richland County for a discharge from the duties of his office as guardian of his daughter, and on the 16th day of October of the same year that Court made its final order for his discharge.

The defendant, Thomas J. Robertson, filed answers in both cases. He denied all the charges of fraud made in the action for an account of the guardianship estate, and he set up the receipt as a defense to both actions.

The cases were referred to a Referee, who took testimony and reported the same to the Court. He also reported that the amount due by the guardian to his ward on September 8th, 1869, on account of the guardianship estate was $20,043.22, and that the defendant, Jacob H. Wells, had received, on the 1st day of April, 1859, as the trustee of his daughter, from the estate of William P. McConnel, deceased, the sum of $3,685.33. The other material facts of the case are stated in the circuit decree and the opinion of this Court.

The circuit decree is as follows:

Carpenter, J. These cases are between the same parties, and were heard by me at the same time, without a jury. It appears that in March, 1859, the defendant, Jacob H. Wells, was appointed guardian of the estate of his daughter, Ella A. Wells, the plaintiff, and was at the same time appointed trustee of her estate under the provisions of the will of William P. McConnel, deceased. In case of Ella dying without issue, the trust estate is subject to limitations set forth in the will.

In each estate Wells gave a bond, with John Caldwell and Richard Anderson as sureties. Richard Anderson is dead, and his estate insolvent. John Caldwell died, leaving the defendant, Thomas J. Robertson, the executor of his will. Both the guardianship and trust estates became lost in the hands of Wells, and these actions are brought to make the estate of John Caldwell respond. The loss of these estates is shown to have been owing to the results of the civil war, before which Wells was possessed of ample means. Ella became of age on 8th September, 1869, and was married to J. K. Livingston on 30th November, 1871. Upon the plaintiff becoming of age she was spoken to by her father, Wells, regarding the loss of the estate by the war, and he told her that Cald-

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well would *give her $10,000. Caldwell called upon Ella and gave her $10,000 in railroad bonds. On 14th September, 1869, the plaintiff signed a receipt which purported to be a full acquittance of all liability of her father as her "guardian," and on account of his "guardianship." Notice that Wells would apply for a discharge before the Judge of Probate was afterwards published, and on the 16th October, 1869, Wells received his final discharge from the Judge of Probate.

In November, 1873, the plaintiff instituted her action against Caldwell's executor upon the guardianship bond, having, in September, 1872, brought suit against the same party on the bond of Wells as trustee.

The plaintiff impeached the settlement on the ground that advantage was taken of her ignorance, inexperience and her filial relations, and that the settlement was an unfair one. The testimony has failed to satisfy me of her ignorance of any material fact, and there was certainly no misrepresentation made her. She was advised that her father had, on account of the war, lost her estate, and that the bonds were to be given her as a compromise in settlement. She certainly knew that $10,000 was not the amount due her; that it was a compromise—so her father informed her; and the amount stated in the receipt informed her that she was discharging a liability of $20,000. It may be granted that she knew not the exact figures, but even in this particular the sources of information were pointed out to her, and any ignorance in this respect was voluntary.—

McLure v. Ashby, 7 Rich. Eq., 444; Kane v. Bloodgood, 7 Johns. Ch., 90 and 114; Maxwell v. Kennedy, 8 How., 220 [12 L. Ed. 1051].

In the language of Taney, C. J., in the last case: "If she remained ignorant, it was because she neglected to inquire." I cannot see where any advantages were taken of the plaintiff. She was an intelligent and well educated lady. No undue influence was brought to bear upon her; no urgent appeals were made to her; and neither Wells nor Caldwell manifested any disposition to take advantage of her. Her father had been unfortunate, had lost in a general calamity, had been kind to her, and had given her the advantage of a fine education. The proposition itself of a compromise was one at that time not unusual between sharp business men. Now, under all the circumstances, can

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it be said that the settlement *itself was not a fair one, and, considering the relations of the parties, one creditable to all?

Was it not morally right?

It is urged that she did not know that she was discharging Caldwell as surety. Suppose this were so—can it be said she did not know that she was discharging the principal?

All the circumstances were such as to give her the information. She knew the bonds were the property of Caldwell. She was told that what Caldwell was to give her was "some money that was mine," (hers). She told Mrs. Blakely that she had had a settlement with her uncle, (Caldwell,) and had compromised with him; and Wells says that he told her that Caldwell was his security. That she had this information she may well have forgotten, but it would be strange that she could have thought otherwise at the time. But if the settlement was proper as to the principal, and the surety resorted to no unfair means to bring about the settlement, there is no reason why it should not stand as to the surety. The testimony shows that Mr. Caldwell at this time was not in a condition of body or mind to drive sharp bargains; and his relations to Ella were such that we cannot infer that he had any disposition to act unfairly with her. His desire seemed to be to settle up his affairs in this world, in anticipation of soon being called to another.

That the bonds were subsequently lost by Ella's father, or that her husband was not satisfied when he informed himself of all the facts, cannot affect the fairness of the settlement at the time it was made. The fact that the plaintiff remained satisfied for years after the settlement until her marriage, and until after Caldwell's death, are good reasons why this court should not disturb the settlement, unless a much stronger case had been made out by the plaintiff.

The next question is to inquire what was compromised in the settlement. On this point I find nothing to justify me in the conclusion that the parties themselves had in view the trust estate also. The receipt only specified the guardianship, and the plaintiff had not the power to discharge her father as trustee.

The trust estate concerned others as well as herself. I therefore regard the settlement as discharging Wells as guardian only.

I therefore find as matters of fact the conclusions hereinbefore stated; and, as matters of law:

1. That, under all the circumstances proven, the settlement made with the plaintiff upon her maturity was one fair and proper in law and now binding on her.

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*2. That the defendant, Jacob H. Wells, and the estate of John Caldwell as his surety, are liable for the whole amount of the trust estate.

It is therefore ordered:

1. That the complaint in the case against Jacob H. Wells as guardian and Thomas J. Robertson as executor be dismissed.

2. That the defendant, Thomas J. Robertson, as executor of the will of John Caldwell, deceased, do pay over to such person as may be appointed trustee in the place of Jacob H. Wells the sum of three thousand six hundred and eighty-five dollars and thirty-three cents, ($3,685.33,) with interest thereon, calculated annually, from the first day of April, 1859, to the day of computation. That is to say: the first year's interest, due on the first day of April, 1860, to be considered an interest-bearing fund until the day of computation, and so on from year to year as the interest falls due, less two and a half per centum commission upon the amount of interest.

It is further ordered, That the Honorable C. P. Townsend be appointed trustee of the estate of Ella A. Livingston in the room and instead of Jacob H. Wells, upon his entering into bond, with at least two good sureties, in the sum of $20,000, conditioned for the faithful performance of his duties as trustee as aforesaid, and in accordance with the provisions relating thereto contained in the last will and testament of William P. McConnel, deceased; said bond to be approved by the Clerk of the Court of Common Pleas of the County of Marlboro.

The plaintiff, Ella A. Livingston, excepted to so much of the decree as affects the action on the guardianship bond, and appealed therefrom on the grounds:

1. In that it holds that the testimony does not show that the plaintiff was ignorant of any material fact necessary to enable her to make the settlement; and that there were no misrepresentations by the defendants, or either of them, or undue influence.

2. In that it holds that she knew it was a compromise, and that, the sources of information being pointed out to her, if she remained in ignorance it was voluntary; that she was subjected to no undue influence, no urgent appeals were made to her, and neither Wells nor Caldwell manifested any disposi-

tion to take advantage of her; that, under all the circumstances, the settlement was fair,

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and, con*sidering the relations of the parties, creditable to all and morally right.

3. In that it holds that she knew that she was discharging the principal and surety, and that the settlement was a proper one, both as regards the principal and surety; that Mr. Caldwell was not in a condition of mind or body to desire sharp bargains, and, from his relations to the plaintiff, we cannot infer a disposition to act unfairly with her; and the fact that she remained satisfied for years after the settlement, until her marriage, and until after Caldwell's death, are good reasons why the Court should not disturb the settlement.

4. In that it finds as matters of fact the conclusions hereinbefore stated, and in said decree more fully set forth.

5. In that said decree finds as matter of law that, under all the circumstances proven, the settlement made with the plaintiff upon her majority was one fair and proper in law and now binding on her, and dismisses the complaint.

6. In that the said decree does not find as a fact that the plaintiff, having been kept in ignorance concerning her property, was, on the night before she attained her majority, informed by her father that her property had been lost by the results of the war, but that her uncle, John Caldwell, would on the next day give her $10,000 in South Carolina Railroad bonds, the interest on which would support her, and thus impressed her with the idea that this was all she could get or was entitled to.

7. In that said decree does not find as a fact that on the very day the plaintiff became of age her father and uncle, as guardian and surety, availed themselves of her ignorance, inexperience and implicit confidence to impose upon her a settlement unfair, unjust and unconscionable; that neither of them exhibited to her any statement of accounts showing the amount due to her or explained the nature of their liability to her, thus withholding from her all opportunity to understand her rights; that she was not allowed the benefit of legal counsel, the advice of disinterested friends or information sufficient to satisfy a mind of the most ordinary business capacity of the fairness of the transaction, but she was hurried with unbecoming haste to its consummation by those who were bound in law, in morals and by the ties of blood to deal with the most perfect fairness and good faith.

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*8. In that the decree should have found as a matter of fact that the plaintiff, at the time of signing the receipt, was left in almost total ignorance of the character of her estate, whence it came, what was the amount, or what were her rights therein, or what the duty and liability of her guardian and his surety, and was first fully informed of the facts by her husband after marriage; that, though she was intelligent, she was, nevertheless, gentle, amiable and uncommonly dutiful, and under the dominion of her father and uncle at the time of signing the release.

9. In that the decree should have found as a fact that the guardian, acting under the advice of his surety, made no separate investment of his ward's funds, but, mingling them with his own and using them in trade and speculation, the estate became lost from maladministration and not from the results of the war; that no return deserving mention was made until after the war, and just before pretended settlement, when the guardian, under the advice of his surety, made a return, covering a series of years, in which, to save his surety and at his request, improper charges for maintenance were made and material mistakes in addition, to wit, the error of $1,000, occurred.

10. In that the decree should have found as a fact that the settlement pretended to have been made with the plaintiff has none of the elements of a compromise; but that the acceptance by a young lady, in her father's house on the day she became of age, at the request of her father and uncle, of $6,000 or $8,000 in satisfaction of a debt of perhaps $30,000, and that from a debtor abundantly able to pay, should rather be termed an imposition and a gross fraud than a compromise; that such a settlement was not legally or morally right, but immoral and contrary to good conscience and equity.

11. In that the decree should have found that the delivery of the railroad bonds by Mr. Caldwell to the plaintiff without explanation, and when he knew that they would fall into the hands of the guardian while yet the ward was not emancipated from his control and dominion, and while in fact he was not in any manner discharged, and which said bonds did in fact go into said guardian's hands and become lost to the ward, was no payment and ought not pro tanto to relieve them or either of them, from accounting for them.

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*12. In that the decree should have found, as a matter of law, that the settlement having been made by the guardian and his surety, who were possessed of a high decree of business tact and large experience, with the ward upon the day she reached her majority and while she was inexperienced in business and unacquainted with her rights in which settlement unnecessary sacrifice is made by her and great benefit and advantage accrues to the guardian and surety, a prima facie case of actual fraud and imposition is presumed, which presumption is not rebutted by the facts but rather confirmed, wherefore the decree should have been to reopen the settlement and order an accounting.

13. In that the findings of fact and the

conclusions of law drawn therefrom in the said decree are unsupported by the testimony, contrary to the evidence and in plain disregard of the well-established principles of law and the uniform practice of our Courts in enforcing good faith and fair dealing between guardians and their wards, the principle of law being that, "to avoid a discharge executed by a ward to his guardian shortly after he has reached his majority, it is not necessary that there should be proof of actual fraud even if full opportunity is afforded to examine the account; yet without willful intent to mislead there may be such a want of communication, both in regard to them and the securities transferred, as would preclude the Court from giving it effect as an estoppel."

The defendant, Thomas J. Robertson, also excepted to the decree, and appealed therefrom on the grounds:

1st. That simple interest only should have been charged on the trust fund and not annual interest.

2d. That interest should have been charged, not from the 1st day of April, 1859, but from the 1st day of January next succeeding.

Hudson & Newton, and McMaster & Le Conte, for the plaintiff.

Rion, for the defendant, Robertson.

March 19, 1877. The opinion of the Court was delivered by

WILLARD, A. J. The appeal from the decree of the Circuit Court in the case against Wells, as guardian, will be first considered. The facts of the case are sufficiently stated in the opinion of the Circuit Judge, and need not be restated at this time.

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*The material facts ascertained by the circuit decree are as follows:

1. That the plaintiff possessed at the time of making this settlement, sought to be set aside, sufficient knowledge of the nature of her rights and of the circumstances of the case to enable her to act understandingly, and that her action in the premises was not affected by any misrepresentation or undue influence.

2. That the settlement was in itself a fair one, and, considering the relations of the parties, creditable to all. He consequently determined, as matter of law, that, under all the circumstances proven, the settlement made with the plaintiff upon her maturity was one fair and proper in law, and now binding upon her.

We are called upon to adjudge that these conclusions of fact and law are unsupported by the evidence and in violation of rules of law and equity applicable to the case. We will first consider the grounds urged for reversing the conclusions of fact. In order to set aside the conclusions of the Circuit Court as to the force and effect of evidence, upon an appeal in cases of equitable cognizance, it is necessary to show that such conclusions are inconsistent with or unsupported by the clear force of the evidence from which they are drawn. It is not sufficient ground to interfere with determinations as to matters of fact that the appellate Court, had it heard the case upon the evidence, in the exercise of original jurisdiction, would have drawn different conclusions of fact than those drawn by the Circuit Court. It must appear that the conclusions of the Circuit Court are clearly wrong. The presumptions in favor of the correctness of the circuit decree must be completely rebutted on considerations arising from the evidence, if it appears that there was contradictory testimony, in order to reconcile which the character and position of the witnesses must be considered as presenting a question of credibility. The circumstance that the Circuit Court is primarily authorized to determine the questions of fact, and the additional circumstance that that Court ordinarily possesses more ample means for arriving at a just conclusion as to the degree of weight that ought to be ascribed to disputable testimony, induces the appellate Court, ordinarily, to defer to the judgment of the Circuit Court. If it appears that conclusions of fact inferentially drawn from the testimony enter into the determinations as to matters of fact, the appellate Court usually leaves these conclusions undisturbed, unless found to be inconsistent with infer-

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ences that are *regarded by the Court as irresistibly arising from such evidence. In a word, the clear result of undisputed testimony must point to a conclusion different from that which the Circuit Court has drawn from it before it will be disturbed on appeal.

The foregoing principles governing appeals as to matters of fact have so often been enunciated by this Court that it is not necessary to refer particularly to the cases in which they have been considered.

It is contended that the conclusions of the Circuit Judge, that the plaintiff, at the time of making the settlement in question, possessed sufficient knowledge of her rights and of the state of her affairs to act understandingly in the matter, is not supported by the evidence. The testimony on this subject is certainly contradictory. The different statements made by the plaintiff and her father, bearing on the question of the extent of her knowledge, was such that it was particularly within the province of the Circuit Court to determine the preponderance of proof. A question of credibility, involving the accuracy of the memory of the respective witnesses, and more or less affected by their respective interests in the controversy, was clearly presented to the Circuit Judge. His conclusions on such matters, as we have already seen, will not ordinarily be disturbed. There is no reason to doubt that the Cir-

cuit Judge gave full and impartial consideration to all the circumstances that have a bearing on this and other similar questions arising out of inconsistencies between the statements of different witnesses bearing upon the same subject. No sufficient reason is urged for disturbing his conclusions as to the testimony that ought to receive the greater weight in the judgment of the Court.

A question of law is ultimately associated with the questions of fact just noticed, namely: To what extent ought the plaintiff to have been informed to enable her to act understandingly? Should we conclude that the Circuit Judge had erred in applying the proper measure to the extent of information regarded as necessary or proper to be conveyed to her under the circumstances in order to enable her fairly to judge as to her interest in the settlement, we would be bound to apply the true measure to the case.

The amount of information that should have been conveyed to her by her father must depend on the character of the motive that prompted her in making the settlement.

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*That motive was clearly either a desire to conform to her father's wishes or to relieve him of part of his liability, supposed to have arisen from his misfortunes, or to settle by a compromise a disputed claim. It is probable that all of these elements extend more or less into the motive that actuated her.

It is very urgently contended that in no respect does the idea of a compromise enter into the settlement; but if the circumstances are properly considered, it will appear that the parties had reasonable ground to suppose, at the time of making the settlement, that a compromise was appropriate. It is far from clear that the guardian was at that time responsible for the whole estate of his ward that came originally into his hands. It has been assumed in argument that the evidence shows that, as guardian, he had mixed up the moneys of his ward with his own and used them for his own profit. The evidence falls far short of sustaining such a conclusion. The testimony of the guardian shows that he invested the plaintiff's money in stocks,—bank, railroad, &c.,—and that the securities became valueless through the general failure of corporations at the close of the late war. It is true that the investment was alleged to have been made in his own name, but that is not decisive, for he may have placed the evidences of such investment for the benefit of his ward and held them apart from the risks of business for all that appears. Nor do the circumstances under which the investments were made appear so as to enable the Court to say that the investments of themselves constituted a breach of trust on the part of the guardian. Nor can it be said that the guardian was bound in this case to volunteer proof that he had not been guilty of a breach of trust in the mode of investment, for no such breach of trust is charged in the complaint; all that is said is that "said large sums of money have been ever since in the hands and under the control and management of the said guardian unaccounted for except as hereinafter shown." The burden of the complaint is failure to account, and yet the plaintiff seems to assume that a decree for the whole original amount of her estate is a matter of course against the estate of her father's surety without going through what is essential to our understanding of the actual liability of her father as her guardian. It is enough to say that there is not enough on the face of the pleadings and evidence to enable the Court to say that at the time of the settlement there was an undisputed case of liability on the part of the guardian and his

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surety to the full ex*tent of the ward's estate that originally came into the guardian's hands. If this view is correct, there was probably in the minds of the parties an idea that there was something unascertained and doubtful in the liability of the parties, and, therefore, something that invited compromise. The evidence before us does not warrant us in saying that the Circuit Judge erred in holding that the plaintiff possessed sufficient knowledge of her affairs to make a settlement understandingly. If the case be regarded as one of a compromise of a disputable debt, no particular information was requisite beyond that of knowing approximately the amount of her estate, the fact that it had been swept away by a disaster common to those around her, and that the existence of any mode of replacing the corpus of her estate was doubtful. We have no reason to question the sufficiency of her knowledge in these respects. If, on the other hand, her sole motive was to conform to her father's wishes, or to relieve him from partial responsibility for a loss which she doubtless believed he had incurred without his fault and through a general disaster, then no particular information as to the state of facts can be regarded as essential to carrying out a purpose resting wholly on benevolent or dutiful feelings.

The evidence does not warrant any conclusion inconsistent with the finding of the Circuit Court that no misrepresentation or undue influence was employed to control the action of the plaintiff in the premises. We might go farther, and say that there is no evidence that could warrant any other conclusion, but we are not called upon to make such a determination. The conclusion of the Circuit Judge that the settlement was a fair one, and, considering the relations of the parties, creditable to all, is objected to. I concur fully in the view of the Circuit Judge in this respect. Assuming that the case, as presented to the mind of the plaintiff, was this,—that her father had lost

her estate without fault on his part and through the course of public events alone, and that she could only look to her uncle to make good to her such loss,—it was the natural dictate of a good heart to relinquish all advantages derived from such a source, or at least to accept but a part of what might be legally demanded. If she regarded her uncle as voluntarily offering to replace part of what was lost, it was natural that a mind thus influenced should prompt her to treat the offer as proceeding from the bounty of her uncle and to release all further demands upon him. When it is considered, in addi-

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tion to this, that the claim *against her uncle was disputable, as we are bound from the evidence to say it was, considerations of prudence would naturally become mingled with those arising from kindly feelings and suggest the very course pursued. If it was right for the plaintiff to have acted as she did from the promptings of her own mind, it was right for her father to strengthen that motive by his counsel in the expression of his wishes. Whether such a course of conduct would be appropriate on the part of one not within the parental relation need not be considered. Equity cannot ignore the existence of such prompting nor declare that to be inequitable which is prompted by the best feelings of our nature. It is true equity is watchful that feelings of this character are not abused or misdirected or unreasonably indulged; but where, as in the present case, no such circumstance appears, it withholds its hand from interfering with acts springing from such motives. The conclusion drawn by the Circuit Court from the facts already adverted to appears to be correct. He holds that, under all the circumstances proved, the settlement made with the plaintiff upon her maturity was one fair and proper in law and now binding upon her. It is contended, however, that the fact that this settlement was made the day after the plaintiff arrived at maturity deprives it of the character of an ordinary contract made with a person of full age. It is well settled that for some purposes the relation of guardian and ward is deemed to continue for some appreciable time after the moment at which the ward arrives at maturity, on the idea that the effect of the past legal relation, as it regards the duty of protection on the one hand and confidence on the other hand, cannot be instantaneously obliterated.—Archer v. Hudson, 7 Beav., 351. When a person in loco parentis, such as a guardian, deals with his ward for his own advantage immediately after such ward comes of age, the presumption is against the fairness of the transaction, and the person claiming such advantage must show, affirmatively, that it is in all respects fair.—Archer v. Hudson; Johnson v. Johnson, 2 Hill Eq., 277 [29 Am. Dec. 72]. It is not difficult to refer the principles of this decision to the familiar rule of equity that a trustee shall make no profit to himself out of the trust estate,—that rule being considered as giving rise to a presumption of undue influence for such a time after the legal termination of the fiduciary relation as should appear to be sufficient for the purpose of removing from the mind of the ward

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the influences incident *to such past relation. The rule that forbids personal advantage being taken of his confidential relation by one assuming or charged with advising another on matters affecting the pecuniary interests of the latter appears to result from assimilation to the principle just stated.—Huguenin v. Basely, 13 Lead. C. E., 95. As one of the incidents of the relation of guardian and ward is that the guardian should act in an advisory capacity to the ward, the Court looks to see that the duty of the relation in this respect has been fully performed. This duty necessarily involves that of putting the ward in possession of all the facts and circumstances essential to an understanding of any case in which he may be called upon to exercise judgment, and whether this duty has been fully performed is a proper subject of legal inquiry. If there has been a failure in this respect, the guardian is deprived of any benefit he might otherwise have derived from his dealings with his ward.—Womack v. Austin, 1 S. C., 421. In the cases in which a presumption of unfairness has been applied a direct benefit to the person seeking to uphold the transaction has been a feature.—Archer v. Hudson, 7 Beav., 351; Huguenin v. Baseley, 3 Lead. C. E., 95; Womack v. Austin, 1 S. C., 421; Johnson v. Johnson, 2 Hill's Ch., 277 [29 Am. Dec. 72]; Gibson v. Jegis, 6 Ves., 266; Heron v. Heron, 2 Atk., 167; Blackburn v. Edgeley, 1 P. Wms., 600; Hatch v. Hatch, 9 Ves., 292.

It is evident that the present case cannot be regarded as one in which the guardian claims any benefit arising from the relinquishment of any part of the plaintiff's demands against her father's surety. The guardian was hopelessly insolvent. If his motive can be gathered from his subsequent conduct, it would appear to be of an opposite character. As it appears that he used the property obtained through the settlement as the means of obtaining credit to go into business, if anything is to be inferred from this fact bearing on his interest in the settlement it would lead to the conclusion that he was interested in his daughter's receiving as much as possible from her uncle. But, however that may be, the case discloses the circumstances of the transaction sufficiently to enable the Court to see that the transaction was fair and equitable, and, should it be considered that a presumption of unfairness attached to the transaction apart from explanation, the facts as developed must be

regarded as sufficient to do away with the force of such presumption.

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*The conclusions of the Circuit Judge, as it regards the effect of the settlement with the guardian on the executor of his surety, appear to be correct.

The appeal taken by the executor of the surety relates to that part of the decree which prescribes the mode of computing interest on the trust fund and relates to the complaint against Wells as trustee. The decree directs interest to be "calculated annually from the 1st day of April, 1859, to the day of computation. That is to say, the first year's interest due on the 1st day of April, 1860, to be considered an interest-bearing fund until the day of computation, and so on as the interest falls due, less two and a half per cent. commissions upon the amount of interest."

This appeal gives rise to two questions—first, what is the rule of calculating interest applicable to the case? and, second, when should interest commence to run? It is necessary to conclude that so much of the decree as ascertains the facts with regard to the disposition of the moneys belonging to the plaintiff in the hands of Wells is applicable both to the estate of the plaintiff held by him as guardian and that held by him as trustee. In other words, that the same events that are to be deemed the cause of the loss of the estate held by him as guardian are to be equally regarded as the cause of the loss of the trust estate. Under these circumstances it might have been a question, had an appeal been taken for that purpose, whether the findings of the decree and the evidence authorized any decree against the surety, or even as against the guardian, for the want of a clear allegation and proof of a breach of trust, in view of the proof as to investments and as to the actual cause of loss; but that question is not before us, as the only feature of the decree appealed from by the executor of the surety is that relating to interest. These facts have, however, an important bearing on the question of interest. The rule of law is clearly settled in this State that only simple interest, qualified as hereinafter stated as to credits for payments, can be charged against a trustee unless it appears that he has dealt improperly with the interest-bearing fund. No such charge can be made out from the facts found by the decree upon the evidence, and, the qualifications of the rule as to payments being inapplicable, as will subsequently appear, simple interest alone can be claimed. In Black v. Blakely, (2 McC. Eq., 1,) it was settled that, as a general rule, trustees,

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*and others in a like relation, are not to be subjected to the payment of interest upon interest, according to the method of computing by annual rests, although the existence of exceptions is recognized, as where one mingles trust funds with his own and subjects them to the risks of trade for his own profit, or where there is a direction to accumulate a fund, which has been disregarded. A qualification of the general rule was also recognized, as where the trustee is to be credited with payments made, in which case it is to be presumed that balances of interest in his hands were first applied to make such payments before the interest-bearing sum was employed for that purpose. This latter qualification had the effect to make interest an interest-bearing fund only where it was, in fact, or should have been, employed to discharge current demands; but in this case it was only in an indirect sense that the interest became an interest-bearing fund, for, in point of fact, the computation of interest was confined to the corpus of the estate; but as that was, in effect, kept intact by taking from the interest fund what was necessary to meet current demands, the interest then employed was, in a certain sense, productive. This rule was approved in Wright v. Wright, (2 McCord, Eq., 185.) The duty of keeping interest balances in a separate account, so that compounding should be avoided, as a general rule, was clearly pointed out in Darrel v. Eden, (3 DeS., 241 [4 Am. Dec. 613].) The rule in Black v. Blakely was followed in Brown v. Vinyard, (Bail. Eq., 460.) In Davis v. Wright, (2 Hill, 560,) Judge O'Neall, referring to the rule of computation laid down in Black v. Blakely, says that he has no doubt that where accounts are made up under it, and the other familiar rule to apply first the interest of each current year as the balance of the preceding year to the expenditures, that it will be found that even by very prudent management they can hardly escape loss instead of making profit. Illustrations of the exceptions to this general rule in the cases of improperly subjecting the estate to the risks of trade and disregarding a direction to accumulate a fund are found in the following cases: Ratcliff v. Greaves, Vernon, 186; Raphard v. Boehn, 11 Ves., 92; Durnford v. Durnford, 12 Ves., 127; Scheeferlin v. Steward, 1 Johns. Ch., 619; Edmonds v. Crenshaw, 1 Harp. Eq., 224.

The results of the rule in question are clearly presented in Huggins v. Blakely, 9

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Rich. Eq., 408. That mere neglect on the *part of a trustee to account does not constitute an exception to the general rule appears in Rock v. Hart, 11 Ves, 58. The rule above stated does not appear since to have been questioned. It is true that at best it only affords an approximate means of adjusting a trustee's account. The proper duty of a trustee is to keep a separate account of trust funds in his hands, whether forming originally part of the trust estate as arising from accumulations. If such an account is presented for settlement there is nothing in the adjudi-

cated cases requiring that the actual amount should be set aside and resort had to a rule merely approximating the truth of the settlement. Such a rule is necessarily imperfect, and if it is attempted to bend it to conform to all the exigencies that arise it will lose its simplicity, that constitutes its chief element of value. In the present case there is nothing to take it out of the general rule that allows only simple interest. It does not appear that any payments out of the fund have been made which ought to have been made out of balances of interest, and therefore the qualification of the rule as it respects current payments is inapplicable to the case. The decree should be modified so as to allow only simple interest. It is clearly settled that, as a general rule, interest on funds received should only be computed from the first day of January next ensuing their receipt.—Adams v. Lathan, 14 Rich. Eq. 304. There are no special circumstances in the present case calling for a departure from this general rule, and interest should begin from the 1st of January next succeeding the receipt by the trustee of the trust funds.

The cause should be remanded to the Circuit Court for a modification of the decree as affecting the liability of Wells and his surety for the trust estate, in accordance with the foregoing principles.

WRIGHT, A. J., concurred.

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*STATEMENT OF POLITICAL CASES.

To fully understand the cases which follow, and which grew out of the general election held in this State on Tuesday, the 7th day of November, 1876, it is necessary to state briefly some of the provisions of the law under which the election was held and the votes canvassed, and such general historical facts as bore upon the points raised and were unquestioned and unquestionable.

By the Constitution and law of the State, the election at each precinct within the County was to be held on the first Tuesday in November by three Managers of Election appointed by a Board of Commissioners of Election.

The voting was to be by ballot, and the Commissioners of Election were required to provide boxes for the Managers appropriately labeled. The Managers were required to keep a poll list, on which the name of each elector voting should be entered.

The polls were to be kept open from 6 A. M. to 6 P. M., and at the close of the polls the Managers were required to count the ballots and within three days to return to the Commissioners of Election the poll list and the boxes containing the ballots.

The Commissioners of Election were required to meet at the County seat on the Tuesday next following the election and organize as a County Board of Canvassers, and within ten days of the time of their first meeting the Board of County Canvassers were to make such statements of the votes "as the nature of the election required," and to transmit to the Board of State Canvassers any protests and all papers relating to the election. Duplicate statements were to be made out and filed in the office of the Clerk of the County, and if there be no such Clerk then in the office of the Secretary of State.

Besides the statements to be filed in the office of County Clerk or Secretary of State, three separate statements of the votes, containing the names of the persons voted for and the number of votes cast for each, were to be made out and transmitted by mail to the Governor, Secretary of State and Comptroller General.

The Secretary of State, Comptroller General, Attorney General, State Treasurer, Adjutant and Inspector General and the Chairman of the Committee on Privileges and Elections of the House of Representatives were to constitute the Board of State Canvassers, four of whom were sufficient to constitute a Board.

At the times herein mentioned this Board consisted of five persons—H. E. Hayne, Secretary of State; F. L. Cardozo, State Treasurer; T. C. Dunn, Comptroller General; William Stone, Attorney General, and H. W. Purvis, Adjutant and Inspector General. Three of these persons, Hayne, Cardozo and Dunn, constituting a majority of the Board, were candidates for re-election.

The duties of the Board, as prescribed by the statute, were to meet, under the call of the Secretary of State, on or before the 10th of November next after the general election, "for the purpose of canvassing the votes for all officers voted for at such election."

The Board when formed "shall, upon the certified copies of the statements made by the Board of County Canvassers, proceed to make a statement of the whole number of votes given at such election for the various officers and for each of them voted for, distinguishing the several Counties in which they were given." They shall certify such statements to be correct and subscribe the same with their proper name. "They shall make and subscribe on the proper statement a certificate of their determination and shall deliver the same to the Secretary of State."

"Upon such statements they shall then proceed to determine and declare what persons have been, by the greatest number of votes, duly elected to such offices, or either of them. They shall have power, and it is made their duty, to decide all cases under protest or contest that may arise when the power to do so does not by the Constitution reside in some other body." The Board had power to adjourn from day to day "for a term not exceeding ten days."

The law further provided "that in case of a contest of the election for Governor, (if the General Assembly by concurrent resolution shall entertain the same,) that the Senate and House of Representatives shall, each separately, proceed to hear and determine the facts in the case so far as they deem necessary, and decide thereon who, according to the 10th Section of Article VIII of the Constitution, is entitled to be declared elected."

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*The Section of Article VIII of the Constitution referred to is in these words: "In all elections held by the people under this Constitution, the person or persons who shall receive the highest number of votes shall be declared elected."

This was a general provision, embracing not only the election for Governor, but also the election for other State officers, for members of the Legislature and for Presidential electors.

The Constitution also provided (Article II, Section 14,) that "each house shall judge of the election returns and qualifications of its own members."

In 1876 the State was divided into two political parties, one known as the Democratic and the other as the Republican party. The Democratic party was composed almost entire-

ly of the native white citizens of the State, and the Republican party was composed of the black and colored citizens of the State, black and white citizens from Northern States who had come South since the war, and a few native and adopted white citizens of the State.

At the election held November 7, 1876, both parties had full tickets in the field. The candidates of the Democratic party on the State ticket were Wade Hampton for Governor; W. D. Simpson for Lieutenant Governor; R. M. Sims for Secretary of State; S. L. Leaphart for State Treasurer; Johnson Hagood for Comptroller General; James Conner for Attorney General; Hugh S. Thompson for Superintendent of Education, and E. W. Moise for Adjutant and Inspector General; and on the ticket for Presidential electors were Theodore G. Barker, Samuel McGowan, J. S. Ingram, Robert Aldrich, John W. W. Harrington, William Wallace and J. B. Erwin.

The candidates of the Republican party on the State ticket were D. H. Chamberlain for Governor; R. H. Gleaves for Lieutenant Governor; H. E. Hayne for Secretary of State; F. L. Cardozo for State Treasurer; Thomas C. Dunn for Comptroller General; R. B. Elliott for Attorney General; J. B. Tolbert for Superintendent of Education, and James Kennedy for Adjutant and Inspector General; and on their ticket for Presidential electors were C. C. Bowen, Timothy Hurley, John Winsmith, Thomas B. Johnston, William B. Nash, Wilson Cooke and William F. Myers.

In every County of the State each party had a full ticket for members of the Legislature and for County officers. The election for members of Congress was held at the same time, and in the five Congressional Districts of the State each party had its nominee on the ticket.

The Republican party had been in the ascendant since 1867, carrying every general election in which there was any contest by majorities amounting to over thirty thousand, and a large majority of both branches of the Legislature had been members of that party. A strong conviction, however, had taken hold of the minds of many of the most intelligent, well informed and influential citizens of the State that at the general election to take place in that year (1876) the Democratic ticket would be successful. Owing to causes unnecessary to be here mentioned, the most intense excitement prevailed. The election, however, was peaceable. There was no violence or bloodshed anywhere at the polls, and but few if any disturbances took place.

The polls were closed on Tuesday, November the 7th, at 6 o'clock P. M., and very soon thereafter it became known that, according to the returns or statements of the County Boards of Canvassers for the different Counties of the State, Hampton had certainly received a majority of the votes for Governor. It was also believed that the other candidates on the Democratic State ticket were elected; but as to the Presidential electors there was great uncertainty, the chances apparently being that the Republican ticket had received a majority.

As to the election in the different Counties for members of the Legislature, it also soon became known that, according to the returns or statements of the County Boards of Canvassers of the different Counties, the Democratic party had elected a majority of the members of the House of Representatives; but the elections in the respective Counties of Edgefield, Laurens and Barnwell, in which the Democratic candidates had the majorities, were contested, and it was feared and believed by many that the members of the Board of State Canvassers would assume judicial powers and give the certificates of election for those Counties to the Republican candidates and thus give to that party the control of the organization of the House.

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*It was also feared and believed by many that the State Board of Canvassers would set aside, disregard or ignore the returns or statements of the County Boards of Canvassers for those Counties of the election for Governor and Lieutenant Governor and the State ticket generally, and thus give a majority to D. H. Chamberlain and the other Republican candidates.

These fears and beliefs grew out of the fact not only that all the members of the State Board of Canvassers were members of the Republican party, but also that three out of the five persons composing that Board were candidates for re-election upon the Republican State ticket. It was manifest, therefore, that if they assumed judicial powers and undertook to decide which of the candidates for members of the House from those Counties were entitled prima facie to the certificates of election, and also to decide on the returns or statements of the County Boards of Canvassers of those Counties as to the validity of the election for State officers, they would be acting as judges in their own cause. And it may be as well to add here that, this objection having been brought to the notice of the Board in a protest against their exercising any other than ministerial powers, they passed resolutions declaring that they did not propose to canvass the returns of Governor and Lieutenant Governor; that as the State Board of Canvassers they had the right to hear protests as to the election of electors for President and Vice President and members of Congress, and to give their certificates to such persons as had the highest number of votes; and, lastly, "that it is the opinion of the Board of State Canvassers that the Secretary of State, State Treasurer and Comptroller General have the right to sit as members of this Board to hear and determine all questions coming before them, except that neither of the said officers shall vote upon his own election."

Such was the political state of affairs in the State immediately preceding the commencement of the action in Wallace v. Hayne and the other political cases which followed that case.

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STATE, ex rel. WALLACE, v. HAYNE AND MACKEY.

(Columbia, Nov. Term, 1876.)

[*Courts* ⇐207.]

The power of the Supreme Court in issuing writs of injunction, mandamus, quo warranto and habeas corpus is not limited by the concluding term of Section 4, Article IV, of the Constitution, expressed in these words: "As may be necessary to give it a general supervisory control of all other Courts in the State," but such term qualifies only the immediately preceding term "and such other original remedial writs."

[Ed. Note.—Cited in State ex rel. Richland County v. Columbia, 16 S. C. 413; State ex rel. Sawyer v. Fort, 24 S. C. 517; Salinas & Sons v. Aultman & Co., 49 S. C. 383, 384, 27 S. E. 407.

For other cases, see Courts, Cent. Dig. § 736; Dec. Dig. ⇐207.]

[*Mandamus* ⇐64, 77.]

The Supreme Court has jurisdiction, by mandamus, over the executive officers of the State, as, for instance, the Secretary of State; and may by such writ supervise, control and direct their action.

[Ed. Note.—Cited in State v. Ansel, 76 S. C. 405, 57 S. E. 185.

For other cases, see Mandamus, Cent. Dig. §§ 128, 164; Dec. Dig. ⇐64, 77.]

[*States* ⇐33.]
The House of Representatives of the State consists, under the Constitution, of one hundred and twenty-four members, and it requires a majority of that number, that is to say, sixty-three members, at the least, to be present to form a quorum for the prosecution of business.

[Ed. Note.—Cited in Williams v. Benet, 35 S. C. 155, 14 S. E. 311, 14 L. R. A. 825.

For other cases, see States, Cent. Dig. § 41; Dec. Dig. ⇐33.]

[*Elections* ⇐259.]
The duty of the State Board of Canvassers in ascertaining who have been elected members of the House of Representatives is purely ministerial,—they have only to add up the number of votes cast for each candidate, and to those having the majority certificates should be given entitling them to seats in the House, and it remains then, if the seats are contested, for the House itself to decide upon the validity of the election.

[Ed. Note.—Cited in Ex parte Mackey, 15 S. C. 333.

For other cases, see Elections, Cent. Dig. § 234; Dec. Dig. ⇐259.]

[*States* ⇐29.]
A certificate from the Secretary of State is not the only evidence that may be adduced showing that a candidate received the highest number of votes, and is, therefore, entitled, at least prima facie, to a seat in the House. If the Secretary of State refuses to issue the certificate, the prima facie right to the seat may be shown by a return of the State Board of Canvassers or by the statements of the County Board of Canvassers.

[Ed. Note.—For other cases, see States, Cent. Dig. § 38; Dec. Dig. ⇐29.]

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[*Mandamus* ⇐63.]
*The Speaker of an illegal and unconstitutional body claiming to be the House of Representatives is a mere private citizen, against whom a writ of mandamus cannot issue.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 127; Dec. Dig. ⇐63.]

[*Mandamus* ⇐160.]
Can mandamus issue to compel the Secretary of State to deliver to the Speaker of the House of Representatives the returns of an election for Governor and Lieutenant Governor after he has parted with such returns to one who claimed to be Speaker of the House but whose claim has been judicially decided to be without legal foundation?

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 326–335; Dec. Dig. ⇐160.]

[This case is also cited in Ex parte Norris, 8 S. C. 483; Ex parte Smith, 8 S. C. 515, as to facts.]

This was a petition to the Supreme Court entitled the "State of South Carolina ex relatione William H. Wallace, Speaker of the House of Representatives, against H. E. Hayne, as Secretary of State, and E. W. M. Mackey."

The allegations and prayer of the petition were as follows:

That a general election was held in said State on the 7th day of November, A. D. 1876, for the offices of Governor and Lieutenant Governor of said State; and upon such election the returns of the several Managers of Election were duly transmitted to the said H. E. Hayne, as Secretary of State, in accordance with the provisions of the Constitution and laws of said State.

And your petitioner further sheweth that the House of Representatives of the General Assembly convened in the city of Columbia on the fourth Tuesday in November, 1876, to wit, in Carolina Hall, in said city, the members thereof having been excluded by force of arms from the State House by the army of the United States, and, after convening, duly organized, elected your petitioner Speaker of the said House, and sent the proper and usual message to the Senate of the said State that said House was duly organized and ready to proceed to business.

That your petitioner, as Speaker, as aforesaid, thereupon demanded of the said H. E. Hayne, Secretary of State, the returns of the election for Governor and Lieutenant Governor, in the possession of the said Secretary of State, under Section 4, Article III, of the Constitution of said State; but the said Secretary of State refused to deliver the said returns to your petitioner, and still refuses so to do, and has unlawfully delivered said returns to one E. W. M. Mackey, claiming to be Speaker of a body claiming to be a House of Representatives, which is not legally elected or organized.

Wherefore, and inasmuch as your petitioner is without any other adequate remedy in the premises, your petitioner prays that a writ of mandamus may issue from this

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honorable Court, directed to the *said H. E. Hayne, as Secretary of State, and E. W. M. Mackey aforesaid, commanding and enjoining them forthwith to deliver to your petitioner, as the Speaker of the said House, the returns of the Managers of Election transmitted to him upon the said general election as aforesaid, and that your petitioner may have such other and further relief as may seem just and necessary.

The petition was verified by the petitioner, and on December the 2d, 1876, a rule was issued by the Court requiring the defendants Hayne and Mackey to show cause "on Monday, the 4th December, instant, why the prayer of the said suggestion and petition should not be granted."

The defendant Henry E. Hayne, for answer to the petition, said:

That before the filing of the petition in this Court, and before he had any notice of said proceedings, he had delivered to said E. W. M. Mackey the returns of the election which have been forwarded to him by the proper election officers of this State, in pursuance of Section 4, Article III, of the Constitution of this State; that before he so delivered said returns, the said Mackey had been elected Speaker of the House of Representatives of this State, and was then in the Speaker's chair and acting as such, and that he so delivered the same before any demand was made upon him by said Wallace, and

before he pretended to have been elected; that he did refuse to deliver the same to said Wallace, because he could not do so, the same being then in the hands of said Mackey. He therefore says that said returns had, before the filing of said petition in this Court, gone beyond his control, and, therefore, he cannot now produce said returns or deliver them to said Wallace.

The defendant E. W. M. Mackey also answered the petition and said:

1. That this Court has no power or authority or jurisdiction to inquire into, hear or determine the matters and things alleged and put in issue in the petition of the relator.

That the House of Representatives of the State of South Carolina duly assembled in the hall of the House of Representatives, in the city of Columbia, the capital of said State, on the 28th day of November, A. D. 1876, pursuant to the Constitution, and pro-

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*ceeded to organize by the election of this respondent as Speaker thereof, and of A. O. Jones as Clerk thereof.

That, having been duly elected Speaker of said House of Representatives as aforesaid, the returns of the election for Governor held in said State on the 7th day of November, A. D. 1876, were delivered to this respondent by Hon. Henry E. Hayne, Secretary of State, pursuant to Section 4, Article III, of the Constitution, and he now holds said returns as Speaker of said House of Representatives, and for the purpose indicated in said Section 4, Article III, of the Constitution, and for no other purpose whatever. This respondent therefore says that this Court has no power, authority or jurisdiction to hear and determine the matters in issue in said petition, and he prays to be hence dismissed with his reasonable costs in this behalf sustained.

And for a further answer he, the said E. W. M. Mackey, said that he was, on the 7th day of November, 1876, duly and legally elected a member of the House of Representatives of this State, and is now in his place in said House, having been duly and legally qualified as such. And that heretofore, on the 28th day of November, 1876, the House of Representatives of said State did assemble in the hall of the House of Representatives, a constitutional quorum of the legally elected members of said House being present and answering to their names, and said House did then and there organize by the election of this respondent Speaker, and A. O. Jones, Esq., as Clerk, and did in all respects proceed to perfect its organization in conformity with the Constitution and laws of this State, and that said House has continued in session from day to day until the present time; and he has at all times since his said election continued to act as such Speaker.

And that the Senate and House of Representatives, by concurrent resolution, have appointed this 4th day of December, at 2 o'clock P. M., in the hall of the House of Representatives, as the time and place for opening, counting and publishing the returns of the election of Governor and Lieutenant Governor.

And this respondent further says that he was duly and legally elected such Speaker, and that said Wallace was not elected by a majority of votes of a majority of the House of Representatives who had been legally elected; that eight of the pretended members who acted and voted for said Wallace had not been legally elected and were not legal members of said House, which question has

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*been submitted to and decided by the legally-constituted House of Representatives of this State; and therefore he says that the pretended House, who pretended to act as a House, and who pretended to vote for said Wallace, was composed of fifty-six members and no more.

And this respondent having been duly elected Speaker of said House of Representatives as aforesaid, the returns of the election for Governor held in said State on the 7th day of November, A. D. 1876, were delivered to this respondent by Hon. Henry E. Hayne, Secretary of State, pursuant to Section 4, Article III, of the Constitution, and he now holds said returns as Speaker of said House of Representatives, and for the purpose indicated in said Section 4, Article III, of the Constitution, and for no other purpose.

Wherefore this respondent says that this Court has no power, authority or jurisdiction to hear and determine the matters in issue in said petition, and he prays to be hence discharged with his reasonable costs in this behalf sustained.

To the answers of E. W. M. Mackey the following reply was filed by the relator:

And the relator alleges that he is entitled to the writ of mandamus prayed for, notwithstanding anything in the return of the respondents contained; for the relator alleges that the body of which respondent claims to be the duly-elected Speaker is not and never was a constitutional House of Representatives, inasmuch as said body, when assembled in the hall of the House of Representatives, as alleged, did not consist of 124 members chosen by ballot by the citizens of this State, and that a majority of a lawfully-constituted House of Representatives, constituting a legal quorum, viz., sixty-three members, did not assemble or organize, but, on the contrary, as relator is informed and believes, not more than fifty-nine members chosen by ballot (if so many) assembled in the said hall of the House of Representatives at the time alleged in the answer and proceeded to organize as pretended.

And the relator further says that he was elected Speaker by a majority of votes of a majority of the House of Representatives who had been duly elected, viz., by a majority of a legal quorum of the House of Representatives of 124 members; that is to say, sixty-

five members, of which sixty-five members
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fifty-seven members *held, as evidences of their legal membership, certificates of the Secretary of State and of the Clerk of the Supreme Court, as hereinafter more particularly described, of the certified determination of the Board of Canvassers, and eight members, to wit, the members elect from the Counties of Laurens and Edgefield.—W. S. Allen, J. C. Sheppard, James Callison, T. E. Jennings and H. A. Shaw from Edgefield, and J. W. Watts, D. W. Anderson and J. B. Humbert from Laurens, who had been refused certificates by the Secretary of State, —held as evidences of their title certificates of the Clerk of the Court issued in accordance with the judgment of the Supreme Court on the petition in mandamus in the case entitled "The State, ex relatione R. M. Sims et al., v. H. E. Hayne, Chairman, et al., the Board of State Canvassers, and H. E. Hayne, Secretary of State."

All of which the relator is willing and ready to verify. Wherefore he prays judgment, &c.

To the answer of H. E. Hayne the relator also filed a reply as follows:

The relator traverses the return of H. E. Hayne as Secretary of State and says: That so much thereof as alleges that said Mackey has ever been elected Speaker of the House of Representatives of the General Assembly of the State is untrue, and denies the same, and craves leave to refer, in regard thereto, to his traverse of the return of E. W. M. Mackey herein, and to make the same a part of this traverse as fully as if herein set forth. All of which the relator is ready and willing to verify. Wherefore the relator prays judgment.

Each of the defendants filed an answer to the reply of the relator, in which he denied each and every averment contained in the reply, and said:

That the pretended certificates issued to the persons named in said reply were issued by the Clerk of this Court without any order of this Court authorizing or directing them to be issued, and without any authority of law; that the only power or authority under or by virtue of which the certificates could have been issued is the Secretary of State, in pursuance of the decision and direction of the State Board of Canvassers; and therefore he says that said certificates are illegal and void.

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*The defendant Mackey also demurred to that portion of the reply which sets up and relies upon the certificates issued in pursuance of the order and decree of the Court for the reasons:

1st. That the Court had no jurisdiction of the said matter.

2d. Because the parties named in the reply were not parties to or in any way before the Court.

It was admitted that all the members, sixty-five in number, of the body which assembled as a House of Representatives on the 28th November, 1876, at Carolina Hall, in the city of Columbia, and which elected W. H. Wallace Speaker, held certificates from the Secretary of State, excepting the members claiming seats from the Counties of Edgefield, five in number, and Laurens, three in number, who held certificates of the Clerk of the Supreme Court, which were given in evidence.

The defendants offered no testimony.

Conner and Gordon, for relators.
Corbin, Denny and Settle, contra.

December 6, 1876. Their Honors the Justices of the Court delivered, seriatim, oral opinions as follows:

MOSES, C. J. This case is an application upon suggestion filed by leave of the Court in the name of the State, at the relation of William H. Wallace, claiming to be the Speaker of the House of Representatives of the State of South Carolina, against H. E. Hayne, as Secretary of State, and E. W. M. Mackey.

The petition sets forth that a general election was held in said State on the seventh day of November, A. D. 1876, for the offices of Governor and Lieutenant Governor of South Carolina, and upon such election the returns were duly transmitted to the said H. E. Hayne, as Secretary of State, in accordance with the provisions of the Constitution and laws of the State.

This allegation is admitted by respondents.

The petitioner alleges that the House of Representatives convened in the city of Columbia on the fourth Tuesday in November, and, after convening, duly organized and elected him, William H. Wallace, Speaker, and notified the Senate; that the petitioner, as such Speaker, thereupon demanded of the
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said H. E. Hayne, Secre*tary of State, the returns of the election for Governor and Lieutenant Governor; that the Secretary of State refused to deliver said returns to the petitioner, and still refuses, and has unlawfully delivered said returns to one E. W. M. Mackey, claiming to be Speaker of a body claiming to be a House of Representatives which is not legally elected or organized; and petitioner prays that a writ of mandamus issue directed to H. E. Hayne, as Secretary of State, and E. W. M. Mackey, commanding and enjoining them forthwith to deliver to the petitioner, as Speaker of the House of Representatives, the returns of the Managers of Election transmitted to him upon the election, and for further or other relief.

On this suggestion the Court granted an order that H. E. Hayne, Secretary of State, and E. W. M. Mackey, show cause on the 4th of December instant, why the prayer and

suggestion of the petition should not be granted.

The pleadings, evidence and arguments of the counsel having been submitted to the Court, we now proceed to deliver our decision and judgment.

As to the jurisdiction of the Court, the exercise of which has been objected to on the part of the respondents, the Court feels no doubt at all that it has power under the Constitution, Section 4 of Article IV:

"The Supreme Court shall have appellate jurisdiction only in cases of chancery, and shall constitute a Court for correction of errors at law, under such regulations as the General Assembly may by law prescribe: Provided, The Court shall always have power to issue writs of injunction, mandamus, quo warranto, habeas corpus, and such other original remedial writs as may be necessary to give it a general supervisory control of all other Courts in the State."

Now, according to the view of the learned counsel for the respondents, the power of the Court as to those writs, under Section 4, Article IV, of the Constitution, is limited to control, by our supervision, over all other Courts in this State. The mere reading of this Section is enough, I trust, to convince the learned counsel that his interpretation of the Section is not well founded. The writ of injunction may be exercised not to control other Courts, but it acts directly upon parties, and no form of an injunction that I can think of could prohibit the proceedings of a Court of inferior jurisdiction. The great writ of mandamus stands upon a dif-

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ferent footing. *It may be addressed to another Court; it may control the exercise of an assumed power by another Court, and, in that view, may be said to supervise. But quo warranto is never used in the supervision of another Court; it is directly an issue between two persons, both claiming an office. So, too, the great writ of habeas corpus mentioned in this Section. How can that writ issue to supervise or correct the errors of a Court of inferior jurisdiction? It is a great writ of privilege, interposing the shield of the law over the body of the prisoner. This great writ of right and liberty acts only upon the person, and never can act upon the Court. To show that the view which we entertain of the said Section is consistent with the end designed by the framers of the Constitution, and that the exercise of this power was to continue as it existed at common law at the time of the adoption of that instrument, they went further and gave to this Court the power to issue "such other original and remedial writs as may be necessary to give it general supervisory control." For instance, the writ of certiorari and every other writ which was requisite to bring into this Court the proceedings of an inferior tribunal, that its action might be supervised by this Court. So much for the objection in that particular.

Then it is alleged that this Court has not jurisdiction over H. E. Hayne, one of the executive officers of the State, because, according to the limitations of the Constitution, the powers of the government are vested in three distinct bodies, neither one of which can exercise any control over another. That may be conceded to the fullest extent, and yet what would become of the rights of the citizen, vested in him not only by the common law but by the statutes, if there was no control over the executive department of the government? The Treasurer is a part of the executive department, and yet more than one case may be found where this Court has interposed to compel him to perform duties specially required of him by law. And so of the other officers. It is not an encroachment upon the duties of their particular departments. This Court does not undertake to say to them that "we are to perform the duties assigned by law to you." It does no more than say you must perform the specific duties assigned to you by law where you have not the privilege of exercising discretion; that is all. The mandamus could not compel the Governor to issue a pardon to a man; that would be an encroachment on his prerogative. But to say that the judicial depart-

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ment of the government, where a citi*zen avers that his right has been infringed upon by an executive officer, could not interfere, as, for example, when the Legislature had appropriated a certain sum of money to be paid to him, and the Treasurer refuses, is startling. Where would the judiciary be? Where would the other departments be? The judiciary would sink into mere insignificance. The other departments might increase in bulk and wield their powers to such an extent that the whole liberties of the people might be entirely destroyed. The Court has previously decided this point in the same way. It was only out of respect to the learned counsel from abroad that it permitted it to be again argued.

The question is whether Mr. Wallace has established in this Court his right, by reason of holding under the Constitution the office of Speaker of the House of Representatives, to the possession of the returns of the election for Governor and Lieutenant Governor, filed with the Secretary of State. We do not feel it incumbent upon us either to inquire or determine if Mackey, one of the respondents in this case, is the Speaker of a legally-constituted House of Representatives of the State of South Carolina. We do not consider that inquiry necessary to the judgment demanded in this case. The Court holds that Mr. Wallace is the Speaker of a legally-constituted House of Representatives of South Carolina, and therefore has such a

status here as not only authorizes but requires the Court to hear and determine the matters set forth in the suggestion. It has been made to appear, by evidence, that of the constitutional number, 124, of which the House shall consist, sixty-three members were in their seats when Mr. Wallace was elected. The constitutional requisition having been thus complied with, there was present the necessary "quorum to do business." This is no new question. It was decided by this Court on a day when everything was calm and serene: when the political atmosphere was pure: when there was no excitement in the country as unfortunately prevails now. In the case of Morton, Bliss & Co. v. The Comptroller General, (reported in 4 S. C. 430) it was held that to constitute a House of Representatives there must be a majority of the number which the Constitution requires to make a House, and that is 124, in the proportion of members to the respective Counties as fixed by the Constitution. Now it is contended that there was not sufficient evidence of the right to membership on the part of the gentlemen constituting the

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number of sixty-three to *entitle them to the floor in the organization of the House. As we understand it, from the proof in the case, and it is conceded by the respondents, all the members had certificates from the Secretary of State except eight, and the qualifications of those eight were established by the proceedings in this Court. No matter what was the character of the certificates, they had the return of the Board of State Canvassers to this Court showing that they had received the greatest number of votes in their particular Counties, which entitled them to access to the floor for the purpose of organization.

The return made to this Court by the Board of State Canvassers shows the name of every candidate in every County and the number of votes he received, and therefore the names of those who received the highest number in their respective Counties. The Court then required that the Board of State Canvassers should make a report in conformity to that return. Instead of performing that duty they adjourned sine die, possibly with the view in that way of avoiding the performance of the duty imposed upon them by the law, but more especially brought to their notice by the order of the highest Court of the State of South Carolina.

The law cannot be evaded in that way. We must at least preserve our civilization and maintain the due enforcement of the laws according to the judgment of those upon whom the Constitution has imposed the duty and responsibility of interpreting them. Unfortunately, in every case there will be differences of opinion: but we think that when a clearer day comes in the political horizon than the present, the whole people of South Carolina will unite in saying the law must be obeyed. Peace and prosperity can never be the reward of the people until every man knows that his first duty is not only to submit to the law but to lend his moral influence to their proper enforcement.

So much of the prayer of the petition as asks for a mandamus against Mr. Mackey must necessarily be dismissed. There cannot be two Speakers of the House of Representatives in South Carolina, and Mr. Mackey stands in the position, so far as appears by the testimony and in the view of the Court, as a private citizen, against whom mandamus cannot issue.

In regard to Hayne, the Court considers that another important question is involved in it, and will order a further hearing at some future day.

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*It is therefore ordered and adjudged that the said W. H. Wallace is the legal Speaker of the lawfully-constituted House of Representatives of the State of South Carolina, and, as such officer, was and is entitled to the possession of the returns of the election for Governor and Lieutenant Governor held on the seventh day of November, A. D. 1876, and which were transmitted to H. E. Hayne, Secretary of State: but it appearing that the said election returns have been unlawfully delivered by said H. E. Hayne, Secretary of State, to E. W. M. Mackey, one of the respondents, the question is reserved for further argument and consideration whether the writ of mandamus should now issue to said H. E. Hayne, Secretary of State.

It is further ordered and adjudged that the petition be dismissed as to E. W. M. Mackey.

WILLARD, A. J. As this is a case of very great magnitude, it would be proper to enunciate briefly the propositions upon which I concur with the action of the Court. The Supreme Court has constitutional jurisdiction in cases of mandamus: our jurisdiction is original and general. We have so construed the Constitution repeatedly, without objection to that jurisdiction having been raised before at this bar, although we repeatedly affirmed that to be under our jurisdiction. Mandamus issues whenever a public officer is called upon to perform a ministerial act of a specific character, and, on demand, has refused its performance. The question then arises whether the Secretary of State and E. W. M. Mackey occupy that position. Are the duties they are called upon to perform ministerial? Are they specific? Have they been called upon to perform them, and have they refused the performance? And the additional question whether Mackey is a public officer.

There can be no question as to the character of the duty of the Secretary of State. He is ordered to do a specific thing—to deliver certain papers to a certain person invested with the office of Speaker of the House

of Representatives; that is clearly a ministerial act. We have rightfully defined a ministerial act to be one proceeding from a duty to do something which an individual or corporation has a right to demand should be done. The Speaker of the House of Representatives has a clear right to demand that the Secretary of State should transmit to him the papers in question. The Secretary of State, being a public officer, charged with

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this specific *ministerial duty, is bound to perform it, and, refusing it, he may be compelled by mandamus. The question which is raised is, is Wallace Speaker of the House of Representatives? It seems that the body over which he presides had the constitutional majority, provided the members from Edgefield and Laurens Counties were entitled to seats in that body. This is indisputable. I am satisfied that the provision of the Constitution that the House of Representatives shall consist of one hundred and twenty-four members is mandatory, and the House cannot obtain a constitutional organization without having a majority of that specific number of members participating in the organization. The question as to whether the members from Edgefield and Laurens were entitled to seats was rightly understood by counsel as depending upon the jurisdiction of this Court in mandamus. If this Court had power to command the Board of State Canvassers to declare the election of those members from Edgefield and Laurens Counties, then we think they are to be regarded as members of the House of Representatives. We permitted counsel to argue the question of our jurisdiction, not because we had any doubt, or could conceive of a possible doubt, but because this is a case of great importance, and the Court wished to hear everything that could be said upon the subject. We have no doubt about our jurisdiction to confine the Board of Canvassers within the limits of their proper jurisdiction—to say what the jurisdiction of that body is. We do not claim, nor have we ever exercised, nor do we intend to exercise, the right to control the discretion of any executive officer or Board whatever, nor to interfere with their discretion. We determined that they had a mere ministerial duty to perform as regards members of the Legislature. The provision of the Constitution making each house the judge of the election returns and qualifications of its own members could leave nothing for the Board to do but the ministerial duty of certifying the results of the election as they appeared prima facie, and the Act of the Legislature itself has paid respect to the Constitution by withholding in terms from the Board of State Canvassers such powers when it is lodged in any other body. In the case under consideration it had been already lodged by the Constitution in the several houses of the General Assembly. The Court commanded that specific ministerial act to be performed. After the judgment was rendered from the bench, and before the writ of mandamus was issued, it

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*appears from proceedings in that case, which are before us, that the Board undertook to make certain declarations in violation of their duty under the judgment of this Court. Under familiar principles, that action was null and void and could give no legal foundation to any legal action whatever. The members of the Legislature were then in the same position as if the Board had refused to make any declaration whatever after having been commanded by this Court, and I presume that there is no lawyer who will give fair consideration to this matter who will doubt that if, after judgment pronounced, the Board had refused to make any declaration whatever, it would have been competent for the members elected under the statement of the Board made to this Court to take their seats without any certificates whatever, inasmuch as their action was abortive when they disobeyed the order of the Court. Technical restrictions are never to be applied in the vital stages of the organization of such a body. Red tape can never be allowed to tie up the organic powers of the government. It would be to attempt to carry matters of form proper to the minor transactions of life into those great matters which cannot be hampered by such things. I am fully in accord with the Court that the body which contained the constitutional number was the House over which Wallace presides. The one presided over by Mackey has no legal status whatever. Mackey is a private citizen and is subject to arrest and punishment. The criminal Courts of the country furnish the means of punishment. As to the Secretary of State, I fully concur in the views of the Court that the question whether a mandamus can go to him after he has parted with the papers should be fully argued at the bar.

WRIGHT, A. J. I fully concur with my associates in all that they have said. I have just remarked to the Chief Justice that it was not necessary for me to say a word, inasmuch as he and my other associate have better expressed my views than I am competent to do. The whole point in this case is whether or not five persons from Edgefield and three from Laurens had a prima facie right to take their seats and participate in the organization of the General Assembly of South Carolina. In looking, a moment ago, at the statutes under which the State Board of Canvassers are directed to act, I find the 24th Section, which is one of the Sections which defines their powers and duties, reads

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thus: "The Board, when thus *formed, shall, upon the certified copies of the statements made by the Board of County Canvassers,

proceed to make a statement of the whole number of votes given at such election for the various officers and for each of them voted for, distinguishing the several Counties in which they were given. They shall certify such statement to be correct, and subscribe the same with their proper names."

That was an indisputable duty devolved upon the Board of State Canvassers. It is evident that they did not perform that duty, inasmuch as they assumed to throw out two Counties in the State and to leave the people of those Counties unrepresented in the organization of the House of Representatives.

Now, was there, or is there, any remedy or redress for the citizens of Edgefield and Laurens Counties? This statute provides that the Board of County Canvassers shall file certified copies of their statements in the office of the Clerk of the Court for each County, also with the Governor, Comptroller General and the Secretary of State. I regard that as a wise provision of the law, for the simple reason (if it can be called simple) that if the Board of State Canvassers could throw out a County or Counties, and declare that those Counties shall have no representation, that there is a way by which you can tell who received the highest number of votes.

Now, I presume the object of the government is, or should be, the protection and representation of the people. If a body of men, acting as a Board of State Canvassers, have the right to throw out one County and thus defeat its representation, they can throw out one-half or all of the Counties in the State and defeat an entire election. Consequently, I take it that those eight men had a right to participate in the organization of the House of Representatives. That being the fact, it was impossible for the other so-called House to have the requisite constitutional majority. So far as regards the other case, I fully concur with my associates that it is a very important and grave question and should be fully argued by counsel. It has not yet been argued at all.

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*STATE, ex rel. BARKER, v. BOWEN.

(Columbia. Nov. Term, 1876.)

[*Removal of Causes* ⇐18.]

An action in the nature of quo warranto to determine the title to the office of electors of President and Vice President of the United States, brought in a State Court, is not removable to the Circuit Court of the United States under the Act of Congress of March 3d, 1875 [U. S. Comp. St. 1913, § 1010] upon the ground that the "matters in dispute therein arise under the Constitution and laws of the United States."

[Ed. Note.—Cited in State ex rel. Barker v. Bowen, 8 S. C. 401.

For other cases, see Removal of Causes, Cent. Dig. § 36; Dec. Dig. ⇐18.]

An action was brought in the Supreme Court of the State entitled "The State, ex relatione Theodore G. Barker, Samuel McGowan, J. I. Ingram, Robert Aldrich, John W. Harrington, William Wallace and John B. Erwin, v. C. C. Bowen, Timothy Hurley, John Winsmith, Thomas B. Johnston, William B. Nash, Wilson Cooke and William F. Myers," in which the complaint or suggestion is as follows:

"Be it remembered that Theodore G. Barker, Samuel McGowan, J. I. Ingram, Robert Aldrich, John W. Harrington, William Wallace and John B. Erwin come here the 2d December, A. D. 1876, before the honorable the Supreme Court of the State of South Carolina, and, by leave of said Court first had and obtained, according to the form of the statute in that case made and provided, give the Court here to understand and be informed that on the 7th November, 1876, a general election was duly held in the said State for electors for President and Vice President of the United States; that at said election the above named relators, Theodore G. Barker, Samuel McGowan, J. I. Ingram, Robert Aldrich, John W. Harrington, William Wallace and John B. Erwin, were duly and legally elected by general ticket, (they being as many in number as the said State is entitled to appoint,) and had the highest number of votes at said election.

"That at said election the votes for the opposing candidates for said offices, respectively, were thereupon duly counted by the several Boards of Managers of the said election, and by them duly returned in their respective Counties to the Boards of Canvassers for their several Counties, and, the several Boards of County Canvassers having made their statements of the votes cast, the same, together with all the papers appertaining to said election, were by the Boards of County Canvassers duly transmitted to the Board of State Canvassers of the said State.

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*"That the said Board of State Canvassers met at the office of the Secretary of State on or before the 10th day of November next after such election and proceeded to canvass the votes given for the electors of President and Vice President, and made a false and fraudulent statement or all the votes, as appears by a comparison of the statements of the County Canvassers with the statements and returns of the precinct Managers in the several Counties, and falsely determined and certified as the persons elected as Electors of the State of South Carolina, of President and Vice President, the following named persons: Christopher C. Bowen, John Winsmith, Timothy Hurley, Thomas B. Johnston, William B. Nash, Wilson Cooke and William F. Myers.

"And, thereupon, the Secretary of State caused a copy, under the seal of his office, of the certified determination of the Board of State Canvassers to be delivered to each of the persons therein declared to be elected.

"And the said Christopher C. Bowen, John Winsmith, Timothy Hurley, Thomas B. Johnston, William B. Nash, Wilson Cooke and William F. Myers, not being duly and lawfully elected, and not having received the highest number of votes cast at such election, received said certified determination so delivered, and under and by virtue thereof, as evidence of title to the said offices and functions of State electors of President and Vice President of the United States, claim the right as such to meet and assemble at the capital on the first Wednesday in December next, being the next after their election, and then and there threaten and claim to vote by ballot for President and Vice President.

"And the said relators further give the Court to understand and be informed that if a true and correct statement of all the votes cast at said election had been made by the Board of State Canvassers, by comparing the statements of the County Canvassers with the statements and returns of the precinct Managers in the several Counties, and if the said Board had justly and truly determined and certified the persons so elected as electors, your relators above named would have been found to be elected, and to have received the highest number of votes cast for electors at said election, and would have been so determined and certified, and would have been entitled to receive a copy of the said certified determination, under the seal of his office, from the Secretary of State, and would have been entitled to assemble, according to law,

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*at the State capital, on Wednesday next, and then and there to cast the votes of the State of South Carolina for President and Vice President of the United States of America.

"Whereupon the said relators pray the consideration of the Court here in the premises, and that due process of law may be awarded against the said Christopher C. Bowen, John Winsmith, Timothy Hurley, Thomas B. Johnston, William B. Nash, Wilson Cooke and William F. Myers, in this behalf, and to make them answer to the State, and show by what warrant or authority they claim to have, use and enjoy the offices, liberties, privileges and franchises aforesaid."

And this was a petition by the defendants to the Supreme Court asking that said action be transferred to the United States Circuit Court for the District of South Carolina.

The grounds upon which the application to transfer were founded are stated in the opinion of the Court.

Corbin, Denny, Settle, for petitioners.
Conner, Gordon, contra.

December 26, 1876. The opinion of the Court was delivered by

WILLARD, A. J. The defendant, C. C. Bowen, and his associates, ask by petition a transfer of this case to the United States Circuit Court for the District of South Carolina. They allege that this is a civil action, involving the title and emoluments of the office of electors of South Carolina for President and Vice President of the United States, and that the pay and emoluments attached to such office by the laws of the State of South Carolina exceed in value $400, and, further, "that said matters in dispute therein arise under the Constitution and laws of the United States."

The authority claimed for removing the cause is that of the Act of Congress of March 3d, 1875.—Stat. 1874 and 1875, 18 Stat. 470. Its requirement is "that any suit of a civil nature, at law or in equity, now pending or hereafter brought in any State Court when the matter in dispute exceeds, exclusive of costs, the sum or value of $500, and arising under the Constitution and laws of the United States," may be removed into the Circuit Court of the United States for the proper District by any party actually interested either as plaintiff or defendant.

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*We will consider whether this is a case arising under the Constitution and laws of the United States.

This is an action in the nature of a writ of quo warranto, brought originally in this Court under the authority of Section 4, Article IV, of the Constitution of this State, which is as follows: "The Supreme Court shall have appellate jurisdiction only in cases of chancery, and shall constitute a Court for the correction of errors at law, under such regulations as the General Assembly may by law prescribe: Provided, The said Court shall always have power to issue writs of injunction, mandamus, quo warranto, habeas corpus, and such other original and remedial writs as may be necessary to give it a general supervisory control over all other Courts in this State."

Under Section 9, Article V, of the Constitution providing for a revision and codification of the laws and forms of procedure, it was enacted that "the writ of quo warranto and proceedings by information in the nature of quo warranto" be abolished, "and the remedies heretofore obtainable in these forms may be obtained by civil actions under the provisions of this Chapter."—Code of Procedure, Section 443. It was held by this Court, in Alexander v. McKenzie, (2 S. C., 81,) that the effect of this Act of the Legislature, read with the Constitution, was to do away with the formal characteristics of the writ of quo warranto, but that the substantial jurisdiction covered by that writ remained vested in this Court under the protection of the Constitution and could be exercised under the form of a civil action originally brought here.

The case in hand is of the character just described, namely, an action in the nature of quo warranto, in which the plaintiffs seek a judgment of ouster against the defendants for unlawfully intruding upon and holding

the office of electors of President and Vice President of the United States.

The matter in dispute relates to the title by which the respective parties claim the offices in question. Is it a case arising under the Constitution and laws of the United States?

It is proper to observe that, for the purpose of the present question, it must be assumed that the Court has jurisdiction to pronounce such a judgment as the principal case calls for, that is, a judgment of ouster. That question of jurisdiction is before us in a plea to the jurisdiction interposed by the defendants, but we have no occasion to anticipate a deci-

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sion on that question of jurisdiction *in order to dispose of the question of transfer to the United States Circuit Court. The theory of the present application is that the Circuit Court has concurrent jurisdiction with this Court to determine all questions that can properly arise in the progress of the cause. To destroy the jurisdiction of this Court at the present stage of the proceedings is to destroy the jurisdiction of the United States Circuit Court, which must receive the same interpretation as that of this Court, and thus to defeat the object intended by the petition for transfer.

It must be conceded at once that, in order to determine the questions raised by the defendants' plea to the Court, it will be necessary for us hereafter, should we conclude that it is our duty to proceed with the case notwithstanding the petition to transfer, to look into the Constitution of the United States, to see by what authority the State of South Carolina acts in the matter of choosing the Presidential electors, and in order to determine whether the authority to act in the matter is of a special and limited character, such as might only authorize a particular legislative or executive act, in relation to which the public officers performing such act should be regarded rather as the immediate agents of the United States Constitution and laws than as agents of the State government, or whether she possesses general authority to proceed in the performance of her duties under the Constitution of the United States, as a State, clothed with local sovereignty, and thus be authorized to exert all her functions, —legislative, executive and judicial,—in order to consummate the act of duty and authority cast upon her. It may be assumed that such an inquiry will be necessary in order to reach a conclusion as to the competency of the State judiciary to deal with the question at all. Would such a reference to the Constitution and laws of the United States be sufficient to constitute the case as one arising under the Constitution and laws of the United States? If this question is answered in the affirmative, then it is difficult to see what would become of the boundary line between the State and national jurisdictions. It would be only necessary for a party to a suit in the State Courts, in order to practically defeat their jurisdiction through a transfer to the United States Circuit Court, to raise an objection to jurisdiction, with or without foundation, based on some reading of the Constitution or laws of the United States; for the moment the State Judges undertook to open the Constitution or laws

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of the United States to see *whether there was any force in such objection, they would be told that the fact of the necessity for such an objection established the case as one arising under the Constitution and laws of the United States, and that it must go to the United States Circuit Court under the statute.

It is clear that such a construction has not been put upon the Constitution and laws conferring jurisdiction on the Courts of the United States, and that it has no foundation on which to rest. We know of no case resting on the authority of the Supreme Court of the United States holding any such doctrine as that it is enough to confer upon a case depending in a State Court the character of one arising under the Constitution and laws of the United States that a plea to the jurisdiction of the Court has been or may be interposed involving a construction of the Constitution or laws of the United States. It is not intended to say that limitations imposed by the Constitution and laws of the United States and affecting and controlling the character of the judgment which the Court is authorized to render may not have that effect in any case; but it is intended simply to affirm that where it is alleged that the State Court has no jurisdiction of the subject matter of the controversy, it is not enough to establish the case as one arising under the Constitution or laws of the United States to claim the want of jurisdiction on the ground of something contained in such Constitution or laws. We understand the Supreme Court of the United States to have said that, in order to ascertain the character of the case, they must look into the pleas as well as into the plaintiff's case; but we do not understand that a plea to the jurisdiction of the Court is one of those pleas that are regarded as exhibiting the character of the case in this respect.—Cohen v. Virginia, 6 Wheat., 379 [5 L. Ed. 257].

We must, therefore, conclude that the parties are bound to show, before they can take away our control over the case, that some provision of the Constitution or laws of the United States properly comes in question in determining the matters on which the respective claims of the parties to have been duly elected to the office in question depends.

We are satisfied that the petitioners ought to show more than this; but even this much cannot be shown, according to the view that we take of the case. There is nothing in the Constitution or laws of the United States

that can be of the least service in determining which of the parties to this suit were

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duly elected to the *office in question. The only feature of the general proceeding to appoint electors that Congress is authorized by the Constitution to control is the day on which they are appointed.—Article II. Authority to determine the mode of appointment is conferred by the Constitution (Article II, Section 1,) on the Legislatures of the States. No limitation or restriction as to the mode of appointment or certifying the fact of appointment is imposed upon the State Legislature. In accordance with this authority, this State has undertaken to provide for the election of the electors of President and Vice President by the electors of the State, and has for that purpose put in operation election machinery that embraces the action of certain officers deriving their appointment and authority solely from the Constitution and laws of the State. By the Constitution and laws of this State the ultimate right to determine the result of an election resides in the Courts, who, by an action in the nature of a quo warranto, may go to the very foundations of right involved, and inquire as to the truth behind all conclusions and determinations of executive bodies and officers in all cases where the nature of the office is such that the writ of quo warranto is a proper remedy.

It is not alleged that Congress has ever attempted to abridge the full exercise of State authority in this respect, and, therefore, we are not called upon to examine any question as to the authority of that body under the Constitution.

It is evident, therefore, that it cannot become necessary to construe any provision of the Constitution or laws of the United States in order to ascertain who were actually and legally elected to the offices of electors of President and Vice President.

If it were otherwise, it would not be enough to show that the Constitution or laws of the United States were incidentally drawn in question.—Carter's Con. Law, 130. In our view, it would be necessary to show that that which has been done, as the ground of the claims of the respective parties to be duly elected, was done under the direct authority of the Constitution or laws of the United States. On the contrary, the direct authority that stands as the sanction and test of such proceedings is that of the Constitution and laws of the State, while the utmost that can be claimed for the Constitution and laws of the United States is that they create the office in question, and thus affect the subject matter to which the controversy relates, without entering at all into the controversy itself.

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*It is clear that the fact that the matter or thing that the parties are seeking to possess themselves of by means of a judgment derives its existence or value from anything contained in the Constitution or laws of the United States has no effect to confer on the case the character of one arising under the Constitution or laws of the United States. If it were otherwise every suit that seeks the recovery of money would be of that character, for the very foundation of the character and legal value of money lies in the Constitution and laws of the United States, who can alone create it as such to make it a legal object of pursuit through the judgment of a Court.

The proposition just stated is supported by Nesmith v. Calvert, (1 Woodberry and Minot, 34 [Fed. Cas. No. 10,123].) There it was held that an action on a contract affecting the ownership of letters patent, issued for an invention, was not one arising under the Constitution or laws of the United States, notwithstanding the letters patent, the subject matter to which the controversy related, owed their existence as a subject of legal consideration to such Constitution and laws.

The fair conclusion is, that in order to constitute a case arising under the Constitution or laws of the United States, the right of action must, in its principal and essential features, rest upon such Constitution or laws, so that if they be withdrawn the case would be without support. If any question depending on the Constitution and such Constitution and laws incidentally arises, the proper mode of correcting any error committed is by review in the Supreme Court of the United States, if proper force is not allowed thereby to such Constitution or laws.

The petition should be dismissed.

WRIGHT, A. J., concurred.

MOSES, C. J., was not present at the final hearing on account of illness, but concurred in the judgment.

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*In re CORBIN.

(Columbia. Nov. Term, 1876.)

[*Contempt* ⇐58.]

Where, to a rule against an attorney of the Court to show cause why he should not be attached for contempt in counseling and advising his clients as to certain matters, deceiving the Court, and addressing it in a rude and discourteous manner, the return denied every material allegation of the suggestion, and no action was taken thereon: *Held*, that the return must be taken as true and the rule dismissed.

[Ed. Note.—Cited in State ex rel. Battle v. Cape Fear Lumber Co., 72 S. C. 327, 51 S. E. 873.

For other cases, see Contempt, Cent. Dig. § 172; Dec. Dig. ⇐58.]

This was a suggestion to the Supreme Court in the case of the State, ex relatione R. M. Sims and others, v. H. E. Hayne. It was filed December 2d, 1876, and is as follows:

And now come the relators into Court and give the Court to know and understand:

That David T. Corbin, an attorney and counselor at law of this Court, has been guilty of sundry contempts of this Court, to wit:

1. By aiding and abetting the respondents, his clients, to commit the contempts of this Court already passed upon by this Court, by his counsel and advice as attorney. This on the 22d of November, 1876, and on divers days thereto preceding.

2. By counseling and advising the respondents, his clients, to do and commit the acts and proceedings by them done on the 22d November, 1876, to wit: making the declaration and statement of election and adjourning sine die pending the proceedings of this Court, to which they were parties, and after being served with the rule to show cause, answering and appearing by counsel, and also after the order of the Court had been made touching the members of the General Assembly of the State of South Carolina.

3. By willfully concealing from the Court such action or proposed action of the said respondents and his connection therewith, and continuing to appear in this Court as counsel for the respondents after counseling the said respondents to a course inconsistent with his duty to this Court as an officer thereof, the effect of which must inevitably be to defeat the judgment of this Court and put a contempt thereon.

4. By aiding and abetting the said respondents, as the Board of State Canvassers, to evade and avoid or attempt to evade and avoid the jurisdiction of this Court.

5. By filing and supporting by argument the return of H. E. Hayne, Secretary of State, to the rule issued against him, wherein is set up the contempts of this Court practiced by the Board of State Canvassers, as a justifiable and lawful proceeding.

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*6. By delaying (by asking for time) the proceedings of this Court when he had reason to believe that the contempt of this Court was about to be perpetrated, with a view to gain time in which the said contempt could be done and completed.

7. By deceiving this Court by the statement "that, in his opinion, the Board had fully complied with the order of the Court in the mandamus case."

8. By deceiving the Court by the statement "that the Board of State Canvassers were then employed in obeying the mandate of this Court, and would require time in which to do so," when he then knew that the said Board had, under his advice, determined not to obey the mandate of the Court in this: that they did not propose to issue certificates to members elect to the General Assembly who had received the highest number of votes for their respective offices (according to the statement filed in this Court by the departments) from the Counties of Edgefield and Laurens.

9. By stating in open Court that if it was the purpose and desire of this Court to put the respondents in jail he would have nothing more to say—this in a rude and discourteous manner.

Upon the above suggestion a rule was issued requiring the defendant, D. T. Corbin, to show cause why he should not be attached and otherwise punished for contempt of the Court; and to that rule he made a return as follows:

Now comes D. T. Corbin, attorney and counselor of this Court, and for return to the rule to show cause why he should not be attached and otherwise punished for contempt of this Court, as set forth in the said suggestion, says:

1. That this is a criminal proceeding against him as an attorney and counselor of this Court, and the same can only be prosecuted in the name of the State by the Attorney General of the State. That James Conner, who signs this pretended suggestion on information, is not by law authorized to sign, file or prosecute the same, being merely a private citizen of the State of South Carolina.

2. That the information (section one) is not sufficiently definite and certain, in that it does not "fully, fairly, plainly, substantially and formally describe" the offense charged, as required by Section 13, Article I, of the Constitution, and this respondent cannot, therefore, be required to answer the

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same. Section one of the informa*tion charges a contempt committed "by aiding and abetting the respondents, his clients, to commit the contempts of this Court, already passed upon by this Court, by his counsel and advice as attorney; this on the 22d of November, 1876, and on divers days thereto preceding," and does not state who the "respondents," his clients, were "aided and abetted," what "contempts" they were "aided and abetted" in, nor what "counsel or advice" was given by the respondent.

The information should set out these particulars at least, viz.: Who were in contempt of this Court; what their contempt consisted of, and what advice was given said parties by the respondent which is alleged to have been given in contempt of this Court.

3. In section two of the information, contempt is charged against this respondent, committed by counseling and advising the respondents, his clients, to do and commit the acts and proceedings by them done and committed on the 22d of November, 1876, to wit: "Making the declaration and statement of

election and adjourning sine die pending the proceeding in this Court, to which they were parties, and after being served with the rule to show cause, answering and appearing by counsel, and also after the order of the Court had been made touching the members of the General Assembly of the State of South Carolina."

As to the matters here charged as a contempt, this respondent says: That the same is too indefinite and uncertain for him to make answer unto. That the clients alleged to have been advised are not named, nor is the specific advice alleged to have been given set out. That it is impossible to tell whether the offense, in the mind of the prosecutor, consists in the advising the making of the "declaration and statement of election" as it was made, or in advising the "making of the declaration and statement of election and adjourning sine die pending the proceedings in this Court, to which they were parties," and after the order had been made touching members of the General Assembly, and hence this respondent does not know whether he is to answer and defend himself for advising the "making" of such "declaration and statement of the election" as was made, or for advice in making such "declaration and statement" when it was made.

But if this were certain, that he is to defend himself against the making of such "declaration and statement of the election" as was made, then the information is silent as

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to what particular "declara*tion and statement of the election" is complained of, as the same is not set out, and neither is it in any manner referred to with certainty. The declaration of the election of November 7, 1876, comprehended a large number of officers and the election of a large number of persons to fill the same, and this respondent cannot answer for his advice in reference to any particular part of it unless the same is specifically set out and charged to be a contempt of the Court.

If by the information it is meant to charge this respondent with contempt for advising the making the declaration and statement of election and adjourning sine die, pending the proceedings in this Court, being served with a rule to show cause, and after the order made touching members of the General Assembly, then this respondent says (while he protests against the generality of the language and the want of certainty in it): That he did advise the Board of State Canvassers, or some one or more of them, that they had no power or authority to sit beyond the term of ten days to determine and declare the recent election of November 7, 1876, which ten days, exclusive of two Sundays, expired on Wednesday, November 22, 1876, but he did not know at what hour of said day they would or could complete their labors and adjourn. That the advice was general that they could not sit beyond that day upon said election, according to the statute. That such was his opinion then, and such it is now. That the opinion was not given for the purpose of evading this Court or its orders, or enabling the Board of State Canvassers to do so, but because it was the plain statute law in the matter, and this Court had made no order, if indeed it could so do, to prolong the life of the Board.

As to when this advice was given, the time named in the information is not correct.

The attention of the Court was called specifically, on November 16, 1876, to the opinion entertained by this respondent that the Board of State Canvassers were limited to a period of ten days within which to perform their functions as a Board, and the Court was asked to instruct the Board as to the effect of pending proceedings upon their action, and to make an order authorizing them to proceed to perform merely ministerial functions and an order to restrain them in the exercise of judicial functions, (if such was intended by the proceedings in Court,) but the Court declined to make any such order or give any advice.

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*The Court was specially informed that the purpose of the proposed order was, if possible, to prevent the Statute of Limitations named from running against the Board. The Court at that time did not intimate that this view of the statute was erroneous, and neither did James Conner, Esq., the prosecutor, then attorney for the opposing party, and present in Court. This respondent avers that this advice,—that the Board could sit "for a term not exceeding ten days."— was given to one or more members of the Board as early as November 15, seven days before the final and last day, November 22, when the term would expire, and with no expectation or thought that there was or would be any matter or thing done in the cause to interfere with such adjournment, as the advice necessarily implied.

This respondent specifically denies that he gave any such advice, or even had an opportunity to give any such, or to withdraw or change such advice, as before given, about the limitation of the term of the Board on November 22, 1876, "after the order of the Court had been made touching the members of the General Assembly of South Carolina."

This respondent and his associate were in Court on November 22, 1876, in the forenoon, when the Court read its opinion and directed a peremptory writ of mandamus against the Board to issue, and remained there waiting to inspect the order to be made, and while there, and just as the Court adjourned for the day, heard that the Board of State Canvassers had completed their labors and adjourned sine die.

This respondent admits that he expected the Board to adjourn some time that day or evening, but that they would adjourn before

that writ of mandamus ordered was served upon them he did not and could not know. It subsequently appeared that said Board completed their labors and adjourned that day at twelve o'clock and forty-eight minutes, and that they did so, as this respondent is informed and believes, without any knowledge, directly or indirectly, that this Court had ordered a peremptory writ of mandamus to be issued against them. It was not served upon any of them till late in the night of that day, and on some of them the next day, as the return of the Sheriff shows.

4. As the contempt charged in the third section of the information in "willfully concealing from the Court such action or proposed action of the said respondents (Board

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of State Canvassers) *and his connection therewith, and continuing to appear in Court as counsel after counseling the said respondents (Board of State Canvassers) to adjourn," etc., "the effect of which must be to defeat the judgment of this Court and put contempt thereon," this respondent says that he did not conceal from this Court any advice given any of the Board in reference to the term of their existence, but called the attention of the Court and counsel on the other side, six days before the adjournment, to this opinion of his and to the statute.

That he denies absolutely any concealment in the matter. The Court and counsel on the other side knew, if they remembered the fact, plainly stated in open Court, that the Board were advised that they "had power to adjourn from day to day for a term not exceeding ten days," and that the sittings of the Board commenced on the 10th of November, and must, therefore, end in ten days thereafter, as there was no longer power "to adjourn from day to day." That this respondent appeared in Court representing the Board up to the 22d day of November, 1871, the very last day they could, by the most liberal construction of excluding two Sundays, sit and perform their duties. This respondent submits that it was the duty of the relators' counsel to have taken notice of the running of the statute, and, if possible and desirable, to have provided against it; that it was not the advice of this respondent that induced the adjournment of the Board on November 22d, 1876, but the terms of the statute which compelled it; that if the judgment of this Court was defeated by said adjournment, then it was the relators' fault not to have brought their case to judgment before the time by law ran out when it could have been of any value to them. This respondent denies any concealment or purpose to mislead the Court in the matter, or any intention to treat the Court with contempt, or any contempt of the Court in fact.

5. The offense charged in the fourth section of the information is answered by reference to the two preceding paragraphs of this answer.

6. As to the alleged contempt set up in section five of the information by filing and supporting by argument the return of H. E. Hayne, Secretary of State, to the rule issued against him, wherein he sets up the contempt of this Court practiced by the Board of State Canvassers as "a justifiable and lawful proceeding," this respondent says that by reference to said answer it will appear that the

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ad*journment sine die of said Board is set up as a mere matter of fact and as a bar to further proceedings; that nothing is said in the answer about said adjournment being other than a necessity pursuant to law, which the Court had no power to avert; that no contempt was committed or intended by setting said fact out.

7. As to the matter charged as a contempt in paragraph six of the information, this respondent says he denies the fact alleged, and says that he did not ask for time for the purpose of delaying the proceedings of the Court; that he did not ask for time at all as a matter of fact; that the case was that a new suggestion for mandamus against the Board of Canvassers was filed and an order to show cause was about to be taken when the Court called the attention of this respondent to the fact and asked what time to answer would be necessary. This respondent did not, and neither did the Board of Canvassers, have any knowledge of this new suggestion till this presentation in Court. This respondent answered merely as a friend of the Court and not as attorney for the Board in the matter as to what would be reasonable time to answer. The Board then knew nothing of the matter. It was the last day on which the Board could sit by law, and the counsel for the relators were supposed to know it. If they did not, it was their misfortune and not the fault of this respondent. The Board was entitled to two days' notice to answer according to law and the custom and practice of this Court, and only that time was given.

9. As to the alleged contempt set out in the eighth paragraph of the information, "by deceiving the Court by the statement that in his opinion the Board had fully complied with the order of the Court in the mandamus case," this respondent says that he denies that he deceived the Court in the matter referred to at all. That he stated then, and states now, that in his judgment the Board of State Canvassers had anticipated in fact the peremptory mandamus and done all they could be required to do under the mandamus; that what they could do by order of the Court they could do without such order. That one of the Justices inquired specifically as to what the Board had done, and what their answer to the charge

of contempt would be, and this respondent refused to answer orally, or answer further at all, unless time was given to prepare carefully the answer of the Board. The Court thereupon disregarded the application for further time to answer the rule to show

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cause upon *the Board why they should not be attached and punished for contempt without answer from them.

This respondent denies any purpose to deceive the Court, as the Court utterly disregarded his expressed "opinion," and proceeded as if no such opinion had been expressed. This was on November 24, 1876, two days after the Board of State Canvassers had adjourned sine die.

10. As to the alleged contempt set out in section eight of the information, this respondent denies that the matter and things alleged are true in the manner and form stated. That he denies every allegation of the section, except as hereinafter admitted. Protesting that he should not and could not be required to answer so indefinitely stated matter, yet, to avoid delay, this respondent says that he did not deceive the Court, and he did not make the statement "that the Board of State Canvassers were then employed in obeying the mandate of the Court and would require time to do so." This respondent supposes and believes that this allegation is founded on the remark made in Court upon the question of reasonable time to answer the new petition for mandamus against the Board of State Canvassers, filed November 22d, 1876, just after the Court delivered its opinion that morning awarding a peremptory mandamus as to a particular declaration of the election to the General Assembly by the Board of State Canvassers.

Upon the question of what would be reasonable time to answer, this respondent said casually that the Court had just imposed, by the opinion pronounced and order made thereon, considerable labor upon the Board of State Canvassers, and that fact should be taken into account in requiring them to make speedy answer in other and new matters.

The peremptory mandamus had not then been issued or served, and there was no order or mandate of the Court upon the Board of State Canvassers which they could be employed then in obeying. The allegation is a pure fabrication as thus shown, as is also the further statement that "he (this respondent) then knew that said Board had, under his (this respondent's) advice, determined not to obey the mandate of the Court, in this: that they did not propose to issue certificates to members elect to the General Assembly who had received the highest number of votes for their respective offices from the Counties of Edgefield and Laurens."

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*No such advice had been given by this respondent, and, by reference again to the facts within the knowledge of the Court, it will be seen no such advice could have been given. The Court had just pronounced its opinion and announced that an order for a peremptory mandamus would be signed. This respondent was in Court and had not seen the Board of State Canvassers to communicate the opinion and order of this Court just delivered and made, and hence could not have advised them "not to obey the mandate of this Court;" and this respondent says further, on information and belief, that when the Board of State Canvassers "refused to issue certificates" to members claiming to have been elected from Edgefield and Laurens, they did not in fact know that this Court had delivered any opinion or made any order in reference thereto; that they only learned that fact after they had adjourned sine die in the afternoon or evening of November 22d, 1876. They had no advice to disregard the mandate of this Court from this respondent on November 22d, 1876, and were totally ignorant of any mandate of this Court when they determined, as a Board of State Canvassers, the result of the election in the Counties of Edgefield and Laurens.

11. As to the alleged contempt in section nine of the information in "stating in open Court that if it was the purpose and desire of this Court to put the respondents in jail he would have nothing more to say;" "this in a rude and discourteous manner;"—this respondent says that he admits that he did make a remark substantially as charged, but he denies that he did it in a rude and discourteous manner or that he intended to be discourteous to the Court in making the remark.

The circumstances under which the remark was made were that this respondent had read an affidavit, made by all the members of the Board of State Canvassers, stating substantially that they had had but two hours in which to show cause why they should not be attached and punished for contempt of the mandate of this Court, and that they had no counsel who was able, from his other engagements, to prepare their answer, and, further, that they had not been served with a copy of the charges against them constituting the contempt; that they could make, they believed, a complete defense to the charges if time were given them, &c. The affidavit on file is referred to for greater particularity. On this affidavit further time to answer was prayed, and, upon this motion, a very warm discussion took place between counsel and a colloquy between

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*Justices of the Court and this respondent. This respondent believed then, and believes now, if time had been given, a perfect defense could have been made by them (the Board of State Canvassers) to the charge of contempt, and, therefore, urged with much

warmth the motion for further time to answer. The motion was discussed severally by the Justices, while the respondent was on his feet and in the midst of his argument, and refused, or a refusal intimated, and, in the heat of the debate, he made, finally, the remark, or something like it, charged. But this respondent denies that he intended any disrespect to the Court, and says, further, that in any less heated debate he could not have made the remark at all, and that he now regrets it.

And this respondent says, finally, that he has not intended by any act done, advice given or word uttered in the conduct of this cause to treat with disrespect the orders or mandates of this Court, or to offer any indignity to the Court itself, or to defeat and render futile proceedings before it.

All of which is respectfully submitted.

Conner, attorney for relators.
Corbin, contra.

January 23, 1877. The opinion of the Court was delivered by

WRIGHT, A. J. Every material allegation in the "suggestion upon the record" in the above entitled case against David T. Corbin, an attorney and counselor at law of this Court, has been specially denied by his answer to the rule to show cause why he should not be attached and otherwise punished for contempt of this Court; and there being no action taken on such return by the counsel for the relators, the answer must be taken as true and the rule dismissed.

WILLARD, A. J., concurred.

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8 S. C. *400

*STATE ex rel. BARKER v. BOWEN.

(Columbia. Nov. Term, 1876.)

[*Quo Warranto* ⇐⇒10, 27.]

An action in the nature of quo warranto does not lie in the name of the State to determine the title to the office of elector of President and Vice President of the United States; and the objection can be made by the defendants under a plea to the jurisdiction of the State Court in which the action is brought.

[Ed. Note.—Cited in State v. Stickey, 80 S. C. 69, 61 S. E. 211, 128 Am. St. Rep. 855.

For other cases, see Quo Warranto, Cent. Dig. §§ 11, 29; Dec. Dig. ⇐⇒10, 27.]

[*Officers* ⇐⇒83.]

An action to determine the title to an office can only be maintained by or in the name of the sovereign with whom the franchises and privileges of the office originated.

[Ed. Note.—For other cases, see Officers, Cent. Dig. §§ 115–123; Dec. Dig. ⇐⇒83.]

[*United States* ⇐⇒25.]

The franchises and privileges of the office of elector of President and Vice President originate and are exercised under the Constitution and laws of the United States and not under those of the State, though the power to appoint to the office is with the State.

[Ed. Note.—For other cases, see United States, Cent. Dig. § 16; Dec. Dig. ⇐⇒25.]

[*Removal of Causes* ⇐⇒86.]

[Cited in State v. Smalls, 11 S. C. 284, to the point that, in order to remove a cause from a state court to the United States Circuit Court, sufficient cause therefor must appear in the petition.]

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 132, 166–179; Dec. Dig. ⇐⇒86.]

The action in this case was brought originally in the Supreme Court. It was entitled "The State, ex relatione Theodore G. Barker, Samuel McGowan, J. I. Ingram, Robert Aldrich, John W. Harrington, William Wallace and John B. Erwin, v. C. C. Bowen, Timothy Hurley, John Winsmith, Thomas B. Johnston, William B. Nash, Wilson Cooke and William F. Myers," and was in the nature of quo warranto, and its object was to obtain the judgment of the Court upon the question whether the relators or the defendants had been elected electors of President and Vice President of the United States at the election held in the State on the 7th day of November, 1876. The relators were the candidates for electors nominated by the party which supported Samuel J. Tilden for the office of President of the United States, and the defendants were the candidates nominated by the party which supported Rutherford B. Hayes for the same office. The complaint alleged that the relators had received a majority of the votes cast at the election, and that the Board of State Canvassers had falsely and fraudulently determined and certified the defendants as the persons elected; that the certificate of election had been given to them, and that they claimed the right to exercise the functions of the office of electors of President and Vice President.

James Conner, with whom was John B. Gordon, for relators.

January 26, 1877. The opinion of the Court was delivered by

WILLARD, A. J. This is an action in the nature of quo warranto brought by the plaintiffs claiming to have been elected to perform the functions of electors of President and Vice President of the United States for the

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State of South Carolina, at a general *election held in and for this State on the 7th day of November, A. D. 1876, and complaining that the defendants, claiming to have been elected at such general election of President and Vice President, have procured certificates of such election to be issued to them by the Secretary of State of this State and claim to exercise the offices of such electors, whereas, as they allege, said defendants were not so elected. The prayer of the complaint is that the defendants may make answer to the State and show what warrant or authority they have to use and enjoy the offices, liberties, privileges and franchises aforesaid. The defendants have answered, pleading to the ju-

risdiction of the Court, without setting up any other defense.

If, then, this Court should conclude that it possessed full jurisdiction in the premises, judgment final in behalf of the plaintiffs would necessarily follow from the state of the pleadings.

This Court possesses, under Section 4, Article IV, of the Constitution of this State, jurisdiction in case of quo warranto, and, since the adoption of the Code of Procedure, (Section 443,) that jurisdiction has been exercised in the form of an action in the nature of quo warranto.—Alexander v. McKenzie, 2 S. C., 81; State, ex rel. Barker, v. Bowen, (ante, p. 382.) If any want of jurisdiction exists, it must arise either from the nature of the rights alleged to be wrongfully exercised by the defendants or from the character of the parties that stand before us as plaintiffs.

The question before us was discussed by the counsel for the defendants chiefly from the general proposition that national questions belong to the national Courts and State questions to the State Courts. On this general theory it was urged that, as the controversy related to the title of the respective parties to an office created under the Constitution and laws of the United States, the case was one necessarily of cognizance in the United States Courts and improper for the consideration of a State tribunal.

I know of no such test as to the relative jurisdiction of the Courts of the United States and of the States as that contended for.

As a general rule, the State Courts have concurrent jurisdiction with the United States Courts of questions arising under the Constitution and laws of the United States.

This concurrent jurisdiction is the basis of transfer, in certain specified cases, from the Courts of the States to those of the United States.—Act of Congress, March 3, 1874–75, 18 Stat. 470 [U. S. Comp. St. 1913, § 1010]. Certain cases of this general class, among

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which the most characteristic are *those affecting international commerce and diplomatic intercourse in a particular way, and certain cases immediately affecting the national revenues and administration, are exclusively conferred upon the Courts of the United States; but these must be regarded as exceptions to the more general rule of concurrent jurisdiction.

The jurisdiction of the United States Courts, arising from the character of the parties, rests on special grounds not affecting the general proposition.

Such a scheme of divided jurisdiction resting upon dual Courts as would result from the application of the rule contended for would have deprived the judicial system of the country of organic stability and committed it to the consequences flowing from the attrition between inharmonious parts. As long as we have judicial unity no serious inconvenience is likely to arise from the fact that our laws spring from two distinct sources—the one supreme as to certain subjects, and the other final as to all other subjects not prohibited by it. Both legislative jurisdictions blend in giving shape to the rights of citizens. These rights, from their nature, must be cognizable as to their entirety by a judicial body. Two judicial administrations, acting independently upon the same rights or subject matter, each limited to tracing the operation of laws derived from a particular source upon such rights or matter in controversy, would present an anomaly consistent with neither sound theory nor experience. The Constitution and legislation of the United States has, on the whole, embodied the highest practical wisdom in solidifying the national and State judicial systems, by making every Court in the land subject to all consequences flowing from a dual legislative system. Congress has effectuated this purpose by drawing the line that divides their jurisdiction, when not influenced by the character of the parties, upon the nature of the rights capable of being brought into controversy, and not upon any theory of committing the interpretation of the national Constitution and laws to one body, and that of State Constitutions and laws to another.

It follows that, should it appear that both the rights in controversy and those to which the controversy relates arose or derived their essential features from the Constitution and laws of the United States, that fact would not of itself defeat the jurisdiction of the Court otherwise than by means of transfer to the concurrent authority of the United States Circuit Court, where the questions to

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*be considered arose under the Constitution and laws of the United States; but it would be necessary, in order to attain that end, to show that the case belongs to a category either conferred exclusively on the United States Courts or prohibited to the State Courts.

The real point of difficulty in the present case was not noticed by the counsel for the defendants. It arises out of the general rule governing the writ of quo warranto, and therefore applicable to formal proceedings serving as a substitute for that remedy. The present action is brought in the name of the State of South Carolina. Can it be maintained in the name of the State? And if not, does not that circumstance prevent judgment? If so, a further question will arise whether that defect can become available to the defendants under their present plea to the jurisdiction, notwithstanding that the objection was not taken by them in form.

The familiar rule governing proceedings by quo warranto is that only the sovereign from whom the office, franchise or liberty—that is,

the subject of controversy—originated, and into whose hands the same, if forfeited, would return, can maintain the remedy or authorize it by the allowance of his name as a means of asserting the title or right of a citizen to the same.

It is necessary, then, to inquire whether the United States or the State stand in the relation just expressed to the rights in controversy in the present case.

The question then arises, Did the authority claimed to be exercised by the defendants as electors of President and Vice President originate in the Constitution and laws of the United States or in those of the State? Whatever difficulties this queston presents arise from the fact that, while the functions exercised by the electors of President and Vice President were created and governed by the Constitution and laws of the United States, the right of respective parties to possess and exercise those functions depends wholly on the effect to be given to the action of State officers acting under the Constitution and laws of the State.

The nature of the functions of the electors of President and Vice President must be examined in order to discover the relationship of those functions to the national and State authorities.

The electoral function certainly involves a franchise or privilege, for the electors are permitted to exercise choice, as it regards the selection of a President and Vice President,—that is, not enjoyed in common with other citizens, and does not arise out of common

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*right. It is conferred by the sovereign authority, and exclusively enjoyed by those upon whom it is conferred.

This franchise or privilege is one of a public nature, as immediately concerning the public. It will not be necessary to inquire whether each elector is to be regarded as holding an office under the United States, for it is enough for the purpose of the present question to know that the functions of the electors involve the characteristics just stated.

The Constitution and laws of the United States look rather to the body of electors within each State as the subjects of legal control and the sources of legal authority than to the rights and duties of the individual electors. The Constitution (Article II, Section 1,) declares that "each State shall appoint, in such manner as the Legislature thereof shall direct, a number of electors equal to the whole number of Senators and Representatives to which the State may be entitled to in Congress." The twelfth amendment provides that the electors shall meet in their respective States and vote by ballot for President and Vice President, one of whom at least shall not be an inhabitant of the same State with themselves; they shall name in their ballots the persons voted for as President, and in distinct ballots the persons voted for as Vice President, and they shall make distinct lists of all persons voted for as President and Vice President, and of the number of votes for each, which lists they shall sign and certify and transmit sealed to the seat of government of the United States, directed to the President of the Senate.

The action of the electors contemplated in these provisions is such as is proper to an aggregate body of a particular constitution, and not to individuals exercising separate and independent functions. Following this idea, Congress has described this body as a "College of Electors," (Rev. Stat., § 133, p. 21 [U. S. Comp. St. 1913, § 201],) and as such has regulated the action of such body in many particulars. It is true that each elector acting with the body in conformity to law influences, separately, the general count at the seat of government, independently of whether the majority of votes cast by the body with which he is immediately connected are in accordance with his individual vote. Still, his right to vote depends upon his acting with and as part of the Electoral College; for if he neglects so to do a vacancy occurs, capable of being filled under the authority of the Legislature of the State.—Rev. Stat. U. S., p. 21, § 133. That this was the idea that Congress entertained of the elec-

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toral function is *very clearly implied in the case of an elector classed with that of a Representative in Congress and member of a State Legislature under the provisions of Section 211 of the Revised Statutes of the United States [U. S. Comp. St. 1913, § 3933], where a right of action is conferred upon all persons who have been deprived of any office other than those above named by reason of a denial of the civil rights of any citizen.

The only explanation of this classification that appears is that all the persons excepted stand in the relation of members of a body recognized by law and through which alone their functions are capable of being exercised.

It may, therefore, be affirmed that the right in controversy is accurately stated as one to participate in the action of a public body, clothed as such with a certain franchise or privilege of a public nature, to wit, of exercising choice in the selection of a President and Vice President of the United States.

It is indisputable that the rights so claimed to be exercised by participating in this electoral action of the Electoral College has its origin and sanction in the Constitution and laws of the United States.

The view just presented assumes that the collective body of electors, called the College of Electors, is, as distinguished from the individual electors, clothed with the elective franchise conferred by the Constitution and laws of the United States in relation to the

choice of a President and Vice President. This view would exclude the idea that the true effect of the Constitution of the United States was to confer that franchise on the States as such, to be exercised according to their discretion.

The difference between the two theories of the disposition of the elective franchise, just noticed, would lead to opposite conclusions bearing directly on this case.

If the Constitution of the United States vests the franchise wholly in the State, so that the discretion involved in the selection of persons to fill the offices of President and Vice President might be exercised by the State acting through her ordinary political agencies, then the State would have to be regarded as the true elector, having as many voters as the number of electors she is entitled to appoint, and it would be competent for her to appoint electors, whose only legal duty would be to express, in form, the choice already fully determined by the authority of the State. In this case the electors of President and Vice President would fall in the condition of mere agents of the States to

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carry out matters *resting wholly in its discretion. In this case, no reason appears why such agents might not be displaced at will by the State either through political or judicial agencies. If, on the other hand, the Electoral College is the true depository of the elective functions, then the discretion to be used in the selection of persons to fill the offices of President and Vice President rests with persons composing legally such Electoral College.

In this case the State has mere authority to appoint, and, at most, may confer the title to hold the franchise but not control its exercise.

I regard the latter view as the one entitled to be received. The idea that is embodied throughout the legislation by Congress is consistent with itself from the earliest to the latest Acts, and is entitled to the authority of a contemporaneous exposition of the Constitution in its original provision in Article II. This idea is fairly embodied in the twelfth amendment and must prevail. According to this idea, the College of Electors is the proper depository of the electoral function. Only those who participate in its action are entitled to a voice in the election of President and Vice President. The rule of its procedure is placed beyond the control of the State and emanates from the Constitution and Congress of the United States.

The right of each elector assembled to exercise his individual choice is clearly indicated by the words "vote by ballot." Such is the ordinary sense of these terms when applied to the more numerous class of electors who participate in the general elections, and no reason appears for giving them any other interpretation in the present connection. These reasons appear to be sufficient to support the conclusions stated, while that conclusion is consistent with the actual practice since the Constitution went into operation.

Does the fact that the title of the individual electors to claim this right is matured under the provisions of the Constitution and laws of the State alone, through the acts of public authority, performed by the State officers and agencies, tend to place the State in such a relation to the functions performed that the State may exercise the rights proper to the sovereign who created such functions? Clearly it does not.

The sovereign who creates an office or franchise often places in the hands of a subject the right to fill such office or confer such franchise by election or appointment, yet that

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fact has never obvi*ated the necessity of proceeding in the name of the sovereign who created and may resume such office or franchise where the title of a subject to it was to be asserted.

When the question arises between the supreme sovereignty and a subordinate sovereign it should receive the same solution.

In the present case the United States has created the function, but authorized the State to exercise the power of appointment to fill it.

The case of a municipal corporation, created by the sovereign, who has conferred upon the corporators the power of choosing municipal officers, involves the same general relationship. In the latter case the ouster must take place in the name of the sovereign.

The act of appointment is one that can be exercised in the hands of a subject, while the act of ouster, through the Courts of law, can only be claimed of common right through the sovereign. The existence, therefore, of the former right cannot imply the existence of the latter, for its nature and quality are different.

In Wallace v. Anderson, (5 Wheat., 291 [5 L. Ed. 91],) it was held that a writ of quo warranto could not be maintained against an officer of the United States except in the name of the government of the United States. The same was held in Nebraska v. Lockwood, 3 Wall., 236 [18 L. Ed. 47].

It is very clear that, if the action in the nature of quo warranto is an appropriate remedy under the claims made in behalf of the individuals who unite with the State as plaintiffs, that such proceedings should be presented in the name of the United States. It will not be necessary to determine whether an action in the nature of quo warranto can be maintained in the State Courts in the name of the United States, although no good reason has yet appeared why, if the United States choose to employ the Courts of the State for such a purpose, they might not do so. It will be the proper time to discuss and settle that question when an attempt is made to exercise it.

The State cannot properly raise it, nor can

private relators raise it in the name of the State. The objection raised by the defendants to the jurisdiction of the Court involves the question just stated.

To meet this objection directly, it would be necessary to decide that which, in my view, cannot be properly decided until the proper parties are before the Court.

As, however, the Court is enabled to perceive a real objection to its proceeding with the case arising from the want of proper par-

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ties, *it is not restricted to the grounds of want of jurisdiction urged by the defendants, and may give weight to the considerations that present an insuperable objection to our exercising such jurisdiction in the present case should we conclude that we possess it as a general proposition.—McClung v. Silliman, 6 Wheat., 598 [5 L. Ed. 340].

The complaint should be dismissed.

WRIGHT, A. J., concurred.

MOSES, C. J., concurred in the result.

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8 S. C. 408

Ex parte NORRIS.

(Columbia. Nov. Term, 1876.)

[*Officers* ⇨41.]

To constitute an officer de facto, he must have a presumptive or an apparent right to exercise the office, resulting from either full and peaceable possession of the powers thereof, or reasonable color of title, with actual use of the office.

[Ed. Note.—Cited in State v. Messervy, 86 S. C. 508, 68 S. E. 768.

For other cases, see Officers, Cent. Dig. § 63; Dec. Dig. ⇨41.]

[*States* ⇨41.]

Where two persons are each in possession of the office of Governor and claiming by an apparent title, and the question as to which is entitled to discharge the functions of the office arises in a collateral proceeding, it must be decided by determining which has the best apparent right.

[Ed. Note.—For other cases, see States, Cent. Dig. § 47; Dec. Dig. ⇨41.]

[*States* ⇨41.]

Under the provision of the Constitution declaring "that the person having the highest number of votes shall be Governor," the candidate who, according to the returns of the Managers of Election, has received the highest number of votes is entitled, where there is no contest, to the possession of the office, and if he takes possession of it without going through the regular form of installation he is at least de facto Governor.

[Ed. Note.—For other cases, see States, Cent. Dig. § 47; Dec. Dig. ⇨41.]

[States ⇨41.]

An incumbent of the office of Governor, who, being a candidate for re-election, is defeated, but who, nevertheless, claims the office, gets himself inaugurated as if he had been elected, and takes possession in part of the office, is not entitled to be recognized as Governor holding over nor as Governor de facto against the person who received the highest number of votes and who also has entered upon the discharge of the duties of the office.

[Ed. Note.—Cited in Ex parte Smith, 8 S. C. 514.

For other cases, see States, Cent. Dig. § 47; Dec. Dig. ⇨41.]

[*Pardon* ⇨4.]

[A pardon granted by one who is de facto Governor is valid, irrespective of his not having a perfect title or evidence of title to the office.]

[Ed. Note.—For other cases, see Pardon, Cent. Dig. § 4; Dec. Dig. ⇨4.]

This was a petition to the Supreme Court entitled "Ex parte Tilda Stephens, alias Tilda Norris," for a writ of habeas corpus.

The case was referred to a Referee to take testimony and report the same to the Court.

On February 15, 1877, he submitted his report, wherein he referred to as the documentary evidence taken by him four (4) exhibits, the first being the Journal of the House of Representatives presided over by W. H. Wallace as Speaker; the second the Journal of the Senate; the third a copy of the oath of office taken by Wade Hampton as Governor

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of the State of South Carolina; *and fourth the Journal of the House of Representatives presided over by E. W. M. Mackey as Speaker.

The oath of office of Wade Hampton as Governor referred to in the report was in the form prescribed by the Constitution, bore date December 14, 1876, and was subscribed before T. J. Mackey, Circuit Judge, and J. Q. Marshall, Trial Justice.

The Referee also submitted the following as the testimony taken by him:

Mr. John T. Sloan, Sr., a witness in behalf of the petitioner, being sworn, in response to interrogations by Mr. LeConte, says:

I am the Clerk of the House of Representatives of the State of South Carolina; I was elected to that position on the 28th of November, 1876. I make, and have the custody of, the Journals of the House of Representatives; they are made in manuscript and then printed, and, in such printed form, are kept as the records of the House. The printed paper introduced in evidence, and marked Exhibit "A," is the Journal of the House of Representatives for the session commencing on the 28th November, 1876, and ending on the 22d of December, 1876.

The notice and invitation addressed to the Senate of South Carolina, signed by W. H. Wallace, Speaker of the House of Representatives, and set forth on page 3 of the first exhibit of the proceedings of the House of December 13th, 1876, was delivered to me by the Speaker, with the request that I would deliver it to the Senate. I, about 12 o'clock of the 13th of December, proceeded to the State House, and, presenting a card of admission to the Senate, signed by R. H. Gleaves, President of the Senate, demanded admission and was refused. I first went to the East door, and was there told by the constabulary to go

to the front door. I then proceeded to this door, where I presented this card, and was there met by a Constable barring ingress. Behind the Constable there were United States soldiers with fixed bayonets. I was here refused admission. Immediately after this Colonel James A. Hoyt, who accompanied me, and who gave me this card, presented a similar card and was admitted. After his admission, I handed him the notice and invitation, hereinbefore referred to, with the request that he should deliver the same to T. B. Jeter, the Senator from Union.

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*In conversation with Mr. Josephus Woodruff, Clerk of the Senate, afterwards, he informed me that the notice and invitation had been received by the Senate and would appear upon the Journal of the Senate, and directed a copy of the printed Journal to be given to me by Mr. Shrewsbury, the Superintendent of the Republican Printing Company. I received the printed copy, which is now produced in evidence and marked Exhibit "B." I called Mr. Woodruff's attention to the fact that the reception of the notice and invitation by the Senate did not appear upon the printed Journal. He said that he had been mistaken about its appearing upon the Journal, but that it had been received; that Senator Jeter had handed it to him, and that he had delivered it to the presiding officer. When the election returns were opened and published, as appears upon pages 3, 4 and 5 of the Journal for December 14th, in addition to the tabular statement and certificate of the Secretary of State, referred to in the Journal, there were before the House certified copies of the original returns of the County Boards of Canvassers, made by the Clerks of the Court of the several Counties, except as to the Counties of Darlington and Kershaw; and, as to these Counties, the votes, as given in the tabular statement, sworn to by Mr. Scoffin as having been taken from the returns in the possession of the Board of State Canvassers.

On the 14th of December, when the returns were opened and published by the Speaker, there were some of the members of the Senate present; I do not know how many. There were also some present when the oath of office was administered to Governor Hampton.

Cross-examined by Mr. Cavender:

I mean to say that I am the Clerk of what is known as the Wallace House.

First exhibit is a correct copy of my manuscript Journal of the House. The Journal of the House, from the 13th of December until the adjournment, was printed daily; from the 28th of November to the 12th of December, inclusive, the Journals were printed during the sitting of the House and after the adjournment. After the Journal was printed it was distributed to the members.

When I applied for admission to the State House, I told the Constable who stopped me at the door that my business was to deliver to the Senate a message, and presented the card of admission. When I returned to the House, I reported these facts to the Speaker.

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*The Speaker did not report them to the House. When I called Mr. Woodruff's attention to the fact that the notice and invitation did not appear upon the Journal of the Senate, he replied that he had been mistaken; he had confounded it with another message which had been formerly received, but that the communication was received.

When the members of the Senate who were present at the opening and publication of the votes for Governor came into the House of Representatives, they did not come in as a body, and were not announced as the Senate; they came in individually. The same applies to their attendance at the inauguration of Governor Hampton.

In reply by Mr. LeConte:

The Journal was printed by authority of the House, as appears in the Journal itself.

When I went to the State House with the notice and invitation, I did not mention my official character.

Hon. Henry A. Meetze, a witness in behalf of the petitioner, being sworn, in response to interrogatories by Mr. LeConte, says:

I am a member of the Senate of the State of South Carolina from Lexington County. Was present in the Senate on the 13th day of December, 1876. Major Jeter, who is also a Senator, called me into consultation as to what course he should pursue in delivering an invitation from W. H. Wallace, Speaker of the House of Representatives, to the Senate to be present on the next day, the 14th, in the House of Representatives, to hear the count of the votes for Governor and Lieutenant Governor of the State. I advised that the paper take the regular course, which was by delivery to the clerk. I saw him deliver it to the Clerk, and the Clerk hand it to the President of the Senate.

My reason for the advice was the difficulty I had had on a former occasion in getting before the Senate a message from Mr. Wallace, as appears by the Journal of the Senate.

I do not know what became of the communication; it was never presented to the Senate. I mean the President did not lay it before the Senate.

Cross-examined by Mr. Cavender:

I do not recollect whether the invitation was in an envelope or not. If it was, I cannot now say whether it was sealed or not. If sealed, it was after I saw and read it.

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*I am not sure whether the Senate was in session at the time of the delivery of the message to the Clerk or not.

My recollection is that the Senate was in session at the time the Clerk handed it to the President. By President I mean R. H.

Gleaves. My impression is that the Senate was in session when the communication was handed to the Clerk.

Hon. Thomas B. Jeter, a witness in behalf of the petitioner, being sworn, in response to interrogatories by Mr. LeConte, says:

I am a member of the Senate of South Carolina from the County of Union. I was present in the Senate on the 13th day of December last. Mr. Hoyt, of Anderson, came into the Senate chamber and handed me a communication signed by W. H. Wallace, Speaker of the House of Representatives, addressed to the Senate, inviting the Senate to be present on a day named for counting the votes for Governor and Lieutenant Governor. The purport of said communication is the same as that found in the Journal of the House of Representatives, on page 3, of the 13th of December. I do not remember whether or not the language is identical. This was during the session of the Senate on that day—some time between the hours of eleven and two o'clock. I do not remember the initials of Mr. Hoyt's name; he was connected with the newspaper at Anderson, and he was a member of the Democratic Executive Committee. I consulted with Major Meetze, one of the Senators, what should be done with the communication, and we decided that it should take the regular course. I either sent it or handed it to the Clerk of the Senate. I do not know what became of the notice afterwards.

Cross-examined by Mr. Cavender:

There was a day named in the notice, but I do not remember the day. When I said we decided that the communication should take the regular course, I meant that it should take the course we gave it instead of my bringing it to the attention of the Senate upon my own motion. The usual course of presenting communications from the House inviting the Senate to participate with the House in the performance of any duty is not by announcement at the bar of the Senate.

Reply by Mr. LeConte:

I think Major Meetze had, on some former occasion, some difficulty in bringing to the

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attention of the Senate a communica*tion from the House of Representatives. He attempted to present it himself, and was ruled out of order.

Mr. LeConte now produced the oath of office of Governor Hampton and proved the signatures, a copy of which is hereto attached. Copy filed by consent.

Also the record in the case of the State, ex relatione W. H. Wallace as Speaker of the House of Representatives, against H. E. Hayne as Secretary of State and E. W. M. Mackey—proceeding for mandamus in the Supreme Court.

Mr. Josephus Woodruff, a witness in behalf of the State, being sworn, in response to interrogatories by Mr. Cavender, says:

I am the Clerk of the Senate of South Carolina; have been such ever since 1868. I was present in the Senate chamber, acting as such, on the 13th day of last December. I have no positive recollection of the date or the purport of the communication, but do remember Senator Jeter handing me a communication directed to the President and members of the Senate; whether on that day or not I cannot say. I handed it to the presiding officer of the Senate; I do not remember whether it happened to be, at that time, Mr. Gleaves or Mr. Swails. I do not know what the presiding officer did with that paper. So far as my recollection goes, it was not submitted to the Senate; if it had been, it would have been entered upon the Journal, and would now appear there. No communication is put upon the Journal without being first laid before the Senate.

I will add, after hearing the testimony of Colonel Sloan, that the paper I referred to in my conversation with him was a paper read by Senator Meetze, relative to the organization of the House of Representatives, at the Carolina Hall, on Wednesday, November 29, 1876, and appears in the printed Journal of the Senate, pages 16 and 17.

I have no knowledge of any other communication from Mr. Wallace, Speaker of House of Representatives, being offered or delivered to the Senate, to its presiding officer or to myself.

Cross-examined by Mr. LeConte:

I am not sure that I read the communication; I think I glanced over it and caught its purport. My recollection of it is that it was a resolution of the House of Representa-

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tives presided over by *Mr. Wallace, relative to the counting of the votes for Governor and Lieutenant Governor of the State.

Hon. R. H. Gleaves, a witness in behalf of the State, being sworn, in response to interrogatories by Mr. Cavender, says:

I am Lieutenant Governor of the State of South Carolina and ex officio President of the Senate; have been such since November, 1872. I was in the Senate, acting as its President, a part, if not all, of the day, on the 13th of last December. I have no recollection of receiving from Mr. Woodruff, Clerk of the Senate, any communication such as that on page 3 of what purports to be the Journal of the House of Representatives of the State of South Carolina for Wednesday, December 13th, 1876, part of first exhibit now shown me.

The form of the communication shown me is not the form adopted by one branch of the General Assembly in inviting the other branch to unite in the performance of a duty common to both, nor is it the form hitherto adopted by the House of Representatives in inviting the Senate to meet with the House at the opening and publishing of the returns of the election of Governor and Lieu-

tenant Governor. The usual form would be for the House to adopt a concurrent resolution and send it to the Senate for concurrence.

I have never known, to my recollection, of any other course being pursued. The day for opening and publishing such returns is proposed by the House in the concurrent resolution, but the Senate may change the day by amendment. If the House concurs, very well; if not, the resolution falls, or the Senate may take no other action on the resolution, and it is laid on the table.

There is one exception to what I have mentioned as the usual form of communication between the two houses in such cases, and that is in the matter of the election of the United States Senator. In that case the day is fixed by law of the United States, as also the manner in which the election shall be conducted.

Cross-examined by Mr. LeConte:

I have stated that I am Lieutenant Governor of the State and ex officio President of the Senate; this by the declaration made by the two houses in Joint Assembly on the 5th day of December, 1876. That is, the Senate and the House of Representatives presided over by Mr. E. W. M. Mackey.

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*Hon. S. A. Swails, a witness in behalf of the State, being sworn, in response to interrogatories by Mr. Cavender, says:

I am a member of the Senate of South Carolina from Williamsburg County, and have been since 1868. I am also President pro tem. of the Senate, and have been since November, 1872.

I preside in the Senate in the absence of Mr. Gleaves. I was present in the Senate on the 13th of December last, but did not act as presiding officer on that day.

I have no knowledge of any communication being received through the Clerk, or otherwise, on that or any other day, such as that on page three (3) of what purports to be the Journal of the House of Representatives of the State of South Carolina for Wednesday, December 13, 1876, part of first exhibit now shown me.

I have heard the testimony of Mr. Gleaves and concur with him in his statement of the usage as Joint Assembly. The meeting of the two houses for opening and publishing the returns of the votes for Governor and Lieutenant Governor, strictly speaking, is not a Joint Assembly but a joint convention. In all Joint Assemblies the President of the Senate presides; in this joint convention the Speaker of the House presides. In the latter case, to the best of my recollection, the custom has been for the House to notify the Senate that it had received the returns, and either proposing a day or asking the Senate to name a day for the meeting of the houses in joint convention. If the Senate does not appear on the day fixed by the House, it has the right to change the day by amendment, as mentioned by Mr. Gleaves. The Senate claims the right to control either message or resolution as to time, subject to amendment by the House, but the whole is by joint agreement.

I have been on the Speaker's stand at every opening and publishing of returns of elections of Governor and Lieutenant Governor since I have been President pro tem. of the Senate. The President and President pro tem. have seats on the platform as representing the Senate. The opening and publishing of the returns by the Speaker is in the immediate sight and observation of the President of the Senate.

Cross-examined by Mr. LeConte:

The usage where a joint convention is proposed for opening and publishing the election returns is, as I recall it, that the House

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*sends a message notifying the Senate that it has received the returns, and either fixing the day or asking the Senate to fix a day for meeting in joint convention.

Any change in the day fixed by the House would be effected by an interchange of messages.

I had no official notice of the opening and publication of the election returns by the House of Representatives presided over by Mr. Wallace, and as a Senator I would not recognize any notice that did not come to me officially.

I have no doubt I saw the notice of it in the newspapers. I do not know whether I saw it in the newspapers before or after the proceedings.

Hon. R. H. Gleaves, recalled, in response to interrogatories by Mr. Cavender, says:

During the four years and more that I have been President of the Senate, I have twice attended joint conventions for opening and publishing the returns of election for Governor and Lieutenant Governor, and occupied a seat on the Speaker's platform, at the side of the Speaker, as representing the Senate. On each occasion the Speaker, after opening the returns, exhibited them to me for examination before publishing them. In 1874, Speaker Elliott, after opening the returns, handed them to me for examination before publishing them. In 1876, Speaker Mackey, after opening the returns, exhibited them to me before publishing them.

Hon. R. B. Elliott, a witness on behalf of the State, in response to interrogatories by Mr. Cavender, says:

The usage, so far as my knowledge extends, touching the opening and publishing of the election returns of Governor and Lieutenant Governor, is as stated in the testimony of Mr. Gleaves and Mr. Swails. As the mode of proceeding after the joint convention convenes, I will state that, in 1874, I was Speaker of the House, and, in opening and publishing the returns of the election of that year, I followed the practice established by my predecessors under the present Con-

stitution of the State. The practice was this: As Speaker, I opened the returns of the election by Counties; as each County was opened, it was handed by me to the President of the Senate for his inspection, after

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which the vote for such County was *declared to the two houses. The Clerk of the Senate and the Clerk of the House made tabulated statements of the votes published. After all the returns had been opened and published, the tabulated statements were footed up and compared. From those statements I declared the result of the election.

Conner, for the petitioner, filed the following argument:

The decision of Judge Carpenter in the case Ex Parte Peter Smith may be safely regarded as the strongest argument in favor of the right of Mr. Chamberlain which has been or can be made. Destroy that, and the claim rests on no basis at all.

I shall, therefore, direct my argument mainly to an examination of that decision.

It is conceded that Governor Hampton received the highest number of votes. It is conceded also that the "election confers the title," but it is denied that Governor Hampton has the right to possession of the office.

Can this conclusion be maintained? I do not mean by United States bayonets, for they can support anything, but by reasoning which a Court will accept.

The title draws to it the possession and the right of possession. No power can legally separate the office and the possession of the office.

The title may be illegal or the possession illegal, but to say that one man is legally entitled to the office and another legally in possession of it is to misuse language.

It is conceded that the title is legal. It then follows, necessarily, that the withholding the possession is illegal.

The reasonable conclusion would seem that those who act illegally should suffer. But the judgment and conclusion of Judge Carpenter is that he who has the legal title and right shall suffer, and he who illegally withholds possession shall profit by his wrong and enjoy the possession.

Truly, as Lord Coke says, the wisdom of the law is not as the wisdom of ordinary men.

Under the Constitution of this State the Courts cannot try the question of title to the office of Governor. This Judge Carpenter concedes.

He also concedes that questions political cannot be decided in the Courts.

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*These concessions illustrate how concisely a proposition may be laid in theory and how utterly it may be ignored in practice.

The Judge says: "The duty of the Court is confined to inquiring whether either of the claimants has complied with the constitutional conditions precedent to entering upon the discharge of the duties of Governor."

If this doctrine is true, then, so far from the Court being confined or limited, it has absolute power to determine the purely political question of who is Governor.

If the Court can decide that there are conditions precedent and that the Governor elect has not complied with them, there is an end of the question. The power to make a Governor is in the Courts and not in the people. The people may have elected him, the Legislature may acquiesce, but the Court says: Stay—we do not think you have complied with the conditions precedent, and you cannot enter in.

If this is the power of the Court, it is power absolute and supreme. If it has the power, it can exercise it as it pleases.

There is no guaranty for an honest decision except the honesty of the individual. But the very object of written constitutions and an exact partition of powers into three independent co-ordinate departments was to create a government of laws, not of men; to find the safety of the citizen not in the probity of the individual but in the limitation of his power. Take the case where the Governor elect takes but fails to subscribe the oath, constitutional condition precedent omitted.

If this doctrine is law, and the Court must be satisfied of the performance of the conditions precedent, then no man can be Governor until he has received the imprimatur of the Court.

What, then, becomes of the independence of the Executive?

Who makes the real Governor? Not the people, but the Court. The people but place a barren scepter in his grip. The King-maker is the Court.

If the title and the office are to be regarded as distinct and separate, and the election confers the title, who, I ask, confers the office? Whence does the right to be Governor de jure and de facto come? Surely from the people and through the election.

The Legislature can only declare the result of the election; the Court can only recognize it. Neither, separately, nor in concert, can alter the result or impair it.

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*They cannot, together or separately, make a Governor.

The people alone can do that. So clear is this, that in cases of contest between rival claimants, if the General Assembly cannot decide who has the majority, it must be referred to the people to hold a new election.

Here there is no question as to who received the majority, and there is no contest before the General Assembly.

To say that a man can be legally elected, can desire to be Governor, and yet cannot be Governor, is a proposition new and startling.

Who can keep him from being Governor?

Surely not one of the departments of the government! If it can singly, or in combination, then it is the sovereign and the executive department is no longer independent.

But apart from the point that the Courts have no power to determine what are conditions precedent, and whether they have been performed, the question remains:

Were there any conditions precedent?

This is the pivotal point of Judge Carpenter's argument, and the fallacy which pervades the entire argument is in supposing that there are any.

It cannot be shown that Governor Hampton has failed to comply with a single condition precedent.

See the Constitution.

If there has been any non-performance of duty, it is on the part of either the Speaker of the House or of the Senate.

The argument then comes to this: that if either the Speaker or the Senate fails in its duty, what follows? that they shall suffer? No. But that the Governor and the State shall suffer.

This is a new doctrine of vicarious atonement. Great stress is laid on adhering to constitutional requirements.

If rigidly adhered to, there never has been, or can be, a Governor constitutionally declared.

The votes shall be published "as soon as the General Assembly shall have organized by the election of the presiding officers of the two houses."

Now the Senate is never organized by the election of its presiding officer, and so the time for counting the votes never constitutionally could come.

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*But nobody ever supposed that the inability to comply with this constitutional condition precedent prevented a Governor from entering upon his office.

Passing from the conditions with which the Governor must comply, we find the decree holding that the Constitution intends the united action of both houses to precede, not only the installation of the Governor, but all legislative action.

The error is in assuming that the opening of the returns is a legislative act.

It is no act, except in cases of contest; the two houses are passive, and, in cases of contest, their functions are judicial rather than legislative.

But the decree says: "From the frequent iteration in the Constitution of the term 'General Assembly,' in connection with the election, opening and publishing the returns, and the installation of the Governor, the actual presence of both houses would appear to be necessary for the legal and proper performance of such duties."

Singular to say, the term "General Assembly" is not used in connection with the election, opening and publishing the returns, except to indicate the time at which the several acts are to be performed.

See Constitution; and there are no duties to be performed by the General Assembly in connection with the election, opening and publishing the returns.

The decree continues: "The absence of either (house) would render nugatory such an exercise of legislative power."

Strange confusion of terms and reasoning. The conclusion rests on a semble; the semble on a fact that has no existence; and yet on this conclusion the whole judgment is made to rest.

What legislative power, and what exercise of it? The decree is silent. Going a little back, it ceases to be "power," and becomes duties; and going still further back, we find nothing—the line runs out. There is no antecedent.

If it is said the power refers to the duties and the duties refer to the connection of the General Assembly with the election, opening and publishing the returns, I have already shown that there are no such duties, and the reference is to nothing.

I have thus endeavored to show that there is no legislative Act or legislative power in the creating or installation of the Governor.

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*I concede that, under the Constitution, both houses should have been present, and that one was not. Why? Let the decree answer: "The Senate persistently refused to recognize the legal existence of the House." Should have said willfully and illegally refused.

By purely political party vote the Senate overrules the decision of the Supreme Court that the House was legally organized; violates the Constitution, which forbids it to exercise judicial power. And yet on that violation by the Senate of its duty and of the Constitution the right of Mr. Chamberlain to be Governor is placed—a legal right resting on a breach of duty and a violation of the Constitution.

If the Senate can by such action defeat their Governor's right, then a minority of one can effect it and a single man determine who shall administer the State as Governor.

The intent of the Constitution is that two houses shall attend. The intent also is that the Governor elected by the people shall have the office.

From the perversity of the Senate both intents cannot be carried out. Which shall prevail—the incident or the principle, the form or the substance?

Which does most violence to the Constitution—to continue in office a defeated Governor or for the legal speaker of a legal House to open and publish the returns in the presence of the House and such Senators as will attend? Take the case I put of a minority of one. Let the other thirty-two Senators attend; it is not the Senate. But does the

absence of that one man do more violence to the Constitution than to continue the defeated Governor under a former title which he has surrendered?

The conclusions of law are:

That Chamberlain was not legally installed.

That Hampton was not legally installed.

Therefore, there is no Governor, is the logical sequence.

The premise is the installation, and, from the want of installation, the Judge deduces the want of office,—making the installation more important than the election.

The right of Chamberlain, who was not elected, and of Hampton, who was, are made to depend on exactly the same thing—the mere ceremonial of installation.

But the logical process by which Mr. Chamberlain is continued as Governor is equally questionable.

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*As Governor Hampton was not legally installed, Mr. Chamberlain continues, because the Governor holds over until his successor is chosen and qualified—not installed, but chosen and qualified.

Hampton, it is conceded, was chosen. What is meant by qualified? Simply taking the oath of office.

The Constitution never mentions installation. A man does not install himself. It says qualified; and that, and that alone, can the Governor do—qualify, take the oath of office.

On the theory which Judge Carpenter propounds, Governor Hampton has not been and never can be installed, and Mr. Chamberlain is Governor, not by the will of the people, but by the fiat of the Court.

The Constitution never meant that there should be a de jure Governor and a de facto Governor during his term of office.

The reasoning which leads to such a conclusion is suicidal.

What was omitted in the case which should have been performed?

Not the opening and publishing the votes by the Speaker.

Simply the formality of doing it in the presence of both houses.

This omission was not the default of the lawful House of Representatives nor of the Governor elect.

The omission did not change the result of the election. The truth of the election as declared by the House was the truth as shown by the returns, viz., that Hampton received the highest number of votes. The Constitution declares that he is Governor, and the Court should have so held.

Elliott, for the State:

The first question raised by the record in this case is the validity of the pardon issued by Wade Hampton.

This inquiry directly involves the question: Is Hampton Governor?

We say, first, he is not Governor, because he has not received the highest number of votes cast in the late election.

We say this on the authority of the determination of the Board of State Canvassers, certified to this Court, respecting the vote of Edgefield and Laurens Counties.

It is true that the Board were not authorized to canvass the vote for Governor, but it is known that the vote was not essentially different for Governor from that for other

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State officers, and we have *the decision of that Board to the effect that, owing to fraud and illegal practices in the Counties aforesaid, it was unable to determine the election in those Counties.

Without the vote of these Counties, Hampton cannot pretend to have the highest number of votes.

We say, second, that whatever the result of the election may be when duly ascertained, that result has, in point of fact, never been duly ascertained in the mode prescribed by the Constitution of the State.

The Constitution requires that the returns of the election for Governor and Lieutenant Governor shall be transmitted through the Secretary of State to the Speaker of the House of Representatives, and by him opened and published in the presence of the Senate and the House.

Section 4, Article III, of the Constitution of the State reads as follows: "The returns of every election of Governor shall be sealed up by the Managers of Election in their respective Counties, and transmitted by mail to the seat of government, directed to the Secretary of State, who shall deliver them to the Speaker of the House of Representatives at the next ensuing session of the General Assembly, and a duplicate of said returns shall be filed with the Clerks of the Courts of said Counties, whose duty it shall be to forward to the Secretary of State a certified copy thereof, upon being notified that the returns previously forwarded by mail have not been received at his office. It shall be the duty of the Secretary of State, after the expiration of seven days from the day upon which the votes have been counted, if the returns thereof from any County have not been received, to notify the Clerk of the Court of said County and order a copy of the returns filed in his office to be forwarded forthwith. The Secretary of State shall deliver the returns to the Speaker of the House of Representatives at the next ensuing session of the General Assembly; and during the first week of the session, or as soon as the General Assembly shall have organized by the election of the presiding officers of the two houses, the Speaker shall open and publish them in the presence of both houses. The person having the highest number of votes shall be Governor; but if two or more shall be equal and highest in votes, the General Assembly shall, during the same session,

in the House of Representatives, choose one of them Governor viva voce. Contested elections for Governor shall be determined by the General Assembly in such manner as shall be prescribed by law."

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*Here are three steps subsequent to the election essential to the ascertainment of the result of an election for Governor:

1. The transmission of the returns through the Secretary of State to the Speaker.

2. The presence, as witnessing and verifying bodies, of the Senate and House.

3. The opening and publishing of the returns, in which is involved, by necessary implication, the work of scrutinizing and counting the returns.

All of these steps are essential elements in the ascertainment of the result. Each of them is an indispensable prerequisite to the conferring upon any one of the prima facie title to the office of Governor of the State. The fourth Section of Article III sets forth with great particularity the mode of ascertaining the result of an election for Governor. The mode therein prescribed is not a mere empty formula, which may be in part modified or wholly disregarded. It is not merely directory, but comes down to us in its full embodiment as a positive mandate to be strictly observed and followed.

These three steps or processes are deemed by the Constitution to be absolutely necessary to the certain and proper identification of the returns, their safe transmission and freedom from fraudulent manipulation, and their lawful promulgation. The Managers of the election in the several Counties are required to seal up and forward the returns through the mails, in order that they might not be tampered with while they are in transitu. The Secretary of State, a high and responsible officer of the State, is made the custodian of them during the interim between the election and the meeting of the General Assembly which is to canvass them to still further insure their protection against alteration or change. The Speaker of the House is only to open them in the presence of both houses in order that they who are to give effect to the election may be satisfied as to the identity of the papers upon which their action is to be based.

The Constitution provides that "the Speaker shall open and publish them [the returns] in the presence of both houses."

It does not even say that they shall be aggregated. There are no express words in the Constitution either conferring the power or enjoining the duty of aggregating the returns, yet it is clear to our minds that such aggre-

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gation must precede the publication of *the result of the election. We say, therefore, that this power is conferred, this duty is enjoined, by necessary and unavoidable implication.

1. Admitting that anything is to be added by implication, we are equally justified in adding whatever is necessary to the full execution of the powers that are conferred; for it is a general principle that where a power is conferred or a duty enjoined, all powers essential to the execution of the power or duty are carried with it by implication—Cooley's Con. Lim., §§ 63, 64; Story on Con., vol. 1, § 430; McCulloch v. Maryland, 4 Wheat., 428; United States v. Fisher, 2 Cranch, 358.

As the result of that, we say it is essential to the discharge of the duty imposed by the Constitution in this Section that the two houses should have the power to verify the returns—to scrutinize, sift and ascertain what was the true and lawful vote. The two houses are to ascertain who has received "the highest number of votes;" that is, the highest number of legal votes, or, at least, the highest number of votes legally returned. To ascertain this fact, they must, necessarily, have the power to scrutinize, sift and verify the returns.

2. We say that this power is conferred not on the House of Representatives alone, but on the two houses acting together.

This is clear from the language of the Section. The returns are to be opened and published not as soon as the House shall have organized by the election of a Speaker, but "as soon as the General Assembly shall have organized by the election of the presiding officers of the two houses, &c." It will also be noticed that the Speaker is to open and publish the returns not in the presence of the House of Representatives alone, but he is to "open and publish them in the presence of both houses."

The Speaker is simply selected as the officer by whom as the organ of the two houses, this work is to be conducted; and the fact of his selection cannot be held to confer any but ministerial duties upon him individually, or to confer upon the House of Representatives any greater powers than it would have had if the President of the Senate had been selected instead of the Speaker of the House. The power to make the verification and scrutiny of the returns, and to ascertain the result of an election for Governor, is conferred upon the two houses concurrently, to be exercised jointly; the duty imposed is to be per-

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formed jointly; and, indeed, *under the provisions of the Constitution it cannot be lawfully performed by one body without the presence—the actual presence—and participation of the other.

Section 1 of Article II of the Constitution of the United States provides that: "* * * The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted. * * *"

Here the language is in effect almost identi-

cal with the language of Section 4 of Article III of our Constitution. Nothing is in terms required but the presence of the two bodies, as in our own Constitution. And in what have the recent discussions of this provision of the United States Constitution resulted? They have resulted in an almost universal concession:

1. That the presiding officer, namely, the President of the Senate, has none but clerical or ministerial duties to perform in connection with the count of the electoral vote.

2. That the powers of the two houses are equal,—the Senate, by virtue of its presiding officer being the presiding officer of the joint convention, acquiring no greater power over the count than the House has.

3. That Congress has the power to call in question the vote of any State, and, by the concurrent action of both houses, to reject the entire vote of a State.

Now, apply this to our case and it stands thus:

1. The Speaker of the House of Representatives, in the matter of the ascertainment and publication of the vote for Governor and Lieutenant Governor, has only clerical or ministerial powers.

2. That the powers of the two houses in the matter of the ascertainment and publication of the result of the election are equal—the House of Representatives, by virtue of its presiding officer being the presiding officer of the joint convention, acquiring no greater power over the matter than the Senate has.

3. That the General Assembly has the power to call in question the vote of any County, and, by concurrent action of both houses, to reject the entire vote of a County.

The idea has never been advanced anywhere that the presence and active participation of the House of Representatives at Washington was not absolutely essential in the electoral count. The idea is equally untenable that the presence of the Senate in our own case can for any cause be dispensed

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with. The Constitution *does not only enjoin it as a duty to be performed by that body, but requires the presence of that branch of the General Assembly as an essential and indispensable prerequisite to the opening and examination of the returns and the ascertainment and declaration of the result of the election.

We say—Third: That not one of these three steps or processes pointed out by Section 4, Article III, of the Constitution and set forth therein as essential elements in the ascertainment of the result of an election for Governor and Lieutenant Governor has been taken by those who claim to support General Hampton as Governor of the State.

First. It is not pretended that the returns of the election for Governor and Lieutenant Governor were ever transmitted through the Secretary of State to Mr. Wallace, who claimed the right to them as Speaker of the House of Representatives. Nor is it pretended that he ever had them in his possession. Nor is it pretended that he ever had in his possession certified copies of the duplicates of said returns filed with the Clerks of the Courts of the respective Counties.

On the contrary, the Journal of the House of Representatives presided over by Mr. Wallace shows that the evidence of the election for Governor and Lieutenant Governor of South Carolina, opened and published by the Speaker, was a tabular statement of the votes of the several Counties for Governor and Lieutenant Governor, as sworn to by Mr. John Scoffin.

Who Mr. John Scoffin is, what his authority was, and whence his authority was derived, are not stated on the face of the Journal; nor does it appear that he claimed, or pretended to claim, or is alleged to have had, any authority to act as agent or deputy of the Speaker of the House itself, or of the two houses, in verifying, scrutinizing and sifting the returns, or in ascertaining the result of the election therefrom.

The secondary evidence submitted by the Speaker consisted of a statement of the vote for Governor at the general elections of 1874 and 1876, certified to by H. E. Hayne, Secretary of State, as from Commissioners' returns "now on file in his office." As "the returns of every election of Governor" are required by the Constitution to be sealed up before being transmitted to the seat of government, and are directed to the Secretary of State only for the purpose of having him "deliver them to the Speaker of the House

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of *Representatives," when such Speaker shall be elected; and as these returns, after being opened and published by the Speaker, become a part of the archives of the House and remain there, it is evident that the Secretary of State could not have obtained any official knowledge of the contents of the returns before delivering them to the Speaker, and that the returns themselves are not "now," and never have been, "on file in his office." Even if they were, he could at the furthest do nothing more than give certified copies of them. It would not be within his power to ascertain and certify the number of votes given for the several candidates for Governor, that being a power expressly delegated by the Constitution to the two houses of the General Assembly.

(a.) Nothing but the loss or destruction of the original returns could authorize the substitution of other evidence of the election.—Greenleaf on Evidence, vol. 1, §§ 82–84.

(b.) These returns were neither lost nor destroyed. If unlawfully withheld, they were legally recoverable by resort to proper legal proceedings. Such remedies have never been exhausted.

(c.) Mandamus was brought against Mr.

Mackey and Mr. Hayne to compel the delivery of the original returns to Mr. Wallace. This Court held that mandamus would not lie against Mr. Mackey, but made no decision as to Mr. Hayne.—State, ex rel. W. H. Wallace, v. E. W. M. Mackey and H. E. Hayne.

No further efforts have been made to recover the returns from Mr. Hayne.

We say, then, that no proper basis has been laid for the admission of or resort to any sort of secondary evidence of the election.

Second. As to the second step in the process,—the presence of the Senate and House of Representatives,—it is conceded that no Senate was present when the election of General Hampton was declared. It is, however, claimed that notice for a joint convention was given to the Senate but was disregarded by that body.

We deny that the Senate was, as a matter of fact, put in possession, officially, of any notice or proposition or invitation from the House of Representatives presided over by Mr. Wallace to be present on a day named for counting the votes for Governor and Lieutenant Governor. Admitting that a paper purporting to be such a notice or invitation was delivered by one of the Senators to the Clerk of that body, and by him transferred to the President of the Senate, the fact remains that the President of the Sen-

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ate did not *communicate the contents of the paper to that body, and hence the Senate had no notice of it. Nor was any such notice given in any way then or thereafter, either orally or by being spread upon the Journal of the proceedings of the Senate. Nor does it appear to have been the duty of the President of the Senate to communicate the contents of the paper to the Senate, inasmuch as the paper was entirely informal in its nature, and, viewed in the light of the usage uniformly observed by the General Assembly in such cases, the paper partook no more of an official character than a like communication addressed to the Senate by a private individual would have done. But even assuming that the notice, if such it was, lay open to no objection predicated on a want of formality either in its nature or the mode of its transmission, and that it was the duty of the President of the Senate to apprise that body, officially, of its receipt and purport, it is yet true, as matter of fact, that he did not do so, and, howsoever much he may have been derelict of duty in this regard, his failure left the Senate without any such notice as it is claimed, by the petitioner in this cause, to have received.

But, admitting it to be true that the Senate had notice of the desire or intention of the Wallace House, still the presence of the Senate at the opening and publishing of the returns is what is essential, and this cannot be dispensed with. The Constitution, as we have already pointed out, requires it. The failure of the Senate to attend, from whatever cause or with whatever motive, is absolutely fatal to the claim that Hampton is now Governor. The absence of the Senate can in no wise enlarge the powers of the House. The duty is imposed, the power is conferred, upon the General Assembly as one of the three departments of the government, and neither can the duty be performed nor the power exercised by any less authority than the sovereign legislative authority of the State.

It is said, however, that if the actual presence of the Senate is necessary, then one branch of the Legislature can defeat an election. This is doubtless true. If one branch of the people's representatives see fit to take that responsibility, they can do it—just as one branch of the General Assembly, by failing to unite with the other branch, may prevent any provision for an annual tax sufficient to defray the estimated expenses for the current year, although the Constitution makes it obligatory upon the General Assembly to do so, and although the adminis-

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tration of the government cannot be *carried on if the General Assembly fails in its duty therein; or just as either branch of the General Assembly, by failing to unite with the other branch, may prevent any provision for levying a tax to pay the deficiency of the preceding year, although the Constitution makes it obligatory upon the General Assembly to do so, and although the servants and creditors of the State must need suffer if the General Assembly fails in its duty therein; or just as one branch of the General Assembly, by failing to unite with the other branch, may prevent any appropriations being made and any money being drawn from the Treasury, even after the taxes have been levied and collected by the direction and authority of the same General Assembly, and although such appropriations and payments from the Treasury are absolutely requisite for the administration of the government and for the protection and advancement of the best and dearest interests of the people of South Carolina. In neither of these cases would it be pretended that the failure of one branch of the General Assembly to unite with the other in the performance of a duty required by the Constitution to be performed by both confers on the other the power to execute that duty itself; and if not in those cases, why in this? In those cases, as we have shown, the failure of one branch of the General Assembly to unite with the other would result in an utter inability to carry on the administration of the government—in the suffering of the servants and creditors of the State—and in the failure to protect and advance the dearest interests of the people. In this, while the aspirations, and, perhaps,

the rights of a candidate for the office of Governor of the State may be defeated, yet the wheels of government are not stopped, nor do the people suffer. The Constitution itself provides a remedy for such an anomalous condition of public affairs. By Section 2, Article III, of the Constitution, it is provided that:

"The Governor shall be elected by the electors duly qualified to vote for members of the House of Representatives, and shall hold his office for two years, and until his successor shall be chosen and qualified."

So that the failure to open and publish the returns of the election for Governor, and to ascertain therefrom who has received the highest number of votes for that office, in the presence of both houses, does not leave the State without a Governor. The office continues to be occupied by the person who, by virtue of a previous election and qualification, already fills it.

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*It is no more startling to suppose that one branch of the General Assembly can prevent the declaration of an election or defeat the election itself, than is the proposition on which Hampton's whole claim now rests, namely, that one branch can elect or declare the election.

Besides, if one branch can declare the election, it does not by any means assure the soundness of Hampton's claim; for, as we have already shown, the powers of the two houses are equal, and the body which is indisputably the Senate had declared the election of Chamberlain before the House of Representatives elected or declared the election of Hampton.

3d. The third and last step, namely, the opening, scrutiny, verification and publication of the returns in the presence of both houses, has never taken place in Hampton's case. Indeed, it is admitted that no such action was had.

But it is said that the election itself gives the title to the office, and that the returns show Hampton to have received a majority of the votes.

We say the evidence is the other way, and is that Hampton has not received the highest number of votes.

But, further than this, we deny the proposition that the apparent result of the election confers the right or settles the title to an office. The work and function of the returning authority or canvassing body, whatever that authority be, is essential to create or perfect the title to an office. The legal ascertainment of the election is always and everywhere held to be an essential and indispensable prerequisite to establish the right or title to an office. Hence such machinery is always provided to ascertain the result of an election.

In Cushing's Law and Practice of Legislative Assemblies, Section 229, the principle is thus laid down: "The right to assume the functions of a member, in the first instance, and to participate in the preliminary proceedings and organization, depends wholly and exclusively upon the return or certificate of election; those persons who have been declared elected, and are duly returned, being considered as members until their election is investigated and set aside, and those who are not so returned being excluded from exercising the functions of members, even though duly elected, until their election is investigated and their right admitted."

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*Again, in Section 240 of the same work, it is said: "The principles of parliamentary law applicable to the question are perfectly simple and plain, founded in the very nature of things, established by the uniform practice and authority of Parliament, and confirmed by reason and analogy. These principles are as follows: First. That every person duly returned is a member, whether legally elected or not, until his election is set aside. Second. That no person who is not duly returned is a member, even though legally elected, until his election is established." * * *

In the case of People v. Miller, (16 Mich., 59,) the Court say:

"The certificate of election, whether rightfully or wrongfully given, confers upon the person holding it the prima facie right of holding for a term."

In the case of Com. v. Baxter, (35 Penn. St.,) Chief Justice Lowrie, speaking of title to an office, says: "This [the certificate] is the legal and prima facie evidence of his title to the office."

Again, the same high authority, speaking for the Court in the case of Kerr et al. v. Trego et al., (47 Penn. St. 292,) says: "In all cases of this kind, at least in all bodies that are under law, the law is that, where there has been an authorized election for the office in controversy, the certificate of election which is sanctioned by law or usage is the prima facie written title to the office, and can be set aside only by a contest in the forms prescribed by law. This is not now disputed."

"No doubt this gives great power to the election officers, but we know no remedy for this but by the choice of honest men."

The following cases are also in point: State v. Churchhill, 15 Minn., 455; Crowell v. Lambert, 10 Minn., 369; State v. Sherwood, 15 Minn., 221; Conger v. Gilmer, 32 Cal., 75; People v. Jones, 20 Cal., 50; State v. Avery, 14 Wis., 122.

Reasoning from these authorities, it would seem to be clear that General Hampton is utterly without title to the office of Governor of this State. The only thing that could give him any shadow of title to the office is wanting, namely, the ascertainment and declaration of the result of the election by the two

houses in joint convention, and the evidence of such ascertainment and declaration by the Journals of the Senate and of the House of Representatives.

Having shown that Wade Hampton is not Governor, it follows, of course, that the pardon which the petitioner here exhibits and pleads is not valid and cannot be recognized

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as a pardon by the *Court. Here, then, the case, so far as a decision of the present motion is concerned, ends.

But it may be acceptable to the Court to hear argument upon the further question, Who is Governor? And, if so, we proceed to discuss that question.

Our position is that D. H. Chamberlain, who was elected as Governor in 1874, is now Governor, under that provision of the Constitution of the State which declares that the Governor "shall hold his office for two years, and until his successor shall be chosen and qualified." This Court will undoubtedly take judicial notice of the fact that Governor Chamberlain was de jure Governor of the State from December, 1874, to December, 1876. It is, of course, known to the Court that Governor Chamberlain has claimed and does claim to be Governor under the election of November 7, 1876, the subsequent declaration of that election by the Senate and the House of Representatives presided over by Mr. Mackey, and his inauguration as Governor in the presence of those two bodies on the 7th day of December, 1876. If argument is desired by the Court upon this latter claim, we shall proceed to present it; but at present we place his claim to the office upon the ground that, if his claim under the recent election is invalid, he is still Governor under the constitutional provision just quoted.

This position and the reasoning which supports it may be stated briefly as follows: The constitutional tenure of this office is for two years and till a successor shall be chosen and qualified. If, as is now assumed, Hampton is not Governor by reason of fatal defects in his title, and if Chamberlain has acquired no valid title under the recent election and his attempted inauguration and qualification, then the title of the former incumbent has never been affected, and he, of necessity, remains de jure as well as de facto the Governor.

His Honor Judge Carpenter, in his judgment in the case of Ex Parte Peter Smith has fully sustained this doctrine, and has supported it by peculiarly cogent reasoning. After stating what is the truth, that the authority relied on in the argument of the counsel for Parmele has never been sanctioned by the Courts of England or America, Judge Carpenter thus forcibly states and disposes of this claim:

"What reason can be adduced in support of the proposition? Is not its statement a solecism? An act without legal efficacy, validity or binding force, conferring no au-

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thority, in law null and *void, by some legal legerdemain becomes suddenly possessed of life and vigor! Powerless to confer a right, it is potent to destroy those already existing. Adding nothing, it subtracts all. Ineffectual to support the slightest claim, it is effective in dispossessing a citizen of an admitted legal possession. My reason revolts from a conclusion so illogical and unreasonable. An act void for one purpose is invalid for all. This is one of the cases in which the law overrules the intention of the individual and renders ineffective and futile his expressed will; and, being ineffective for one purpose, it is so for all purposes."—Broom's Legal Maxims, 669.

We do not regard further examination of his position strictly necessary, but a more elaborate presentation of it has now been made to this Court in a printed argument entitled "In re application of Peter Smith, &c.," and it seems proper to examine that argument and test its validity.

The argument referred to presents four grounds upon which it is claimed that Governor Chamberlain's inauguration on the 7th of December terminated his tenure of the office of Governor under his election in 1874. These grounds are:

1. That his recent inauguration was evidence of his intention to resign his former title and must be regarded as having that effect in law.

2. That, irrespective of intention, the act, as the acceptance of an incompatible office, operates as a resignation in law.

3. That his act was a resignation or surrender according to certain legal analogies.

4. That his act must be regarded in the light of a legal estoppel.

In controverting this argument, it is to be said, at the outset, that no precedent, not one adjudicated case, is presented or can be found in which the doctrines relied on in this argument have been applied to such a case as the present one—a case involving the right to a public office held under a title running indefinitely or until a successor is chosen and qualified. The argument rests wholly upon an effort to apply various doctrines of law, by analogy, to this case.

(a.) The cases and authorities cited under the first head of the argument referred to go wide of this case in every instance. In a condensed statement those authorities tend to support the following points:

1. That a resignation is a renunciation.

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*2. That such resignation need not be in any form of words, but may be by parol.

3. That acts are as effective as words to effect a resignation.

4. That any civil office may be vacated by the act of the incumbent.

5. That a formal refusal to hold an office conferred or a formal disclaimer would be a resignation.

6. That the acceptance of another separate and incompatible office is a resignation of the former office, without regard to the intention.

The above statement comprises every point covered by the authorities cited. What application have they to the case in hand?

What is the question involved in the present case? It is this: Conceding that Governor Chamberlain's recent inauguration is wholly void and ineffectual to confer a new title, has it still had the effect to divest him of his former title, which clothed him with his office until his successor should be chosen and qualified?

To establish a negative answer to this question, it is not necessary to dissent from any of the points above stated in the opposing argument. We do not deny that Governor Chamberlain could have resigned his office either in words or by parol or by acts. We do not deny that a formal refusal to accept the office or to act under it, or the acceptance of another incompatible office, would be a resignation in law. But the present is not such a case, and we beg the Court to notice the essential difference here—a difference in legal principle and effect which is wide and essential. In this case the postulate or concession of the argument is that the act or acts which Governor Chamberlain has done are void, null, nugatory. If he had tendered a formal resignation in writing,—if he had announced his resignation in terms by parol,—if he had refused to longer act under his former title,—or if he had accepted another and incompatible office, the case might be covered by some of the authorities cited. But he has done none of these things. He has simply made a claim of a new election to the same office, proceeded to the ceremonial of an investiture of that office under a new title. By the hypothesis of the present argument, this ceremonial of investiture is wholly void because no right to such new title existed. Now, where does this leave him? On what ground or principle is this act to be accounted a resignation of his former office and title? Did he intend to resign

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by this act? It certainly *cannot be affirmed that such was his conscious intention in his own mind. The probability, if not presumption, is the other way. The only evidence, in either direction, of his intention is found in his act, and that act is now conceded in this argument to have been in law meaningless and void to accomplish the purpose for which it was intended. If by spoken or written words, if by a formal disclaimer or rejection of his title, he had evidenced his intention to lay down the office he then held, or if, by the acceptance of an incompatible or disqualifying office, he had in law vacated his former office, the argument of opposing counsel might prevail. Here, however, he had simply done an act, and that act is void and nugatory.

Now, in law a man is held to intend the natural consequences of his acts. It will not be contended that the natural effect of Governor Chamberlain's act was to relinquish his former office, for there is no evidence, aside from the act itself, that he intended this result.

But it is said every man is presumed to know the law, and he must, therefore, be presumed to have intended to accomplish the legal effects of his act. The legal effect of his act is nihil. It produced no effect. It conferred no title. It wrought no change. It devolved no office. And, therefore, by irresistible logic, it took away no rights, but left him precisely where he stood the moment before he did the act, to wit, Governor by virtue of the failure of a successor.

That Governor Chamberlain believed he was acquiring a new title to the office of Governor by his act is not denied; but that he intended to abandon a former title, or that he intended to make his choice between two titles, does not appear by the act itself and cannot be inferred as a legal inference. He must be held to have intended only the legal effect of his act. Governor Chamberlain, in submitting to the ceremony of his recent inauguration, must be held to have said not that "he had abandoned all right which he had to the office by virtue of the clause of the Constitution" now in question, but that he believed he was entitled to a new term of the same office, and intended to assert that claim without in any manner affecting his former title. In other words, he put his new claim to the test; if it failed, as by the hypothesis of the present argument it did, then he still retained his former title unimpaired.

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*(b.) The second position assumed in the argument which we are now examining is that Governor Chamberlain's act, irrespective of his intention, operated as a resignation, because it was the acceptance of an incompatible office.

This position requires but slight examination. It proceeds upon—we say it respectfully—a singular confusion of ideas. The argument assumes that Governor Chamberlain's recent inauguration gave him no rights, conferred on him no title, and yet with the next breath asserts that he did on the 7th of December last assume and take upon himself a new and incompatible office, and that this assumption and possession of a new office or new term of office operates as a resignation of the former one. Now, need it be repeated, that if Governor Chamberlain's recent inauguration was void, it conferred no title, no new office, no new term? He was, therefore, never in possession of this asserted incompatible office or term.

It will be found that in every case where the doctrine of incompatible offices has been applied the second office has actually been assumed and possessed. Never has the at-

tempted assumption of an incompatible office been treated as working a resignation of a former office. No such case, we venture to think, can be found among the innumerable precedents in English and American law. The "incompatibility" of which the law takes notice must actually exist. The "incompatible" office must have been actually assumed. [We shall notice hereafter the argument attempted to be drawn from the acceptance of a new lease while a former one is unexpired.]

We do not regard it as necessary to the support of our position to controvert the distinction drawn by the argument which we are answering between incompatibility arising from inconsistent "powers and duties" and inconsistent "titles." Upon either ground of incompatibility the result is the same, namely, that the incompatibility can never arise unless the two offices or two titles actually coexist. If the attempted assumption of the second office or title is void, the incompatibility never exists, and the consequent resignation of the former office or title never takes place.

The case mainly relied on in the argument of opposing counsel is that of People v. Carrique, (2 Hill, N. Y., 98). Let us examine that case. It is stated in the argument of opposing counsel that this case was one "in which the defendant, who had been a Justice of the Peace under a certain Act, had

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been elected to a similar *office under a subsequent Act, and was sought to be prevented from acting under his first title upon the ground that he had accepted office and been sworn in under the subsequent Act."

This is, to say the least, a singularly inexact statement of the case, and the statement seems to have been constructed with the view of conveying to this Court the impression that this was a case involving a conflict of titles in the same person to the same office. An examination of the case will show a wholly different case and state of facts. The facts were these: Carrique, the defendant, was, under the Act of 1822 establishing a Court called "the Justices' Court in the city of Hudson," appointed as one of the three Justices of such Court. He qualified and entered upon the duties of this office May 1, 1836, and continued in this office till March 13, 1840. On the 23d of January, 1838, he was also appointed, (not elected,) under the Act of 1830, which provided for the appointment of two additional Justices of the Peace in and for the city of Hudson, one of the two additional Justices of the Peace for that city, and entered upon this latter office January 26, 1838, and continued in this office till March 13, 1840, on which day Whiting, the relator, was appointed and commissioned by the Governor a Justice of the Peace in the place of the defendant, under the Act of 1830. Information in the nature of a quo warranto was brought on the relation of Whiting against Carrique for usurping the office of Justice of the Peace.

These facts show that the case involved, first, the question of the right of the same person to hold two distinct and separate offices at the same time—the one office being a "Justice of the Justices' Court," and the other "a Justice of the Peace" for the city of Hudson—offices separate and distinct in their creations, duties, powers and emoluments. Second, the case involved no question of the validity of the title, appointment or qualification of Carrique to his second office as Justice of the Peace. On the contrary, the Court (Cowen, J.,) says expressly: "The appointment (of Carrique) of 1838 was valid, the acceptance rightful, and the defendant must be held as rightfully holding his office under the Act of 1830." Two questions were made by the Attorney General: 1st. That the defendant's title was void because he "held the incompatible office of a Justice of the Justices' Court." 2d. That the appointment of the relator, Whiting, was in itself a removal of the defendant.

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*Upon the first question the Court held that the appointment and acceptance of the new office under the Act of 1830 was valid, and its effect was a resignation of the former office of "a Justice of the Justices' Court," and then added: "It becomes unnecessary, therefore, to decide whether the two offices were or were not incompatible. If they were, the disqualification was removed by an acceptance of the new office; if they were not, then there was not even a qualified disability." Judgment was accordingly given on both issues raised for defendant.

Now, we respectfully ask this Court to what point the authority of this case goes? And we answer that it goes, beyond controversy, to this precise point and no other: that the valid appointment, the rightful acceptance and the rightful holding of a new and incompatible office are, by legal implication, a resignation of the former office and an election to accept the new office.

It was not a question of the incompatibility of two terms of the same office, but of two distinct and different offices. More than this, the case proceeded expressly upon the judgment that the new office was fully acquired and actually held by Carrique under a valid appointment thereto.

Suppose, now, that in this case it had appeared, either by admission or otherwise that Carrique's appointment under the Act of 1830 was void—that he never actually possessed the office, either by defect of power in the appointing power or by defect of qualification by the defendant,—what may we conclude would have been the judgment of the Court?

We submit that it would have been that Carrique, having never held the second office, had never vacated or resigned his former office.

The case of People v. Metropolitan Police Board, (26 N. Y., 316,) is also much relied on in the argument of opposing counsel to sustain several of his positions. The case has, plainly, no application to our present controversy. It was an appeal from the judgment of the Supreme Court in mandamus, and is thus stated and decided by the Court, pp. 320, 321: "More than two years after the Metropolitan Police law took effect, under the pretext that he was a member of the city police at the first meeting of the Metropolitan Police Board, and by operation of law transferred to the new force, and never having resigned or been legally dismissed, he invokes the mandate of the Court to restore

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him to the office of patrolman and *permit him to enjoy its emoluments; and this, though he has persistently refused to take or hold, and has never taken or held, office as a member of the Metropolitan Police, or under the Board established by the Act; has withdrawn from such police force and disclaimed holding any office or doing any duty as a member of the force of the Metropolitan Police district, and has since the passage of the Metropolitan Police Act, for his private gain, entered into other employments, in no wise connected, but inconsistent with his duties as a member of such force. This is the case of the relator as shown by the record." The judgment below for relator was accordingly reversed and judgment ordered for defendants.

Neither the facts of this case, nor the judgment of the Court, nor its reasoning, lend any support to the argument of counsel on the present issues.

The case is put in the argument of opposing counsel of the inauguration of another person than Governor Chamberlain on the 7th of December "to whom he has yielded the office," and it is asked whether, if it were subsequently ascertained that the newly-inaugurated person was not lawfully inaugurated, Governor Chamberlain would again be entitled to enter upon his office.

Our answer is, that in such a case the actual incumbent would ordinarily be treated as the de facto officer and his acts regarded as valid; but if it should be judicially found that he was not entitled to his office, and judgment of ouster rendered, it would of necessity revert to the person who was de jure entitled to hold the office. If such were not the case, the office would be vacant.

(c.) The third position in the argument to which we are now replying undertakes to establish the doctrine for which it contends by a reference to analogies drawn from the surrender of leases.

In order to lay some apparent basis for such an argument, an effort is made to assimilate leases to public offices in respect to the law governing them. References are made to Roman and English law to establish the position that the tenure of offices as well as and was held from the lord or sovereign.

It is enough to say, in answer to this, that offices are not created, devised or held in any such way in this country. The idea and form of appointment to public office in this country is radically different from the feudal idea and form.

"Public offices are not held by contract with the government, nor are they the property of the incumbents."—Conner v. City of New York, 2 Sandf., 355.

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*"Public offices are not incorporeal hereditaments, nor have they the character or qualities of grants."—Conner v. Mayor of New York, 1 Seld., 285.

But conceding, for the purposes of argument, that the law of leases can be applied to the present case, we take issue with the position of counsel that the taking of a new lease by a lessee whose term has not expired is a surrender of the first lease even when the latter lease is void.

We agree entirely with His Honor Judge Carpenter in his decision in the case of Ex Parte Smith, where he says: "The case of Mellows v. May, cited in Bacon's Abridgment, vol. 5, p. 663, was relied on, where it is stated that 'if one be lessee for life or years, and take a new lease of the same lands, though such lease be void for any defect in the making or execution of it, as if it were for life to begin at a future day, yet is a surrender of the first lease.' In a note on the same page, it is impliedly asserted that this case was erroneously reported. If it ever was law in England, the case has long since been overruled. 'No surrender, express or implied, in order to, or in consideration of, a new lease would bind, if the new lease is absolutely void; for the cause, ground and condition of the surrender fails.'"

Lord Mansfield, in Zouch v. Parsons, 3 Burrows, 1807; Wilson v. Sewell, 4 Burrows, 1980: "So far as my examination of the authorities extends, this doctrine has been sustained by all the British Courts since that time, and I think, notwithstanding the case of Mellows v. May has in a few cases been approved by some American Courts of undoubted learning and ability, the preponderance of authority in this country is largely adverse to the ruling said to have been made in that case. It is perhaps not unworthy of remark, that most of the cases in which the doctrine laid down in Cro. Eliz., 873, has received commendation arose upon a very different state of facts, and the references thereto were illustrative of some supposed analogy, rather than cited as an authority in point."

The opposing counsel seeks to controvert the conclusions of Judge Carpenter by citing the case of Van Rensselaer v. Penniman, (6 Wend., 579,) and lays special stress upon the case on account of the distinguished character of the Court for learning and ability. We

dissent from nothing said in praise of the Court, but we think it due to the memory of the men who composed the Court, and as

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*a vindication of their high claims to the consideration of the profession and the bench of this day, that we should relieve them from the construction put upon the case by the opposing counsel.

The facts of the case were that, the ancestor of the plaintiffs being seized as tenant in fee-tail of an estate, leased it to one Cuyler in 1776 for three lives, with a covenant that if the heirs at-law, or any other person, should dispossess the tenant Cuyler he should pay him for improvements. Subsequently the lessor died, declaring by will that, as the Legislature had abolished tenancy in tail, he devised the said estate to his grandson and his heirs-in-fee. The grandson took the devised estate subject to the lease, and in 1796 executed a new lease to Cuyler of the same premises, for the same lives, at the same rent, and with a covenant to pay for improvements at the expiration of the lease if his heirs, or other persons having authority, should remove or dispossess Cuyler or his heirs or legal representatives. At the expiration of the three lives a controversy arose as to whether payment should be made for improvements made during the two leases or only during the last lease, the estate having been conveyed under decree in partition between the heirs of Cuyler, in 1826, to Penniman, the defendant. The controversy resulted in an action of ejectment. The Court, in deciding the case, after saying that the principal question was whether the acceptance of the second lease was a surrender of the first, and after stating the general doctrine upon the subject, held "that if the acts of the parties, taken altogether, are such as to rebut the idea of a surrender, then none ought to be presumed, * * * and that in this case every circumstance, except the fact of receiving the second lease, altogether rebuts the idea of an intention to surrender the right to compensation for improvements," * * * and finally held that no surrender was made or implied in receiving the second lease.

This is the actual decision in the case of Van Rensselaer v. Penniman, a case cited with great emphasis to establish the positive and absolute doctrine that the simple acceptance of a second lease works a surrender of the first! The true doctrine of the case is that the acceptance of a second lease may or may not work a surrender of a former lease; that this depends on the intention of the parties, and that this intention is to be gathered from all the facts of the case.

Nobody could well dispute these doctrines. It amounts to saying that a person may, if

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he chooses, surrender a former lease by *taking a new one, but that in order to accomplish this result he must have intended it, and must have evidenced his intention by his acts.

In quoting from the general statements of law which form the first part of this decision, the opposing counsel, as will be seen by inspecting the printed argument, states as follows: "And this," proceeds the case above cited, "is the consequence, *although the second lease should be void.*" [The italics are not ours.] The sentence as it stands in 6 Wendell, 579, is as follows: "And this is the consequence, although the second should be void *for any cause other than the want of authority in the lessor.*" [The italics are ours.] And this sentence is followed by these words: "As this presumption of a surrender arises from the acts of the parties which are supposed to indicate an intention to that effect, it must follow that where no such intention can be presumed, *without doing violence to common sense*, the presumption cannot be supported."

It is now respectfully submitted that the case of Van Rensselaer v. Penniman, when correctly stated, lends no support to the case of Mellows v. May, but, on the contrary, makes the whole question one of intention to be gathered from the acts of the parties and not at all a rule of absolute law.

But there is, to speak plainly, a practical absurdity in endeavoring thus to assimilate the case of taking a new title to office and taking a new lease to lands.

In the present case, who are the parties, lessor and lessee? It may be answered, the State is the lessor and Governor Chamberlain the lessee. If this be granted, what new lease has the State executed? How has she evidenced an intention to grant a new lease? If this is a case of lessor and lessee, the act of the lessor in making a second lease must be clear and undisputed. If that fact does not exist, or cannot be shown clearly, then one of the conditions of the doctrine in question is wanting, namely, the execution of a new lease. If this Court does not find, in point of fact, that a new lease was executed in form, at least, then no application of the doctrine in question is possible. If the lessee assumes that a second lease has been executed by the lessor, when, in fact, none has been executed this assumption does not create a lease or put it in the power of any one to say that a lease has been executed.

But it may be well to bring the present case to the clearest possible comparison with the case of a lease of lands and test the

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doc*trine in question. If, then, A had granted to B a lease of lands for two years, and until the lessor should execute a new lease of the same lands to another person, and that person had actually entered under the new lease, and if B, at the expiration of the two years, should understand from the acts

of A that a new lease of the same lands had been executed by A to him, and under this belief should accept such a new lease, and it should afterwards be declared that such second lease had never been made or was void, we should have a case as nearly analogous or identical with this case as could perhaps exist in the case of leases. Now, is there anywhere a respectable legal authority which would hold that under such a state of facts a surrender by B of his former term was intended or could be enforced? The case of Van Rensselaer v. Penniman would certainly be strong authority to the effect that under such circumstances no surrender was intended or effected.

(d.) The last position taken by counsel in support of his doctrine that Governor Chamberlain cannot claim to hold under his former title is founded on the law of estoppel. This is another of the analogies attempted to be applied to this case. Here again it is noticeable and highly significant that no case can be cited in which estoppel has ever been applied to conflicting claims to public office.

The law of estoppel may be searched from beginning to end, and no case will be found of its application or use in any case except such as involve the rights of property. Office, public functions, are not property in this sense. No man has a real or personal estate in a public office. A public office cannot be acquired by gift, grant, inheritance or devise. It cannot be bought, sold, aliened, rated or farm-let.

"If the idea of property cannot attach to the power appertaining to a political office, neither can it attach to the obligation that results from the possession of such political power. Such an idea is inconsistent on its face, for if any one has a property in an obligation, it is not the one who is bound by the obligation, but he who may enforce it." —Alexander v. McKenzie, 2 S. C., 93.

But if the subject matter of the present case were one to which the doctrine of estoppel could apply, there is no relation of parties here which would permit its application.

This may be seen by considering the very definition of estoppel.

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*"The very meaning of estoppel," says Herman, "is when an admission is intended to lead, and does lead, a man with whom a party is dealing into a line of conduct which must be prejudicial to his interest, unless the party estopped be cut off from the power of retraction."—Herman on Estoppel.

"Estoppels in pais can only arise when the conduct of the party estopped is fraudulent on its purpose or unjust in its results." —Ibid, 335.

"When an act is done or a statement made by a person which cannot be contradicted or contravened without fraud on his part and injury to others whose conduct has been influenced by the act or admission, the character of an estoppel will attach."—Ibid, 338.

"Estoppel in pais cannot arise without proof that wrong has been done or is threatened on one side, and injury suffered or justly to be apprehended from it on the other, nor unless the injury is so clearly connected with the wrong that it might and ought to have been foreseen by the guilty party." —Ibid, 339.

Treating, then, a public office precisely like a piece of land, for the sake of this argument, it must appear, in order to create an estoppel, that one party has acted with the intention of misleading another party, and has actually misled him into a course of conduct injurious to his interests, and that this wrong or injury ought to have been foreseen by the party estopped. Now, we ask, how is such a doctrine to be applied to this case? Who are the parties here to whom this doctrine is to be applied? So far as the present record shows, Governor Chamberlain is not a party at all. The only parties who appear in any relation in this record are the petitioner, the Superintendent of the Penitentiary, and Wade Hampton. Governor Chamberlain does not appear as an actor.

But suppose the case was that of Peter Smith, who pleads and exhibits a pardon signed by Governor Chamberlain. How is estoppel to be applied in this case? Whom has Governor Chamberlain misled? Whom has he intended to mislead? What action or conduct has any one taken in consequence of Governor Chamberlain's action which has resulted in his injury? If Wade Hampton is to be regarded as a party in interest here, has he been misled by Governor Chamberlain's inauguration? Has he waived or renounced any rights or acted to his own injury in consequence of that inauguration? It would hardly seem so, inasmuch as only one week later he himself assumed to claim the same office, the same title, and to be inaugurated under his claim of election.

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*Has the Superintendent of the Penitentiary been misled to his injury by Governor Chamberlain's claim to be Governor under his recent inauguration? He has not recognized his action under either his former or his second claim or title.

The case is put by opposing counsel of an action of false imprisonment by the petitioner against the Superintendent. Does anybody imagine that in such a case the plea of estoppel would be or could be made? Governor Chamberlain would in no sense be a party to such an action, nor would his acts or recitals be admisssible, except as they appeared on the face of the pardon.

The more the effort is made to apply the doctrine of estoppel to such a case as the present, the more impossible it will be found

to make the application. If estoppel could be applied anywhere, as to any of the parties interested in this case, it would be as between Governor Chamberlain and his grantee, the petitioner. Some analogy might possibly be urged in holding that Governor Chamberlain was estopped from denying his own pardon when it was pleaded by one to whom he had granted it. Even in that case he would only be estopped from denying that he was Governor when he granted the pardon, and not from denying the one or the other title under which he might claim to hold that office.

Estoppel has, therefore, no possible application to this case: First, because estoppels are never applied or enforced except as to rights of property; and, second, because there is no party setting up an estoppel who would be, under any circumstances, entitled to plead it.

The foregoing argument has been addressed mainly to establishing: First, that Wade Hampton is not Governor; and, second, that Chamberlain is. It has been shown that the fact upon which the title to the office is made by the Constitution to depend—the fact of having received "the highest number of votes"—has never been ascertained in Hampton's case in the manner required by the Constitution, and that that fact cannot to-day be asserted upon the basis of any competent official, legal or constitutional canvassing of the votes. If it is believed to be a fact, it has never been ascertained to be a fact, so as to lay the basis of title to office.

It has been further shown that Governor Chamberlain's former title has not been impaired or cut off by his recent inauguration, because, upon the theory of this argument, that inauguration was wholly void and nugatory.

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*In conclusion, there remains another question, to wit: whether Governor Chamberlain's recent inauguration, and the claim of title on which it was based, is valid or not? That question I do not feel inclined to discuss, unless the Court shall indicate its wish to hear argument upon it.

Barker, in a case in which John Pelton was the petitioner, and in which the questions were the same as in the Tilda Norris case, filed the following argument:

May it please the Court, the third proposition of counsel for petitioner is "that if neither Wade Hampton nor D. H. Chamberlain has been legally installed as Governor, is not Chamberlain Governor by virtue of his holding over under his old title, acquired by the election in 1874, which made him Governor until his successor is elected and qualified?"

This proposition has been fully and ably met by Mr. Maxwell, who has shown, by principle and upon authority, that Chamberlain's former title, under which he might have elected to hold over, has been surrendered in law by his attempted inauguration, which, though invalid to give him a new title de jure, is sufficient, as a declaration of claim under a new title, to terminate absolutely his old tenure and estop him and those claiming under him from setting up his old title as authority for his acts as Governor. Had he not done so, he might (until the inauguration of Wade Hampton) have held a good title. He has simply surrendered a good title and put it beyond his reach by attempting to clothe himself with another and inconsistent title.

I will only cite a few additional authorities on this branch of the case:

"The term 'surrender by operation of law' was said by Parke, B., in delivering the judgment of the Court, to be properly applied to cases where some act has been done by or to the owner of a particular estate, the validity of which he is estopped from disputing, and which could not have been done if the particular estate continued to exist. The law there says that the act itself amounts to a surrender." * * * (2 Smith's Leading Cases, 614.)

The point has been expressly decided in South Carolina in the case "Ex Parte Gray."—Bailey's Equity, 77. * * * "In this case," says Colcock, J., delivering the opinion of the Court, "I am of opinion that the

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respondent, by having become *a candidate for the office, under the terms prescribed by the Act had voluntarily resigned all right to the first term, and could not now claim the office." * * *

"It is said that the doubts of the respondent were stated and some objections presented at the first election; but he nevertheless entered the lists and was voted for as a candidate for the office, under the limitation fixed by law, and actually held the office. In Jacob's Law Dictionary, title 'Surrender,' the law which I think applicable to this case is collected. 'The surrender at common law,' it is said, 'is the usual surrender, and is of two sorts, viz.: A surrender in deed, or by express words in writing, where the words of the lessee to the lessor prove a sufficient assent to give him the estate back again; and a surrender in law being that which is wrought by operation of law, and not actual, as if a lessee for life or years take a new lease of the same land during the term, this will be a surrender in law of the first lease.' 'And this surrender in law, by taking a new lease, holds good, though the second lease is a voidable lease.'—5 Rep., 14; 6 Rep., 69; 10 Rep., 67; 1 Inst., 218; Cro. Eliz., 873. * * * Dillon on Municipal Corporations, 200; 3 Hill N. Y. Rep., 243; 16 Johns. N. Y. Rep., 28; Bacon's Abridg., vol. 5, pp. 657, 662."

The only other grounds upon which the attempted pardon can be contended for are

the claim of Chamberlain, as grantor thereof, to the office of Governor by virtue of or under color of the election on Wednesday, November 7, 1876.

It has not been maintained in the opening argument, and we have had the benefit of no authorities on the point, though it is made in the answer, that D. H. Chamberlain claims to act as Governor de facto, and we presume it will be relied on in reply.

We deny that Chamberlain has de jure title either by holding over or by virtue of election in 1876, or that he is de facto Governor.

In Wilcox v. Smith, (5 Wend., 231,) it was held "to constitute an officer de facto, a mere claim to be a public officer and exercising the duties of the office are not sufficient; there must be some color of right or an acquiescence on the part of the public for such length of time as will authorize the presumption of, at least, a colorable election or appointment."

In Kimball v. Alcorn, (45 Miss., 151,) it is said: "To constitute an officer de facto, there must be a color of right by election or

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*appointment, or an acquiescence by the public for a length of time which would afford strong presumption of legal right. The incumbent himself has no privileges and is shielded from no responsibility. If he attempts to enforce a right grounded upon and flowing out of his office, his title is put in question, and he must show a legal right. So, where he justifies it, there is much and respectable authority to the point that it is not enough to show that he is in office by an appointment which is irregular or that the State has for a long time acquiesced, but he must prove a legal right."—5 Watts, 539; 7 Johns.; 9 Johnson, 135; 2 Swan, (Tenn.,) 135; 2 Head, (Tenn.,) 586; 2 Metc., (Ky.,) 494; People v. Tiernan, (30 Barb.) To constitute a person an officer de facto, a mere claim to be such officer and exercising the duties of the office are not sufficient. It is well settled that there must be color for the claim and a colorable title to the office.—People v. White, 24 Wend., 520; People v. Peabody, 6 Abbott, 234. As was said by the Supreme Court of Connecticut, "an officer de facto is one who exercises the duties of an office, under color of right, by virtue of an appointment or election to that office."—Rochester and G. V. R. R. Co. v. Clarke National Bank, 60 Barb., (N. Y.,) 234. "When color of authority notoriously ceases, the reason for sustaining their acts as the acts of officers de facto ceases."—King v. Corporation of Bedford Level, 6 East, 356; Rex v. Verelet, 3 Campbell, 432; King v. Lisle, 2 Strange, 1090.

In the case of D. H. Chamberlain, the claim to the office by virtue of the election of November 7, 1876, is accompanied by the notorious fact that on the face of the returns another was elected, and that the declaration of him as Governor was a false statement of the result of the vote made by a notorious illegal body, so adjudged by the Court. There is against his claim of title, by mere possession of the furniture of the Executive Chamber, (in which he is sustained against law by armed force,) the fact of a person claiming to be Governor who has received the highest number of votes according to the face of the returns and against whose prima facie title no protest has been presented. There is also a denial of the claim of Chamberlain from the first assertion of it, a constant protest, and no acquiescence by the public, and the notorious illegality of the declaration upon which he bases his assertion of claim. Either of these facts are sufficient to rebut any presumption or color of title under the election in November.

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*In South Carolina it has been held in Kottman v. Ayer, (3 Strob., 94.) "the acts of a King de facto are as binding as if he were in office by legal right, so long as those whom he governs acquiesce in his exercise of power. I do not undertake (says Evans, J.) to say that in an organized state of society, under a regular government, the acts of an usurper, of one who obtrudes himself into an office, without color of claim, would be binding; but where the electing or appointing power has conferred the office upon him, and he is in the actual discharge of his duties without his title being questioned in any legal way, the community in which he lives have the right to regard him as a legal officer, and his acts as to them will be valid. * * * To entitle one to claim the emoluments of an officer or the privileges conferred by it, he must show, if his right be questioned, that he is an officer de jure, as in the case of Allen v. McNiel. One claimed prize money as an officer. It was held he must prove himself such. His having acted would not be sufficient, where his being an officer is the very gist of his action. * * * But (except in the first class of cases, where the right claimed depends on the fact that the party is an officer,) it would seem from the cases that the presumption of the legal right to an office arises prima facie from the actual discharge of its duties. But this is a rebuttable presumption, and its effect is destroyed by proof to the contrary."

We contend, on authority, that the presumption of legal right, as holding over, which might have arisen from the actual discharge of the duties of the office by D. H. Chamberlain is fully rebutted, and its effect is destroyed by his declaring himself Governor under a new and inconsistent title by the election in November, and that the presumption of legal right under color of election under the declaration of the Mackey House never arose. Chamberlain claims the office under the recent election, through a chain of frauds and illegality which destroys

any presumption of title. The petitioner who sets up in the pardon his grant, or attempted grant, is compelled by the very evidence of his grantor's pretended induction into office to admit here that Wade Hampton had, by the returns of the election, the highest number of votes. The Constitution declares that he who has the highest number of votes shall be Governor. How do they claim that the election of Governor Hampton is set aside? By showing successive acts of persons assuming to be public officials, done in defiance

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of the Constitution and the *judgment of the highest Court in the State. No proof is produced of a protest before the Legislature; none of an examination of such protest; no witnesses summoned; no day appointed; no decision showing by the proper tribunal that the votes cast for Wade Hampton or his majority over Chamberlain were illegal. Upon the action of the Mackey House alone rests D. H. Chamberlain's claim to be Governor de jure or de facto.

I regard is as a happy accident, because it disposes of the most of the false structure of title claimed here, built upon the declaration of Chamberlain's election by the Mackey House, (the Senate concurring;) that the Constitution does not say that he is Governor who shall be declared to have received the highest numbers of votes, but says: "He who has the highest number of votes shall be Governor." In the very next sentence it provides how, in case of a contest of the election, such contest shall be decided.—Constitution, Art III, § 4.

We assert, then, by the light of this language, as grand as it is simple, that no declaration of a lawful House (still less a Mackey House) or of a General Assembly contrary to the face of the returns can set aside the will of the people there expressed. Nothing can legally change such a result but a decision upon a contest tried according to law. When, therefore, Chamberlain or his grantee admits, as here admitted, that Hampton had on the returns the highest number of votes and shows no contest, it is an admission in law that Hampton is and that Chamberlain is not Governor.

The process by which the declaration of Chamberlain's election was reached, through a pretended count of the vote, was by throwing out, by a vote of the Mackey House, (a majority of the Senate concurring,) the entire votes of two Counties of the State. The precedent or authority for this revolutionary proceeding is not shown and cannot be. Its justification is the mere will of the persons who assumed to act as the House of Representatives and of the majority of the Senators conspiring with them.

It is claimed that the Mackey House was legally organized. This has been decided by the Supreme Court of this State to the contrary, and yet the effort is made here to discuss the whole question de novo, as if it had not already been discussed fully and decided finally. It is said that the Clerk of the former House, (Jones,) who on the 28th of

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November called the roll of the House *of Representatives, had a legal right to omit Edgefield and Laurens from the call, because the certificate of members returned elected, based upon the certificate of the Board of State Canvassers, which the Clerk (Jones) had from Hayne, Secretary of State, did not contain names of the members elect from Edgefield and Laurens. That Secretary of State, that Clerk of the former House, and every man who participated in the proceedings of that body on that day, had legal notice that, under the Constitution, there could be no House not composed of fully 124 members elect from thirty-two Counties in the State; that no certified determination of a Canvassing Board, no certified list of Secretary of State and no roll of members could be complete or legal which omitted two Counties. They had further notice that that particular certified determination of the Canvassing Board was illegal, false, in fraud of law, and made in disobedience and contempt of the Supreme Court. They and each of them had further notice of the judgment of the Supreme Court, based upon the true returns of said election, deciding that five members elect from Edgefield and three from Laurens were entitled to seats in the House and entitled to participate in the organization thereof. In disregard of the law, they proceeded to make a false and illegal roll call, omitting Edgefield and Laurens from the roll and from the call.

This was the first step in the bold defiance of law, the crowning act of which was the inauguration of D. H. Chamberlain. If, as is asserted, it was the legal duty of the Clerk of the former House to call the roll, and the Secretary of State sent him a false roll, it was his duty to return it and demand its completion according to law. Such would have been his course unless he intended to assist in the plot which was afterwards developed. Proceeding, then, upon the principle not recognized by the Constitution, viz., that the majority of persons returned to them from the Secretary of State's office was a legal quorum, competent to do business under the Constitution,—instead of sixty-three, a majority of 124 members,—and, having organized on this basis, they go on to elect a Speaker of the House of Representatives. E. W. M. Mackey, the historical personage, who will live in the story of the State's dishonor, is the party who advances now to the footlights. He is elected by a majority of the illegal body. He is the party put forward as the pretended Speaker of the pretended House of Representatives. It was at that

point in the history of this conspiracy that

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proceedings *were taken in the Supreme Court, on the part of William H. Wallace v. Hayne, as Secretary of State, and E. W. M. Mackey. Having demanded the returns, in accordance with the Constitution, Mr. Wallace received a reply from the Secretary of State that he had not those returns, and that he had delivered them to E. W. M. Mackey, holding possession of the chair of Speaker in the hall of the House of Representatives, and upon that a rule to show cause on a suggestion in mandamus was issued and served upon Hayne and Mackey, commanding them to answer before the Court to the matters and things in the suggestion set forth, and to show cause why the prayer of the relator should not be granted.

In answer to that suggestion, which asserted the title of Wallace as Speaker of the lawful House, and charged the illegality of the claim of Mackey as Speaker, Mackey and Hayne came into the Court and answered, submitting to the Court the question of the legality—the one of his title to the office and the other of his act in delivering the returns. In the case of Mackey the issue was joined upon the distinct question whether a House of Representatives, under the Constitution of South Carolina, composed of 116 members, was a lawful House, and whether a majority of 116 was a constitutional quorum of a lawful House, against the assertion of Wallace that 124 members, under the Constitution, was the only legal House known to the law, and that sixty-three members of such majority was the only legal quorum, and upon the issue so joined the Supreme Court entered a judgment and took cognizance of all the matters affecting organization argued here to-day.

The question of the right of the members elect from Edgefield and Laurens to participate in the organization and the question of their exclusion from that House were distinctly before the Court, and it was there decided, upon the issues made up, that Wallace was the legal Speaker of the constitutional House of Representatives of South Carolina; that there could not be two Houses, nor two lawful Speakers, and, therefore, that Mackey was not Speaker of the House of Representatives, and being, therefore, a mere private individual, was not subject to the particular process prayed for. This judgment became the law of the land, just as in the case of Marbury v. Madison, (1 Cranch, 137). The mandamus was refused, although all the questions were decided, and it is a leading case in America.

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*In Davant v. Essex Company, (7 Wall., 109,) it was contended "that the decree in the first suit, being simply one of dismissal, did not prevent the filing of a new bill." The Court, however, said: "The decree dismissing the bill in the former suit, * * * being absolute in its terms, was an adjudication of the merits of the controversy and constitutes a bar to any further litigation of the same subject between the same parties. A decree of that kind * * * is a final determination."

In Hopkins v. Lee, (6 Wheat., 109,) it was held that "a judgment or decree of a Court of competent jurisdiction is conclusive wherever the same matter is again brought in controversy."

It may be said that this is true only as between the parties to the suit and their privies, but it is a maxim of the law that, as to all questions affecting the public which come before the Courts for decision, the subject matter in issue is not res inter alios acta, because in such controversies all citizens of the State are privies.—Broom's Legal Maxims, p. 917.

We claim that this whole reopening here of this question as to the validity of the Mackey House is irregular. That decision is binding upon all the citizens of this State, and that body over which Mackey presided is wholly illegal and unconstitutional and all its actions void from beginning to the end. Its original, essential, fundamental illegality sticks to it and will taint the action of every individual or body acting in connection with it. The taint spreads like a corroding poison and damns forever the action of every public or private person who dares to give it sanction or support.

A feeble majority of the Senators, carried away by the spirit of party or otherwise, united with the Mackey faction, and their illegal conduct is relied on to give sanction and color of title to the claim of Chamberlain. No participation on the part of the Senate with a body of men setting themselves up as a House of Representatives, without title and in defiance of law, can ever remove the taint of invalidity from or give sanction to the action of such a body. The idea of a majority, which is a boast of American institutions, and to which is attributed so great effect, is sacred only when a majority acts within the limits of law; the moment it acts beyond those limits it loses its sanctity and all claim to respect. It is the voice of the Senate and of the Constitution and of the law only when it acts within the obligations of law. It is not the voice of the Senate when it steps beyond the law.

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*It may concur or recognize, or refuse to concur or recognize, but it is the Senate just so far as its action is in accordance with law. It not only can give no legality but it loses all legality of character itself, and the action of the Senate, upon which they rely here to support this title, is as void in law as it is bad in morals.

On the 5th day of December this Mackey

body, so pronounced by the Supreme Court to be utterly illegal, sends a notice to the Senate of its resolution to proceed to a count of the votes for the office of Governor and Lieutenant Governor on the next day. The formula was observed of a joint resolution with this Senate to concur with them in opening these abstracted returns of the election. The resolution which came to the Senate from the Mackey rump came from a treasonable body. The concurrence in that resolution was a mere participation in an illegal act by a majority of that Senate. They concurred with the Mackey body in a resolution to open and count the votes for Governor.

Accordingly, on the day appointed, (this majority of the Senate so concurring with the Mackey body so unlawfully assembled,) the joint conspirators proceeded to open certain returns, the possession of which had been obtained by them, unlawfully, from the Secretary of State, who had, in violation of law, delivered them to Mackey.

These returns were from all the Counties in the State, including Edgefield and Laurens, showing the vote cast for Hampton and Chamberlain. When Edgefield was called, a member of this body objected to the vote from Edgefield being counted. Thereupon the objection was put to the House, and it proceeded to decide the question, and then and there disposed of the entire votes of two Counties of the State, and cast them out of the count without having the case made, no parties notified, no witnesses produced before the proper tribunal by a contest, but of their own motion, outside of the Constitution, the Senate involved with the mock House in the conspiracy, they arrived at a judgment which undertook to decide in this manner that there was no election in Edgefield and Laurens and that the votes cast there were not legal votes.

An ex parte unconstitutional determination of an illegal body disfranchises the citizens of two Counties in the State! It throws out Edgefield and Laurens. They little thought that they were then and there destroying

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all *color of title* in Chamberlain to the *office of Governor *by the election* in November; that they were doing what when brought to the test of law would defeat them. Notoriously they proclaimed to the world that the way in which they proposed to establish the usurper Chamberlain as Governor was by the casting out of Edgefield and Laurens upon the ex parte action of an illegal body; and he who should have known the law—he whose reputation, whatever else of name he may leave behind him in South Carolina, will certainly never be denied the claim of an able and astute lawyer,—overcome and blinded by his own intense partisanship or be it what it may which settled down upon and clouded his judgment,—he whose reputation a year ago would have carried him back to his home with the respect at least of a portion of this people,—he puts his hand to the work of treason, and, upon the invitation to him from the Mackey House to come in and be inaugurated, he goes in an unhappy moment to join the others of the band of conspirators in the hall of the House of Representatives, and, in destruction of his record as a lover of right or of law, in the face of his education, in the face of the civilization of which he boasts himself, in defiance of the Supreme Court of this State, in the presence of these men, he flies in the face of the Constitution and the laws which he was there swearing once again to support and defend. In the face of high heaven, which he dared to invoke, he swears himself into the office on the basis of treason! Title! Why, may it please the Court, when one sets up the *color of title* to office, and in setting it up proclaims to the world the infamy through which the claim is derived, does it need words to show that that is not, in contemplation of the law, in its purity and justice, *color of title*, but the very opposite—the notorious declaration to the world that he has *no color of title* to the office?

These facts were made notorious by these very people, and notice of it has been brought home to the Superintendent of the State Penitentiary. He has been notified that Chamberlain does not propose to hold office under his old right, nor by virtue of having the highest number of votes, but by the action of this illegal body. Mr. Parmele, if he had recognized this man's attempted pardon, could have been indicted for an illegal escape of the State's prisoner. Even if he, in an action for a negligent escape, could have plead the confusion of the times in mitigation, he could not have been justified, and judgment would have gone against him at least for a technical escape.

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*We might rest the case here, without going into the question of Hampton's claim. His acts as Governor are not here called in question. But we shall not shrink from the issue, whether it be pertinent or not to this case.

We rest his claim upon the position that Hampton received the highest number of votes on the face of the returns. The other side has admitted this, and we claim the benefit of this admission. The fact, accompanied by the absence of any proof of a contest made against the face of the returns, stands as title de jure by force of the words of the Constitution itself: "He who has the highest number of votes shall be Governor." It is like a judgment, demanding obedience of Courts and all persons in the State.

But it is said that there was no declaration of Hampton's election according to the forms of the Constitution, inasmuch as the Senate did not unite with the constitutional House in counting the votes. In reply, we say that, admitting any irregularity or flaw, caused by physical or moral obstruction, to

have occurred in the process of ascertaining who was elected Governor, the great fact, being ascertained, (no matter how,) overrides all process or forms, and covers all flaws or irregularities in reaching it.

All the preliminaries pointed out by the Constitution are subordinate to the question which the Constitution seeks by those preliminaries to reach, viz.: Who is Governor? That fact being known and admitted, all other matter, such as the formula prescribed as to opening and publishing the returns in the presence of both houses, &c., ceases to be of any moment whatever on a question of who is Governor. If, for example, Mr. Chamberlain to-day, in justification of his act, could show by the admission of the party calling his act in question that he had the highest number of votes on the returns, and that no contest had been made or decided against him, no flaw or omission in any proceeding by which his election had been ascertained or declared could unseat him. What would, in such case, be true of his title, is, in this case, true of the title of Governor Hampton.

In this case it is admitted by us that when the House of Representatives proceeded to count the votes it was not joined by the Senate in its organized capacity, and it is also admitted that the sealed returns, which should have been opened by Speaker Wallace, were not opened by him in the presence of the two houses.

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*I deny that either of these omissions, in the letter of the law, invalidate the election or qualification of Governor Hampton. All the directions which precede the sentence which begins with the words: "He who has the highest number of votes shall be Governor," in the Section of the Constitution, constitute an entire proceeding. It is not any sort of returns that are to be opened and published in the presence of both houses, but the special returns sealed up by the Managers of the Counties and sent by them to the Secretary of State. If these (or the special substitute for them, the certified copies which, in a certain event, the Secretary of State procures from the Clerks of the Courts,) cannot by any accident or physical or moral cause be opened and published in the presence of both houses, then the whole clause falls to the ground, and with it the necessity of the attendance of the Senate with the House.

I admit that, where the letter of the Constitution cannot be strictly pursued, the highest public duty is to adhere to the spirit and true intent of the Constitution, and, as near as may be possible, to the letter and the forms prescribed by the law. This, we contend, was done by Speaker Wallace and the constitutional House of Representatives in ascertaining who was elected Governor.

The original sealed returns, having been wrongfully delivered by Hayne, Secretary of State, to Mackey, and opened by him, the House proceeded to obtain the next highest evidence of the election. Certified copies from the Clerks of the Courts were procured of the returns of the several Counties and were aggregated. Accident furnished a certificate from the Secretary of State, of the respective number of votes received by Hampton and Chamberlain for Governor. The aggregated returns from the Counties corresponded with the Secretary's certificate of the aggregate of the returns, (those which had been opened by Mackey and returned to Hayne,) and upon this evidence that Hampton had the highest number of votes the House declared him Governor.

It is said that the Senate was not present. We maintain that the letter of the Constitution did not require the presence of both houses in ascertaining the fact upon secondary evidence, and the spirit of the Constitution was observed by the constitutional House of Representatives, the only branch of the political department of the State government which was acting lawfully, and its declaration is binding upon the Courts, as evidence of a fact, at least until otherwise declared.

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*But the Senate was present, constructively, in law. It had notice of the action of the House, and did not (that is, a majority of Senators,) choose to attend. Such willful absence could not mar the honest and legal action of the House, or defeat the will of the people as to the office of Governor, or affect the process of ascertaining the result of the election. It is, moreover, a familiar maxim that where a party to be notified, or entitled to notice or demand, places himself or itself in such attitude to the party who is required to give notice or demand as to make the notice or demand an impossibility or a useless and unnecessary act, then notice or demand is dispensed with in law. This the Senate did, in advance, by refusing to recognize or confer with the lawful House, by associating itself with the Mackey body and by surrounding itself with the bayonets of the United States soldiery, behind which it was entrenched, in violation of the Constitution requiring it to sit with open doors.

It cannot be held that the absence of the Senate, or a majority of the Senators, under these circumstances, in any way invalidated the action of the House in declaring the truth of the election, viz.: that Hampton had the highest number of votes and is Governor. The innate and intrinsic virtue of the truth overrides all defects and cures all irregularities in the mere formula of declaring the vote, and leaves Governor Hampton's title, de jure and de facto, where the Constitution places it,—upon the simple fact, here admitted and not contested, that he had the highest number of votes.

If he be not Governor, certainly D. H.

Chamberlain is not Governor, either de jure or de facto.

The following proceedings took place in the case:

On March 2d, 1877, the following order was filed:

"It is ordered, That the relator be discharged from the custody of the Superintendent of the Penitentiary.

"A. J. WILLARD, A. J., Presiding.

"I concur in the above.

"J. J. WRIGHT."

The above order was signed on the 27th of February, and on March 1st, before it was filed, the following opinion and revocation of Judge WRIGHT was filed with the Clerk:

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*On the 9th day of February, 1877, the petitioner, by her attorney, presented to this Court her petition for a writ of habeas corpus, setting forth therein her sentence in the Court of General Sessions for Laurens County, and her incarceration under said sentence in the State Penitentiary; that, while undergoing said sentence, on the 9th day of February, 1877, a pardon was issued to her by Wade Hampton, as Governor of the State, but that the Superintendent of said Penitentiary, upon the presentation and inspection of said pardon, refused to discharge the petitioner, and continued to restrain her of her liberty, contrary to law. She, therefore, prays the Court that the cause of her detention may be inquired into, and that she may be discharged from her unlawful confinement.

The writ prayed for was granted and made returnable forthwith. On the 10th day of February the Superintendent of the Penitentiary, in obedience to said writ, appeared before this Court with the body of the prisoner, and made return that he held her under her original sentence in the Court of General Sessions, which had not yet expired, and that, as to the pardon signed by Wade Hampton, he submitted to the judgment of this Court whether the same was, in law, a sufficient authority for the release and discharge of the prisoner.

On the 12th day of February this Court proceeded to the argument of the case, which was continued from time to time until the 23d of February.

The arguments addressed to the Court may be characterized as unusually able and exhaustive and have covered the case in all its phases. It now devolves upon the Court to pass upon the questions raised and presented for its determination. These questions are, perhaps, as grave and important as have ever been brought before this Court. They are likewise embarrassed by considerations connected with the political condition and parties of the State. This Court cannot take notice of the interests, wishes or purposes of political parties as such. In its judicial capacity it knows no parties and can pay no regard to any considerations except such as concern the legal and constitutional rights and principles involved in the case before it. The fact, however, which cannot be unknown to the Court, that the contending political parties in the State regard their respective interests as largely involved in the decision of the present case, devolves upon the Court an unusual degree of responsibility, combined with matters of great inherent difficulty

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as *well as delicacy. As one member of this Court, I accept such responsibility with what I conceive to be a becoming spirit of self-distrust. I could have devoutly wished that such issues could have been finally adjusted in those other forums in which they at first arose; but they are presented to the Court, and they must be met, and I now proceed to present my conclusions, founded on the best reflection and deepest study I have been able to give this case.

The petitioner sets forth and pleads a pardon signed by Wade Hampton. The respondent, by his return, formally and explicitly puts this pardon in question before this court. The first inquiry, therefore, which meets us is: "Is the pardon set forth by the petitioner a valid instrument warranting the discharge of the petitioner from her imprisonment?" Strictly speaking, this is the only question upon which the Court is now called to pass: for if the pardon is valid, the prisoner is entitled to her release; and if it is not valid, she is not so entitled. In either case the decision puts an end to the case.

Whether the pardon involved in this case is valid or not, depends upon the question whether the person who signed it as Governor is in fact or law the Governor, so as to be authorized to grant the pardon. In the wide range of the arguments addressed to the Court there is one which constitutes the decisive test in this case. I refer now to the proper construction to be given to the various provisions of Section 4 of Article III of the Constitution of the State. That Section is in the following words:

"The returns of every election of Governor shall be sealed up by the Managers of Election in their respective Counties and transmitted by mail to the seat of government, directed to the Secretary of State, who shall deliver them to the Speaker of the House of Representatives at the next ensuing session of the General Assembly, and a duplicate of said returns shall be filed with the Clerks of the Courts of the said Counties whose duty it shall be to forward to the Secretary of State a certified copy thereof, upon being notified that the returns previously forwarded by mail have not been received at his office. It shall be the duty of the Secretary of State, after the expiration of seven days from the day upon which the votes had been counted, if the returns thereof from any County have

not been received, to notify the Clerk of the Court of said County and order a copy of the returns filed in his office to be forwarded forthwith. The Secretary of State shall de-

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liver the returns *to the Speaker of the House of Representatives at the next ensuing session of the General Assembly; and during the first week of the session, or as soon as the General Assembly shall have organized by the election of the presiding officers of the two houses, the Speaker shall open and publish them in the presence of both houses. The person having the highest number of votes shall be Governor; but if two or more shall be equal and highest in votes, the General Assembly shall, during the same session, in the House of Representatives, choose one of them Governor viva voce. Contested elections for Governor shall be determined by the General Assembly in such manner as shall be prescribed by law."

It will serve a useful purpose to notice each successive step in the process provided for by this Section:

1. The Managers of the election are required to seal up and transmit the returns of the election of Governor to the Secretary of State, and a duplicate thereof is required to be filed with the Clerks of the Courts of the several Counties to provide a remedy in case of the loss or delay of the original returns.

2. The Secretary of State is next required to deliver said returns to the Speaker of the House of Representatives at the next session of the General Assembly.

3. It is, in the third place, provided that during the first week of the session, or as soon as the General Assembly shall have organized by the election of their presiding officers, the Speaker of the House shall open and publish the returns in the presence of both houses.

4. The next and last step is the declaration that the person having the highest number of votes "shall be Governor."

The facts to which it is necessary to allude in stating our conclusions are few and simple, namely, that an election for Governor was held on the 7th day of November, 1876, in this State: that the returns of said election were sealed up and transmitted by the Managers to the Secretary of State; that these returns were subsequently delivered by the Secretary of State to E. W. M. Mackey, claiming to be Speaker of the House of Representatives; that subsequently, upon other and secondary evidence, the House of Representatives presided over by W. H. Wallace, without the presence of the Senate, proceeded to declare Wade Hampton to have received the highest number of votes, and hence that he had become the Governor; that subsequently Wade Hampton took the oath of

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*office and has since claimed to be the Governor; that Daniel H. Chamberlain was the Governor from December 1, 1874, to the time of the inauguration of Wade Hampton, on December 14, 1876.

It is first to be remarked that the Constitution of the State is our supreme law whenever not in conflict with the Federal Constitution. Its provisions are to be regarded as imperative and authoritative in all cases to which they apply. No emergency can possibly arise which will warrant us in ignoring or defeating the Constitution in any of its parts or provisions. What it commands must be done. What it forbids must be prevented. The highest function of this Court is found in enforcing and applying these principles to the varied cases which may arise before it.

An election by the people is, in this country, an orderly expression of the will of the people in respect to their public officers. It is not a single act, but a process consisting of a series of acts. It may be described as a chain, whose links consist of the several stages or steps in the process from beginning to end. The casting of the ballots into the ballot box is often spoken of as the election, but it is, in truth, only one step, however important that step may be, in the elective process. If the election were to stop there, no result would be reached. The will of the people would never thus find expression. The votes must be taken from the ballot boxes, assorted, examined and aggregated. This is as essential a step, in every respect, as the casting of the ballots.

Other things also, besides the mere casting of the votes, enter into the essential elements of an election. A mere casting of votes and their counting on any given day does not constitute an election. These acts must be done in pursuance of a law prescribing them, in the manner and form required by law, and under the supervision and control of persons appointed to such duty in accordance with the law.

When, therefore, it is said that it is the election which gives the title to an office, it is meant, if the statement is to be accepted as true, that it is the election in the full sense in which we have now stated it which gives the title. In this sense, and in no other, it is true. Some degree of inaccuracy was observable in the arguments of counsel upon this point, and it is essential to clearness to state it with precision.

Looking now at the Section of our Constitution already quoted, it will be found that it presents and describes the whole process

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of *an election. It recognizes as parts of this process, called an election, all the several stages which have already been mentioned. It recognizes the original casting of the ballots, the counting of such ballots and the statements of the results, called the returns, the due transmission of such returns to the proper lawful custodians, and the subsequent examination and publication of

the returns by the proper lawful officers in the presence or by the agency of the proper legislative bodies. All this is the mandate and clear provision of our Constitution. Logically speaking, no one of these steps can be said to be more or less important than another. The weakest link in a chain is as vital to its integrity as the strongest.

It will be admitted, without argument, that several of the steps in the process of our recent election were duly taken. It will be admitted that the ballots were cast on the 7th of November last; that they were duly counted; that the returns were duly made up, sealed and transmitted to the Secretary of State. It will be admitted that although the original returns were not in the hands of Speaker Wallace, yet that certain other evidences were presented, which, in the absence of the original returns, duly accounted for, were admissible under the Constitution and according to familiar principles of law.

We reach now the stage in the elective process when, in the language of the Constitution, "the Speaker shall open and publish them (the returns) in the presence of both houses." Pausing here, we ask if there is any reason for saying that this provision can be disregarded and still a valid election take place? Can the substance of this provision be eliminated from the elective process and still leave its validity unimpaired? If regard be had to the reason of the matter or to the prominence intended by the Constitution to be given to this stage of the process, nothing could be more essential to the validity of an election than a full, substantial compliance with this provision. The evidences of the will of the people have been thus far carefully guarded by the Constitution in the hands of lawful custodians, and now comes the critical stage when, as contemplated by the Constitution, they are to be opened and published. And what are the safeguards thrown around this process by the Constitution? They are these—the opening and publishing of the returns by the Speaker in the presence of both houses. Conceding that the returns, strictly speaking, were not in the hands of Speaker Wallace, and that the

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substituted evidences were ad*missible in their stead, the inquiry arises, What is necessarily implied in, and what is the true meaning of, the expression, "open and publish"? Taken literally, no result would be reached by merely opening and publishing the returns; they must be added up, counted or aggregated before any result can be reached. These words, therefore, plainly mean that the votes evidenced by the returns shall be counted. But counting implies judgment—the separation and examination of the legal and illegal, the good and the bad votes. To deny this would lead to plain absurdity. Suppose among the returns was one not signed by any Manager—would it be contended that it must be counted? Or suppose a plain forgery is discovered among the returns presented by the Speaker—must this forgery be counted? Illustrations might be indefinitely multiplied, showing that, from the nature and necessity of the case, there must be the power, when the returns are opened and published, to reject false, fraudulent, spurious or illegal returns. This result points at once to the reason for the requirement of "the presence of the two houses" in the Constitution. They are to be present in order to make the result of opening and publishing the returns express the will of the people—to guard it against illegality or fraud.

It has been strenuously urged that the process here under discussion is merely mechanical or physical, consisting of nothing but the opening of the papers called returns, and the reading of what they contain, and that thereupon, by force of the Constitution, the person who appears on the face of the returns to have the highest number of votes becomes entitled to be, and is, the Governor. I cannot admit such a conclusion. It does violence to reason. It is contrary to the fitness of things. It is opposed to the plain interpretation of the requirement of the Constitution. Why, it may well be asked, has the Constitution provided for all the several stages of the elective process so carefully, and at last has summoned together the two houses which compose the General Assembly at the concluding stage of the process? Is it merely in order that they may be silent witnesses to the mere mechanical act of opening certain packages and listening to the reading of them? Reason tells us no. These legislative bodies are summoned to act as the authoritative arbiters in the crowning act of this great elective process, to prevent the will of the people and the laws of the State from being overthrown; to so act upon the returns as to defeat violence, fraud and cor-

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ruption. *This great duty is committed to the General Assembly in joint convention assembled. It is the highest, most august and responsible tribunal to which, in the first instance, such a grave duty can be confided. Why was it not, as in the case of other officers, committed to the Board of State Canvassers? One sufficient reason would seem to be that the duty was too grave and responsible in this instance to be entrusted to anybody less responsible than the immediate and responsible representatives of the whole people of the State. When by the united action of the whole body of the people's representatives the result has been ascertained, then the declaration takes effect that he who has "the highest number of votes shall be Governor." Such a result as this was not allowed to be reached through any agency less responsible than the General Assembly itself.

Upon this point no arguments could be more applicable than those drawn from an examination of the parallel provisions of the United States Constitution respecting the election of a President and Vice-President. The language of our own Constitution and that of the United States Constitution are so similar as to give application to the arguments adduced in the one case to the other. The recent discussions of the provisions of the United States Constitution upon this point, as was observed in the argument before this Court, have resulted in a general agreement that Congress, under the proper interpretation of the provision that "the President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted," has power absolutely and finally to reject the entire vote of any State. They are not present as mere witnesses of a mechanical process of reading and counting the votes. They are present in their high capacity as the legislative power of the whole nation, to guard, verify and determine the result of the elective process. Not until by the action of Congress in this high capacity the result is ascertained can the result of the returns be known or stated. When that is ascertained and declared as the result of the action of Congress, the other result follows, namely: "The person having the greatest number of votes shall be President." From that point—the moment when Congress ascertains and announces the result of its examination of the returns—the Constitution may properly be said to be self-executing. The final result follows then by the fiat of the Constitution, but not till then.

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*Every feature of this reasoning applies to our own Constitution. Our General Assembly are not present at the opening of the returns of the election of Governor for the purpose merely of witnessing the mechanical process of opening certain packages and reading their contents. They are present to act as the grand inquest or supervising body, charged with the supreme duty of making a declaration which shall truly express the lawful result of the returns of the election. Whenever that result has been by them ascertained and made known, then the Constitution of our State, as to the rest of the process, becomes self-executing, and whoever is so declared to have received the highest number of votes "shall be Governor." Standing upon this view of the Constitution, a view to which I am led by irresistible reasons, it is needless for me to point out the effect upon the claim of Wade Hampton to be Governor. It is admitted that the lawful Senate of South Carolina was not present, and took no part, silent or active, in the work of declaring the election of Wade Hampton. The fact of his election has, therefore, never been ascertained and declared in the manner imperatively required by the Constitution. The elective process has been arrested and cannot be completed until this requirement of the Constitution has been obeyed. It is not to the purpose to say that, as matter of fact, the returns show that Hampton received a majority of the votes. No power can say what the returns, when duly examined and declared by the only persons competent under our Constitution to examine and declare them, will show, any more than it can be affirmed before Congress has acted upon the electoral returns what the result of those returns will be. Common notoriety is of no value here. The Constitution provides but one way to ascertain and declare that fact, and that way is through the united, concurrent action of the two houses which compose the General Assembly. Until that fact is thus established, the Constitution cannot execute itself. No man can be declared to have received the highest number of votes, and hence no man can be declared Governor.

I find myself, therefore, forced to the conclusion, under the light of the best examination I can give to the Constitution as bearing on this question, that Wade Hampton having never been declared to have received the highest number of votes at the last election by the only power competent to ascertain and declare that fact, cannot, under the Constitution, be Governor. The pardon granted by

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him *to the petitioner in this case must, therefore, be held to be invalid and not a sufficient authority in law to warrant the discharge of the petitioner from her present imprisonment, and the present motion must be denied.

This Court has knowledge of the fact that Daniel H. Chamberlain was elected as Governor in 1874, and, under the Constitution, his term of office continues "until his successor shall be chosen and qualified." Under this provision of the Constitution he must be held entitled to the office of Governor at the present time. I do not agree with the view advanced in the arguments at bar that his recent inauguration has resulted in a forfeiture of his title to hold the office. That act at most could only be void and would not divest him of a former good title. The various arguments attempted to be drawn from the law of leases and of estoppel do not, in my judgment, apply to this case.

I have most strenuously endeavored to arrive at correct conclusions in the present case, for I am deeply impressed with its gravity in its relations to all our public affairs. But the Constitution is the supreme guide, and I must follow it wheresoever it leads. If I have erred, I shall greatly regret it; but I shall have the consolation of knowing that I have endeavored to honor my judicial trust by a faithful regard to my

official oath and the Constitution of South Carolina.

Filed 1st March, 1877.

State of South Carolina—In the Supreme Court, November Term, 1876.

Ex Parte Tilda Stepens, alias Tilda Norris—Habeas Corpus.

Having attached my name to an order discharging the petitioner in this case on the 27th day of February, 1877, after mature deliberation, believing that the order should not have been made, I now hereby revoke, recall and cancel said order, so far as my signature may have given it sanction, and substitute the foregoing opinion in its stead.

J. J. WRIGHT,
Associate Justice South Carolina.

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*On March 7th the following statement was filed by Judge WILLARD:

A final order was made in this case on the 27th day of February last past, with the concurrence of Associate Justice WRIGHT, at a conference of the Court on that day, from which the Chief Justice was absent by reason of severe illness. The order in question terminated the present proceedings by habeas corpus by discharging the prisoner. At the request of Associate Justice WRIGHT, I suspended the filing of the order until Saturday of this week. On Thursday an opinion was placed in my hand by the Clerk of the Court, purporting to be the opinion of Judge WRIGHT, although not endorsed with his signature in the customary manner. This opinion was accompanied by a memorandum having the signature of Judge WRIGHT, purporting to be a revocation of the previous order in which he had concurred.

Without receiving any subsequent communication from Judge WRIGHT, I attended the Court on Friday, the 2d day of March, pursuant to adjournment.

It was my intention to express orally at that time the results to which I had arrived as to the questions involved in the case, but, in consequence of the absence of Judge WRIGHT, the Court was necessarily adjourned and no opportunity afforded for such statement. I deem it important, in view of the important questions involved, deeply affecting the interest and feelings of the people of the State, and in view of the anomalous and unprecedented character of the recent proceedings taking place before a Court of last resort, to put on record a brief statement of the results arrived at by myself, intending to place them in the form of a formal opinion at the earliest practicable moment:

My conclusions are:

1. That, according to the returns of the Managers of Election in the several Counties, made in duplicate and one copy thereof transmitted, sealed, to the Secretary of State, and the other filed in the office of the respective Clerks of the Courts of the several Counties, Wade Hampton received the highest number of votes for the office of Governor of this State at the election held on the 7th day of November last.

That, such being the fact, he became Governor of this State by the direct declaration of the Constitution contained in the follow-

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ing *words: "The person having the highest number of votes shall be Governor," there having been no contest of the votes for Governor recognized by a concurrent resolution of the two houses of the General Assembly, as prescribed by law, under the authority of the Constitution, contained in these words: "Contested elections for Governor shall be determined by the General Assembly in such manner as shall be prescribed by law."—Art. 3, § 5.

That, inasmuch as no contest existed under the Constitution, and no two persons had equally the highest number of votes, the General Assembly had no function to perform except to establish by law a day on which he should be installed; that day being required by the Constitution to be during the first session of the Legislature.

That the only object of the opening and publication of the returns was, in such a case, notice of the facts disclosed by the returns.

I also conclude that the provision declaring the person receiving the highest number of votes, according to the returns communicated to the Secretary of State, and filed with the Clerks of the Courts, is independent of that preceding it, prescribing the duties of the Speaker of the House of Representatives, as it regards opening and publishing the returns in the presence of the houses, so that if the latter is unperformed the former is entitled to full force and effect.

2. I conclude that the acceptance by Mr. Chamberlain of the declaration of an unauthorized body to the effect that he was elected Governor, and taking the oath of office thereunder, was an unlawful usurpation of the office of Governor, inconsistent with the provisions of the Constitution in reference to the right to hold over until his successor is elected and duly qualified, and does not present a case for holding over within the contemplation and intent of the Constitution.

3. I conclude that Mr. Chamberlain is not capable of being duly recognized as de facto Governor, as he is without the recognition or co-operation of the popular branch of the General Assembly, and by reason thereof, incapable in point of fact to execute the functions of Governor.

4. I hold that no executive, legislative or judicial act is requisite to fulfill any condition or remove any obstruction impeding the full execution of the purpose and intent of

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the clause of the Constitu*tion declaring the person receiving the highest number of votes to be Governor, and that Wade Hampton is entitled to claim the efficacy of that clause of the Constitution, and in virtue thereof is Governor of the State of South Carolina, and his pardon duly issued is entitled to be respected.

A. J. WILLARD,
Presiding Judge.

On the 24th April, 1877, the following opinion was filed:

WILLARD, A. J. The question to be considered is whether the pardon issued by Wade Hampton as Governor of the State to Tilda Norris is valid and effectual, so as to entitle her to be released by the Superintendent of the Penitentiary, who holds her in confinement under the judgment and sentence of the Court of General Sessions for the County of Laurens.

This question resolves itself into another, —whether Wade Hampton was Governor de facto at the time of issuing the pardon in question. A pardon issued by a Governor de facto is valid. This principle is recognized as applicable to pardons issued by the King of Great Britain.—Bacon's Abr., Title "Prerogative," A. The reason there assigned shows clearly that the rule does not depend on the extent of the powers existing in the Crown, but on the character of those powers. It is placed on the ground that there should always be one capable of administering the laws at the head of the government. The existence of organized society is a primary necessity to all communities; its functions cannot safely be suspended for even short periods of time. Laws derive their efficacy, as means of protecting individual and public rights, from the physical support which is brought to their aid. In all stable governments this physical force is practically in the hands of the chief executive officer, by whatever name he may be called. Under our form of government the head of the State is commander-in-chief of the military power of the State, and as such represents the reserved force that constitutes the ultimate strength of the laws. In his relation to the ordinary and civil means of overcoming resistance to the mandates of the Courts, he has important functions to perform that can never be safely suspended. All regular governments have some mode by which the right of succession to its chief office is determined; but, what-

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ever may be such rule *of succession, occasions have arisen and will continue to arise when a case of disputed succession exists. During such intervals there must be a continued administration of the laws, and experience of government has shown that it is safer and better to recognize the person who succeeds in obtaining possession of the executive powers during the existence of the contest than to subject the government to the risks incident to a failure in the exercise of its chief executive functions. On this foundation the doctrine rests already adverted to. Certain essential principles of government are always applicable, whatever may be the form of government, and the one referred to is of that class. That under our form of government a suspension of the executive functions would be attended with evils similar to those that have led to the adoption of the English rule as to the authority of a de facto head of the State is sufficiently demonstrated by the present condition of this State. Uncertainty as to the administration of the laws has not only relaxed the vigor of the criminal jurisdiction, causing an increase of crime, but has impaired public faith and confidence to such an extent as to practically paralyze the industry of the State. It must, therefore, be concluded that the office of Governor of a State is within the reasons of the rule that imparts validity to the official acts of the person who for the time being is the actual possessor of the powers of chief executive.

In order to determine whether Wade Hampton was de facto Governor at the time of issuing the pardon, it is necessary to consider what circumstances must exist in order to entitle a person to be regarded as de facto Governor.

But, before considering the state of the law as it regards this question, it may properly be suggested that it is not enough for the purposes of the present case to determine that Wade Hampton was duly elected Governor and is entitled to exercise the duties of that office, for the validity of his pardon depends on the fact that he was actually in the exercise of these powers at the time of its issuance. It is not enough that he had the right to act as Governor at that time; it must appear that he was, in point of fact, acting as Governor. But, where two persons claim each to be exercising the office of Governor, it may become necessary, in order to determine which has the better presumptive right, to look into those facts which constitute the color of their respective claims, and, in this way, the fact that one has a perfect

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and the other a spurious claim *may come to be judicially discovered, while the real object of the inquiry will stop short of determining the merits of their respective legal titles to the office in question. What, then, is essential in order to constitute one a de facto officer? In other words, under what circumstances may third persons claim that the acts of a public officer are valid and effectual, notwithstanding a fatal defect in the title by which he claims to hold the same? The authority of the cases is far from clear as to what are the essential conditions in virtue of which public official acts are regarded as valid and binding, independently of rightful authority in the public officer from which

they proceeded. The various applications of the rule made in the cases that have arisen under it can hardly be said to have been generalized into any statement that can serve the purposes of an accurate guide to a sound conclusion.

The view which appears to approach the nearest to satisfying the reason of the rule as laid down, and to connect together the various points actually ruled, is embraced in the statement that to constitute an officer de facto he must have a presumptive or an apparent right to exercise the office, resulting from either full and peaceable possession of the powers of such office or reasonable color of title with actual use of the office.

There are two distinct cases put in the foregoing statement: One case is where one in possession has full and peaceable possession, and the other where, while in the actual use of the office, he cannot be said to have full possession of all its powers. By "full possession" is meant such possession as would enable its incumbent to fulfill all the substantial purposes of such office. The case last mentioned would embrace one where two persons claiming adversely to each other had succeeded each in becoming invested with some of the functions of the office and thereby excluding the other to such extent from the full use of the office. It is evident that these cases embrace all contingencies likely to arise and cover the principles involved. An instance of the first class may be supposed when one claims and occupies the office of Governor with full recognition and the possession of all the powers of the office in virtue of an election. It happens that subsequently it is determined judicially that the election under which such claim is made was unconstitutional and void. We suppose a case where the judgment does not proceed on the direct right to hold the office of Governor, but collaterally to it. It is clear that, not-

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withstanding such a decision, *the official acts of a person filling the office of Governor would still be entitled to respect as valid.—Taylor v. Skrine, 3 Brev., 516. And yet, after it is known by final judicial action that the election was invalid and void, it could not be said that subsequent official acts derive their validity from the fact that the incumbent possesses colorable title to his office at the time of performing such acts. We may suppose a case still more severely testing these principles: As when, after the election and before the installation of the person elected Governor, a judicial determination declaring the election void had occurred, and yet the person claiming election proceeds and takes the office and becomes fully and peaceably invested with all its powers. In this case it cannot be doubted that the official acts of such person would be entitled to be respected. It will be remarked in this connection that full and peaceable possession of the gubernatorial office implies, from its nature, recognition by the branches of the government co-ordinate with the executive. In the last supposed case the officers would enter without any color of title, but against clear right, and yet it might so happen that unless such succession should take place a lapse in the administration of the laws might occur, rendering such succession desirable.

Whatever may be thought as it regards inferior offices, the ground upon which the duty of the citizens to obey the chief magistrate of the State rests should be easy of comprehension—as free as possible from mere matter of opinion and from fictions of law. Uncertainty as to duty in this respect tends to breed public disorder. If the proposition is advanced that obedience to a chief magistrate is due whenever he is found fully and peaceably possessed of the powers of his office, it is at once intelligible and the reason is apparent. If, on the other hand, it is affirmed that that duty is limited to cases where such officer has color of title, doubt and uncertainty immediately arise as to what constitutes color and what is the measure of sufficiency as applied to mere color of right.

The simple form stated is the one in which Bacon puts the doctrine of obedience to the reigning sovereign in the reference above given. The case of two persons claiming by antagonistic title, each possessed of some of the powers or functions of the same office, evidently must be treated on different principles from those just stated; neither having complete possession, a resort must be had to the respective grounds on which their several claims stand. If the question arises between

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third parties, where there is a dis*puted Governorship, the Courts cannot pass judgment directly and finally upon the merits of their respective titles for the want of proper parties to such a decision. It is obvious, then, that in a collateral proceeding the question will be: "Which has the best apparent right?" The presumption of law will clearly arise in his favor. The appearance of right, real or unreal, in fact, is what is called "color," and it is manifest that color may exist from the least appearance of right to that which is complete and convincing, and which is, in itself, the highest legal evidence of right. It is manifest that if two persons are contending for the same office, and neither can take advantage of the fact of full and peaceable possession, the one that has the clearest and the best ground for raising a presumption of title ought to be preferred. It is necessary to look into adjudicated cases to see if the foregoing conclusions have adequate support. It will not be necessary to group the cases with reference to distinctive features of the question, but to consider their separate effect upon the general propositions. Such a research is indispensable before the grounds can be clearly known upon which the present controversy must be disposed of.

As would be anticipated, the English cases

do not develope the doctrine in question as fully as it is stated in the American cases. In this country the modes of election and appointment and the conditions precedent to taking actual possession of office are various and often involve particulars that are not evidenced with that certainty requisite to enable the community to judge accurately as to the merits of a claim to perform the functions of a public office. The executive commission in this country, while evidence of the fact of appointment or election, is not conclusive but may be rebutted, while the royal commission is not only evidence of title but the source of title itself. Woodbury, J., in Johnston v. Wilson, (2 N. Hamp., 202,) says: "On general principles, the choice of a person to fill an office constitutes the essence of his appointment." * * * "After the choice, if there be a commission or an oath of office, or any ceremony or inauguration—these are forms only—which may or may not be necessary to the validity of any acts, under the appointment, according as usage and positive statute may or may not render them indispensable." This authority, well supported by citations, affords an explanation of the fact that, under the local customs and laws of the various States, the question of title is surrounded, in this country, by many complexities.

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*Richardson, J., in State v. Billy, (2 N. & McC., 356,) says: "Regarding then, the common law, we easily perceive why a commission may be essential under the English government. There, in a word, it is at once the expression of the royal will and the partial delegation of his power. There, for the purposes of his office, the officer is the agent of the King, and his commission is his letter of attorney, wherein he finds his power, of what kind and to what extent." He further says that "in this country the officer derives no power from the chief magistrate." It is apparent, as it regards all officers in England who derive their authority by commission from the King, that the evidence of their authority is so notorious that no field exists for that class of contests as affecting officers of that description which are essential for a full judicial development of the principles involved. The doctrine has indeed been applied in that country to corporate officers, but it is easy to see that its application to corporate officers must involve important modifications of the rule as appropriate to the officers of the supreme government. The evils resulting from uncertainty as to the exercise of public authority delegated to a corporate body are local and comparatively small, while the means for remedying abuses or lapses of public authority of that class are ample.

The result reached in Rex v. Lisle (2 Str., 1090,) was doubtless due to the peculiar relations subsisting in that country between the King and corporations existing by his grant. In that case, it was held that the want of due appointment by a Mayor who presided at a corporate election invalidated the election to such an extent that the person chosen as Mayor at such election was held incapable of holding the office as against the crown. Here the origin of corporate authority is so different that a different conclusion would probably arise from the application of the principles applicable to de facto holding. It must be borne in mind, however, that the last mentioned case involved the effect of the public acts of an officer having no more than de facto authority from the crown, and differs materially from such as concern the effect of such official acts in those persons only. The principle in question would seem to find better illustration in cases involving the public authority of the reigning sovereign, for in that case the argument drawn from necessity and public convenience has its utmost force. It is said in Bacon's Abridgment, Prerogative A, quoting from Foster's Criminal Law, 399, that what constitutes a

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King de facto is "full and *peaceable possession of the crown." The reason for the rule as to de facto officers is stated in Viner's Abridgment, 114, as follows: "For the law favors acts of one in a reputed authority and the inferior shall never inquire if his authority be lawful." The elements of the ground of recognizing de facto competency, as stated in the two authorities just cited, are "reputed authority" and "full and peaceable possession." These are readily resolved into the statement already made, which places the right upon a presumption arising out of the fact of full and peaceable possession.

People v. Collins, 7 Johns. R., 549: In this case a Town Clerk refused to file a survey of a public road on the ground that the Commissioners of Highways were not duly in office. The Court granted a mandamus to compel the filing of the survey on the ground that the Commissioners were de facto such, and the Clerk, being a ministerial officer, could not dispute their authority. In holding the Commissioners to be de facto, stress is laid upon their having color of title to their office. The Court says that the Commissioners "were Commissioners de facto, since they came to their offices by color of title, and it is a well settled principle of law that the acts of such persons are valid when they affect the public or the rights of third persons who have an interest in the act done; and this rule is adopted to prevent the failure of justice." This statement, while it recognizes the fact that color of title is adequate ground for claiming as against third persons the right to exercise the functions of an office, does not necessarily include the idea that proof of color is unnecessary when full and peaceable possession is had of the

functions of such office. Had the case presented no color of title, but the mere fact of full and peaceable possession, that question would have been before the Court; but it appears to have been otherwise.

Fowler v. Beebe, 9 Mass., 231: This was an action between third parties involving the due service of process purporting to have been served by a Sheriff's deputy. It was alleged that the Sheriff had never been appointed such. The fact was that the County in question had been newly created, but that the Sheriff had been appointed by the Governor before the Act passed, and therefore at a time when the County had no legal existence. It was held that the Sheriff was de facto such, and that his title could not be disputed in a case where the Sheriff was not a party; that it would have been otherwise

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in an action in which the Sheriff was *attempting to justify under process, or where an information to try his title had been brought. The precise grounds on which the conclusion that the Sheriff was such de facto rests are not stated. Judging from the report, it might have rested on the ground that the Sheriff, being in full and peaceable possession of his office, his acts were entitled to be respected, as affecting third persons, until his title was disproved in a direct proceeding, or upon the other ground that he had color of title. It is difficult to see how his title could be regarded as colorable, the fact being that at the time of his appointment there was no such office as the Sheriff of that particular County to fill, and the act of the Governor was necessarily a nullity. If that which the law adjudges bad on its face is held to have the color of good, then the idea of color has no substantial meaning or value. Then a notoriously bad title is a foundation for a claim of de facto competency equally with one that is presumably good, or at worst disputable. In that case, color would be a mere fiction and not a fact, and the essential fact would be the possession had of the functions of the office. It will be hardly necessary, after the substantial reasons of the rule given by Bacon, to have resort to a modern fiction for the purpose of founding the doctrine upon its principles. With time fictions tend to give way to the substantial truths they cover, but the reversing of this process is an unfavorable indication. When proof of color of title is resorted to for the purpose of converting a partial possession of the functions of an office into a possession recognizable as full and complete, it serves a substantial purpose and should be defined in a manner agreeable to the substantial office it is called upon to perform. If the idea of color is confined to titles that may be presumed good without violating any rule or principle of law, then a test is afforded that can yield substantial assistance in defining the grounds of the efficacy of official acts. It certainly would not fairly represent the decision of the case last adverted to to hold that it had determined that the title of the Sheriff had color of being good notwithstanding it appeared, as matter of law, that the appointment was wholly void.

Backman v. Ruggles, 15 Mass., 180:

This case clearly involved a question of color of title. A Deputy Sheriff had been appointed, but had not qualified for the discharge of the duties of his office. The failure to qualify was matter of fact that demanded proof, and it is a clear case for third

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parties to rest *on the presumption that all was rightly done that was requisite to perfect his right to exercise the office under his title.

Mason v. Dillingham (15 Mass., 170,) occupies the same ground as that last stated.

Johnston v. Wilson, 2 N. Hamp., 202: This case turned on the right of a defendant to justify in trespass under authority of an office claimed by him. Still, the case contains valuable references to the general doctrine as affecting third persons, and recognizes the rule applied in the two cases from the Massachusetts report just cited.

McBee v. Hoke, 2 Speers, 138: The action of one claiming to be Coroner was here in question as affecting third persons. He had been duly appointed, but had failed to qualify. It appeared that he had held the office for the prior term under due appointment and qualification, and was entitled to hold over until his successor was duly appointed and qualified. The Court held that he was de facto Coroner and his official acts were binding on third parties. Judge O'Neall, who delivered the opinion of the Court, with his accustomed vigor and aptitude to lay hold of the substantial truth of cases, says: "I take the broad ground that, being found in office, of which he had been the incumbent for many years, the plaintiff had the right to regard him as Coroner, and his acts for them are good." Again, he says: "One in office and transacting its duties is supposed to be rightfully there, and, so far as third persons are concerned, that presumption legalizes his acts." Here are two consecutive statements, the first of which embodies the facts on which the efficacy of the official acts in question depended, and the last the rule applicable to such facts. In the first statement long-continued possession is spoken of, but when the rule is stated importance is not attached to the duration of such possession. The Coroner, in that case, had been many years in the office, and that fact was important as tending to show that his possession was full and peaceable; but Judge O'Neall did not place the right of his official action to recognition on the ground of its duration. The reason of this is obvious. As the terms of office in this country are short, the rule

would be of little value if only applicable to cases of long-continued possession, using this term in the sense in which it is used in connection with the rule of law inferring presumptively title to property from the fact of long-continued possession. The presumption of title to office as validating official acts

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*does not arise out of the principle of the rule just referred to, but out of another and distinct rule, having its foundation not in the nature of evidence but in considerations of public policy and convenience. It is because the functions of the body corporate, like those of the physical body, ought always to be performed that validity is ascribed to the official acts of persons improperly in office.

Judge Evans, in Kottman v. Ayer, (3 Strob., 92,) while approving the language just quoted from Judge O'Neall, thinks that it was not necessary to the case before him, and, therefore, to be regarded as obiter dictum. It is true that the Court of which Judge O'Neall was a member might have put the decision in the case of McBee v. Hoke upon the ground that the Coroner, being duly appointed, was in under color of title, notwithstanding his failure to qualify. They did not, however, place the case on that ground, but distinctively on the proposition laid down by Judge O'Neall. When a Court lays down a proposition and places the decision of the case distinctly upon it, its acts should have authoritative weight, even if other grounds existed upon which the judgment of the Court might have been placed. It is impossible, at all events, to resist the conclusion that the case under consideration developes not only the sound theory of the subject but a practicable rule suited to the emergencies calling it into action.

State v. Hill, 2 Speers, 150: Here David R. Coleman claimed the office of Coroner, to which an appointment had been made in the name of Daniel Coleman. The whole Court concurring, Judge O'Neall places the conclusion that David R. was de facto Coroner upon the decision in McBee v. Hoke. The Court escaped the necessity of saying whether an appointment of Daniel was sufficient color to enable David R. to claim the office from the fact of full and peaceable possession, which brought the case within McBee v. Hoke. This was a fortunate circumstance, for if the appointment of Daniel could give color of title to David R., it could equally well give it to any other person having the same surname.

Kottman v. Ayer, 3 Strob., 92: The Justice in this case was duly appointed, but failed to qualify. The case was distinctly decided on the ground that he had color of title. Judge Evans, in the opinion of the Court, says, referring to the language of Judge O'Neall quoted above: "These propositions, though not absolutely necessary to be affirmed in that case, and which may be

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supposed to be mere dicta, I *propose to show are supported by all the authorities." He adds: "I do not undertake to say that in an organized state of society, under a regular government, the acts of an usurper, of one who obtrudes himself into an office without color of claim, would be binding; but where the electing or appointing power has conferred the office upon him, and he is in the actual discharge of its duties, without his title being questioned in any legal way, the community in which he lives have a right to regard him as a legal officer, and his acts as to them will be valid." The statement very correctly places the authority to be ascribed to the official acts of one improperly in office upon the right of the community, for its own convenience, to regard him as such. The case of an usurper referred to evidently carried in the mind of the Judge the idea of one attempting to force his will against that of the whole community. It is evident that while such a state of things should exist such usurper could not get the benefit of the rule that exacts proof of full and peaceable possession. But should the community conclude that it was better for a short time to submit to the usurper than to encounter greater possible evils, there is no sound reason why they should not be permitted to do so. The rule in question looks solely to the convenience of the public and pays no regard to any supposed right of a mere intruder. The case here put, of having a good color of title, was the very case before the Court, and it is reasonable to conclude that Judge Evans intended to carry his statement of the rule only so far as was essential to the decision of the particular case. On the whole, this case does not appear to add to or detract from the strength of the decision in McBee v. Hoke beyond indicating that the rule there broadly laid down admits of some limitations. In stating the rule as extending only to cases of full and peaceable possession it would seem that such a limitation as that implied in Kottman v. Ayer might be solely reached.

State v. Hayward (1 N. & McC., 546,) follows Rex. v. Werbst, (3 Camp., 432,) holding that one not having legal title as a Justice could not administer an oath so that perjury would lie as for false swearing. To such cases the rule under examination is not considered as extending.

Taylor v. Skrine, 3 Brev. 516: The official acts of a Circuit Judge are called in question in this case. He had been appointed by the Governor, but subsequently the authority under which the appointment was made was

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held to be unconstitu*tional. The official acts of the Judge were held valid, but the case was put on the ground that he had color of title. It is probable, from the citations, that the Court intended to follow the statements of the rule in the New York cases,

which appear to lay stress on the possession of color of title. The New York cases do not appear to have intended an exhaustive statement of a rule, and were not such as to call for the consideration of the question whether, in the absence of color, possession of a certain character could be sufficient ground for validating official acts. Taylor v. Skrine would doubtless be more readily and satisfactorily explained upon the grounds laid down in McBee v. Hoke, but that view of the case does not appear to have been presented or considered. Had such case been regarded as conflicting with the views presented in McBee v. Hoke, it would no doubt have been particularly noticed in that respect in the last named case. It will be observed that the cases do not call in question the correctness of the rules stated in Bacon's Abridgment, already referred to, in their application to the chief executive, whilst a reasoning that runs through them has the same character with that given for the authority of a de facto King to issue a valid pardon. It is also noticeable that nowhere is the case considered of two persons each claiming adversely to the other partial possession of the same office, and each referring their right to a claim of title, and each showing something that may be regarded as color of title. It would follow then that the rule which has been stated is, at all events, applicable to the acts of the chief executive in their bearing on third persons, and that the effect of inconsistent claims as to the possession of color of title must be determined according to the principles involved without decisive aid from the adjudicated authorities. Applying, then, to the present case the test of full and peaceable possession, it becomes necessary to inquire whether Wade Hampton, at the time of issuing the pardon, had full and peaceable possession of all the necessary functions of the office of Governor. It will not be necessary to state all the facts and circumstances having a bearing on the question.

It is enough for the present purpose to know that Daniel H. Chamberlain claims to be Governor of this State, and is recognized as such by the Senate, while Wade Hampton holds the recognition of the House of Representatives. Without recognition of both bodies that comprise the General Assembly,

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no person can be said *to have full and peaceable possession of the office of Governor, for the most important duties of the office relate to the share that the Governor is entitled to take in the exercise of the law-making power. A failure on the part of either branch of the Legislature to recognize the person claiming to hold the gubernatorial office places it out of his power to perform functions essential to the office of Governor, and without the performance of which the purposes of that office cannot be said to be fulfilled. This Court has already decided, in Wallace v. Mackey, [8 S. C. 367] that the body presided over by Speaker Wallace is entitled to be recognized by the judicial authority as the House of Representatives. It is this House that recognizes Mr. Hampton. The body presided over by Mr. Mackey, not being judically recognizable as the House of Representatives, its recognition is of no legal importance. It follows that neither of the claimants can show that he has full and peaceable possession of the gubernatorial office, and the next question that arises is, which is entitled to recognition on a ground of possessing sufficient color of title? Both are in possession of some of the functions of the office, while there are functions that, at the present moment, neither can fully perform. It is clear that it is not pertinent to ask which has a greater share of the proper powers belonging to the office in question, as that fact cannot become decisive between them in this case. One or the other has the better apparent or presumable right, and it is perfectly manifest that, from the nature and necessity of the case, as well as from the application of the principles and tests already discussed, resort must be had to the evidence of title exhibiting the nature of their respective claims of right to take the office in order to see which has the best apparent or presumptive right.

That claim to perform must be preferred which arises from the performance of acts of public authority conformable to law and appropriate to perfect or present right to enjoy the office in question.

Two things are essential to perfect a present right of possession—election and installation. Election determines the right to succeed the existing incumbent at the time and in the manner prescribed by law, and installation establishes a present right to exercise the functions of the office.

The color of title by which the respective parties claim consists of certain public acts claimed to amount to an election and installation.

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*Looking into the evidence that discloses the fact of the performance of these acts, we are to say whether either of the persons claiming to possess the office of Governor shows a due performance of all acts of public authority essential to complete a present right to the office. Both cannot show that fact. One or the other must show a failure in some or other of the essentials in this respect. If we find that either possesses clear evidences of that character, it is evident, if the principles already presented should govern this case, that he must be recognized as Governor de facto. Although, as has already been said, the issue joined does not impose upon us the necessity of determining the absolute de jure right of either, yet that color of title must be preferred that rests on the best grounds—on the appropriate acts

of public authority that, under the law, complete a legal right of present possession. If, then, we find that either of the persons shows a title of that kind, the inquiry must stop, for that fact excludes the possibility of any right in the other. The question then arises, is it made to appear that Wade Hampton has been duly elected and installable as Governor? The person properly filling that office is made such by the Constitution, through conformity with its provisions. The Constitution, as will appear, assumes to provide all the means requisite to the accomplishment of this purpose, and gives the sanction of authority that accompanies and follows the exercise of such means. The provisions of the Constitution bearing on the subject are as follows:

"Article III, Section 2. The Governor shall be elected by the electors duly qualified to vote for members of the House of Representatives, and shall hold his office for two years, and until his successor shall be chosen and qualified, and shall be re-eligible. He shall be elected at the first general election held under the Constitution for members of the General Assembly, and at each general election thereafter, and installed during the first session of the said General Assembly after his election, on such days as shall be provided by law."

Article III, Section 4: "The returns of every election of Governor shall be sealed up by the Managers of Election in their respective Counties and transmitted by mail to the seat of government, directed to the Secretary of State, who shall deliver them to the Speaker of the House of Representatives at the next ensuing session of the General Assembly, and a duplicate of said returns shall be filed with the Clerks of the Court

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of said Counties, whose *duty it shall be to forward to the Secretary of State a certified copy thereof upon being notified that the returns previously forwarded by mail had not been received at his office. It shall be the duty of the Secretary of State, after the expiration of seven days from the day upon which the votes have been counted, if the returns thereof from any County have not been received, to notify the Clerk of the Court of said County and order a copy of the returns filed in his office to be forwarded forthwith. The Secretary of State shall deliver the returns to the Speaker of the House of Representatives at the next ensuing session of the General Assembly; and during the first week of the session, or as soon as the General Assembly shall have organized by the election of the presiding officers of the two houses, the Speaker shall open and publish them in the presence of both houses. The person having the highest number of votes shall be Governor; but if two or more shall be equal and highest in votes, the General Assembly shall, during the same session, in the House of Representatives, choose one of them viva voce. Contested elections for Governor shall be determined by the General Assembly in such manner as shall be prescribed by law."

Article VIII, Section 10: "In all elections held by the people under this Constitution the person or persons who shall receive the highest number of votes shall be declared elected."

A general election was held on the 7th day of November last. Returns were made out by the Managers of Election in the several Counties in duplicate. One copy of these returns was sealed and transmitted by mail to the Secretary of State and the other copy was filed in the offices of the Clerks of the Courts of the respective Counties. Thus far the law was fully complied with. It is in evidence that, according to these returns, Wade Hampton was elected Governor. It is to be observed that, by the Constitution, the returns constitute an open record from the time they are made out by the Managers of Election, and as such are required to be filed as open public records in the offices in which records intended for general public information are usually filed. The sealing of the duplicate copy delivered, intended for the Secretary of State, is not for the purpose of concealment of the facts set forth, but to insure against alteration while being transmitted to the hands of the Speaker of the House of Representatives. In this respect the Constitution of this State differs from that of the United States, attending which last no publication of the results of

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the voting of *the Presidential election can take place until a proper body is constituted, consisting of the Senators and members of Congress, to witness the opening and publication thereof.

In this State, publications for all general purposes, including the forming of evidence on which to base judicial action, is accomplished, by the direct command of the Constitution itself, by the act of filing in a public office. The subsequent publication before the two houses of the General Assembly is obviously for the purpose of acquainting them with the result of the election, so as to enable them to ascertain whether they are called upon to perform the only acts in reference to the gubernatorial election committed to them, viz.,—making choice between two candidates having equally the highest number of votes, and determining any contest of the vote for Governor that may appear to be made in the manner prescribed by law. The effect of that clause of the Constitution that declares that "the person having the highest number of votes shall be Governor" is that if it appears by the record, consisting of the Managers' returns, that any one person has received the highest number of votes, such person becomes ipso facto Governor, unless a case contesting the truth of that record is

presented in competent form. Has there been a competent contest of the vote for Governor? The language of the Constitution on this point is that "contested elections for Governor shall be determined by the General Assembly in such manner as shall be prescribed by law."—Article III, Section 4. A contest is a proceeding more or less formal, by which conflicting claims to an election are determined by some competent body. The mode of conducting such contest is prescribed by statute in the following terms, (Gen. Stat., 32, § 28): "That in case of a contest of the election of Governor, (if the General Assembly, by concurrent resolution, shall entertain the same,) the Senate and House of Representatives shall each, separately, proceed to hear and determine the facts in the case, so far as they deem necessary, and decide thereon who, according to the 19th Section of Article VIII of the Constitution, is entitled to be declared elected. If the two branches of the General Assembly come to the same decision, they shall, by concurrent resolution, declare who is duly elected and entitled to enter upon and exercise the office of Governor, and such person shall thereupon, upon taking the oath of office prescribed in the Constitution, be inducted into office." The statute then provides for an election in case

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the houses cannot *agree. A contest presupposes parties opposed in interest, a subject of controversy and notice thereof brought to a body capable of determining it. A contest of the vote for Governor must be recognized according to the terms of the statute by a concurrent vote of the two houses, otherwise it cannot exist as such. The Constitution in terms having subjected such contest to the rules of proceeding prescribed by law, and a law following that constitutional authority having prescribed, as a condition precedent to its legal existence, that a concurrent resolution should be adopted recognizing the fact of contest, it follows that no contest can be deemed to exist unless such a concurrent resolution was adopted. No such concurrent resolution appears ever to have been passed. The Journals of the Senate and House of Representatives show no such resolution, and none is pretended. No concurrent action of any kind took place between the Senate and House of Representatives. It is not necessary to look into the proceedings that took place between the Senate and the body popularly called the Mackey House, as the latter body has no legal character. It may be remarked, however, that it is not pretended that any concurrent resolution of that kind was ever adopted by those bodies.

The foregoing conclusively settles that no case for disputing the truth of the Managers' returns has been legally or constitutionally created; but it may be observed that it does not appear that there was before either branch of the General Assembly any notice whatever of any such contest either forwarded with the Managers' returns or brought in by memorial or otherwise, or that parties to any such contest were represented, or that any action was ever taken by either house separately to determine the facts of any such contest. It therefore follows that the declaration of the Constitution, "the person having the highest number of votes shall be Governor," was entitled to the full force intended for it. It remains to consider what is that force. This provision is to be considered with the general legal proposition that the election and not the mode of subsequent authentication constitutes the essence of de jure right.—Johnston v. Wilson, 2 N. Hamp., 202.

The Managers' returns constituted the primary evidence of the fact of election, made such by the Constitution itself, and the declaration that the person having the highest number of votes shall be Governor must be referred to the constitutional record evidencing the facts. If the record is disputed

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in a competent mode, *then the declaration of the Constitution is displaced, and the determination of the contest disputing such record and the declaration of the General Assembly, based on such determination, become the efficient means of designating the person to be Governor.

In the present case the evidence created by the Constitution was not disputed by any competent contest and remained final and conclusive both upon the Legislature and the Courts. The Constitution does not require, in cases of this kind, that any declaration whatever shall be made as a condition precedent to the vesting of right to the office of Governor. It is contended, however, that transmitting the sealed Managers' returns to the Speaker of the House of Representatives and the opening and publication of returns in the presence of the two houses are conditions precedent to the force of this declaration of the Constitution becoming effective by way of constituting a Governor. Are they made such by the express terms of the Constitution or by any necessary or reasonable implication?

The strongest argument that can be drawn from the text of the Constitution in support of the view is based on the fact that the transmission of the returns to the Speaker of the House of Representatives is spoken of first in order; then the opening and publishing of the returns, and then follows the declaration in question. The proceedings in the General Assembly are spoken of in one sentence. Then follows, in a separate sentence, the declaration. There is no grammatical evidence of an attempt to connect them. The argument from position is all that can be drawn, and that is, at least, merely inferential, and the weakest kind of argument that can be applied to the ascertainment of the meaning of language. Ordinarily, stat-

utes imposing duties on public officers endeavor to present their duties in a successive order, approaching, as nearly as possible, to that in which, in point of time, the events will arise to which they relate. This is done as a matter of convenience. It is not to be assumed that in statutes of this class the various provisions introduced are so placed as to evidence in the clearest manner their legal dependence or independence of each other; for that mode of grouping is not customary and is unlikely to become so until Legislatures are wholly filled by lawyers and logicians. The reason of a statute is to be arrived at by less formal means. There is no evidence on the face of the Constitution of any express intent to make the force and effect of its declarations dependent upon the

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*performance by the Legislature of the duties cast upon it. It is equally clear that it is not a necessary implication, for the antecedent acts are not essential to the efficacy of the declaration. It is only that which is necessary and essential that is drawn into the text of a statute on the ground of necessary implication. This will more fully appear when the argument in favor of allowing the view contended for as a reasonable implication from the text is considered.

The general object of a statute must be considered in order to ascertain what is or is not a reasonable inference from its terms. The object of the Constitution was to establish a permanent form of government. As essential to that object, it sought to distribute the great powers of government,—legislative, executive and judicial,—between three co-ordinate branches, each as independent of the other two as prudence would permit. While each was capable, in the nature of government, of acting more or less upon the others, still it was obvious that the existence of one or the other of these great and necessary features of the government should not become dependent upon the performance by another of these bodies of mere acts of form and ceremony. If such should be permitted, one might destroy the others and break up the balance and equilibrium of the powers of government and subvert the essential objects of the Constitution. This principle is so plain that it needs no elucidation.

It is only necessary to bring the present case within the principle just stated to dispose of the construction contended for. Where there is a choice on the face of the returns, and no contest of the truth appearing on their face, the Legislature has nothing but a formal duty to perform. That its duty is not of substance appears by the fact that it cannot affect the result if duly performed; and its only substantial significance would arise from such a construction as would allow a failure in the performance of such duty to defeat the object of the Constitution, viz., the succession of the person chosen by the electors to the office to which he had been elected. The act of opening and publishing the returns is clearly for the purpose of giving them information enabling them to see whether they have any duty to perform in the premises. For all other purposes publication took place at the filing of the Managers' returns with the Clerk of the Court. If there had been no choice on the face of the returns, then the duty would have

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been substan*tial in its nature, as we have already seen. So, had there been in point of fact notice of a contest, the duties of the two houses might have been substantial had they chosen to recognize the existence of such contest by a concurrent resolution. The failure to perform their general duty left the question in the simple form in which it stood on the face of the returns. It therefore appears that the only substantial function possessed by the General Assembly consisted in disputing the returns, and failing to exercise this function had only the effect to leave the returns in full constitutional force and to leave the Legislature in the position of neglecting a duty formal in its nature merely, which, upon the construction contended for, would effect a destruction of the existence of a rightful claim to the executive office. That such a construction could have been approved by legal minds imbued with the principles of constitutional law can only be accounted for by the force of party interests for a time obscuring just views of fundamental principles. One of the most important principles of the foundation of constitutional government, and essential to its stability, is this: That unconditional declarations of the supreme law, capable in their nature of taking force without the intervention of any act—either legislative, executive or judicial—derive full efficacy from the Constitution itself and become ipso facto executed. This principle, now fully understood and applied by the Courts, is decisive in its application to the matters just considered, while applying with equal force to that which is to follow.

Thus far we have considered which of the parties claiming to be in the office of Governor possesses reasonable color of title, so far as it regards the claim to have been elected to that office, and we have found that the one whose pardon is the subject of the present discussion possesses that advantage. It remains to consider whether the circumstances attending the accession of each to supposed possession of the office afford in themselves color of title that cannot be questioned.

It is not necessary to consider what might have been the effect if Mr. Chamberlain had been inducted into the office of Governor by the full consent and co-operation of both bodies of the Legislature, for such was not the case. Had it been, it is unlikely that

two distinct persons would be found at the same time each claiming to have actual possession of the office.

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*Recognition by the Legislature would have practically placed the recognized incumbent in undisputed possession and left it to the other contestant to find means of asserting a claim to the office de jure. The recognition of Mr. Chamberlain by the Senate alone, without the House of Representatives, was without effect for any purpose; nor did the Senate, uniting with a body of persons possessing no legal competency, confer any color of title on him as claiming incumbency through such an act.

Mr. Chamberlain in assuming to take the office must be regarded as owing such possession he may have to an act of unlawful usurpation. This act was rendered possible by the use of unlawful military force in controlling the organization of the legislative body, and carried out, notwithstanding the decision of this Court divested the body resulting from such forced organization and styling itself the House of Representatives of all right to recognition by that title in the Courts. It was upon the authority of such illegal body, and after its character was ascertained by this Court, that Mr. Chamberlain attempted to rest his right to take possession of the gubernatorial office upon a claim of having been elected Governor for two years at the last general election.

An act thus clearly violative of the Constitution as interpreted by this Court, and accomplished in defiance of the right of this Court to give a final construction to the Constitution, can have no effect to confer color of title upon an alleged incumbent.

But it is said that, admitting that the attempt of Mr. Chamberlain to possess himself of the office for the new term proved abortive, still he must be regarded as holding over under his antecedent term, under the constitutional right to hold over until his successor was chosen and duly qualified.

There are two answers to this proposition. The first is that he had voluntarily abandoned the office by his former title when he assumed to hold by a new title and tenure; and that his successor having duly qualified by taking the oath of office the constitutional right ceased and could no longer afford color of right to its possessor.

Counsel have ably and elaborately argued from the principles applicable to leases and from grants from the crown to show that the acceptance of a new title and tenure is a virtual relinquishment of any unexpired title or tenure derived from the same source subsisting at the time of taking the new title and tenure.

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*Even if it were conceded that the principle contended for in this respect were not fully illustrated in the class of cases adverted to in the argument, it is free from doubt that they are applicable in the present case.

The whole object of the Constitution in directing that certain public officers should continue to discharge the duties of their offices after the expiration of their legal terms and until their successors should be duly chosen and qualified was to provide for the discharge of the public functions annexed to such offices until there should be found to assume their exercise persons possessing rightful competency. If a third party had claimed to have been elected and qualified to take the office, and the outgoing Governor had seen fit to recognize his right of succession, and permitted him to assume the functions of Governor, it will not be pretended that the former incumbency could be resumed under any circumstances, even though it should be found that such successor was not elected or qualified according to law. The effect of allowing succession, though in the same person, is the same, because the same reason underlies it. To hold that one who, at the termination of his office as chief magistrate, attempts to perpetuate his incumbency by a clear act of unlawful usurpation, and, when driven from that claim, may fall back upon a provision of the Constitution designed wholly and exclusively to facilitate the transmission of the chief magistracy from one lawful successor to another, contradicts all legal reason, and would be equivalent to surrendering the highest office in the government to become a prey for the crafty and unscrupulous. It is unnecessary to elucidate this proposition, novel as it is, for it is at once condemned by that right sense of justice that lies at the foundation of law, and has no support in any known principle or precedent.

Not only did the outgoing Governor evince an intention to relinquish the office as previously held by him under authority of a former election and qualification, but in point of fact he lost that full and peaceable possession that he previously had the moment he assumed to take it at the hands of an unlawful authority, by losing at the same moment recognition by the House of Representatives requisite to complete possession, and from that moment the fact of possession passed into legal doubt and dispute. It is the settling of that dispute that constitutes the matter of especial interest in the present case, and, as we have already seen, the decisions of the

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*Courts bearing on the question of de facto holding afford certain rules and principles upon which that disputed question of possession must be determined.

On the other hand, the facts of the Governor elect having been duly elected and qualified and having taken the oath of office, whereby he became qualified to succeed to the office, are circumstances that afford indisputable color to his claim, because resting on

proof that would be conclusive, if the direct question of his legal right to the office were now presented for decision.

It is contended that the clause of the Constitution providing that the Governor elect should be installed on a day to be fixed by law during the first session of the Legislature precludes his being duly installed on any other day than on one fixed in the manner prescribed. It appears that no day has been fixed for that purpose by law since the adoption of the Constitution.

The only object which the Constitution had in view was to make it imperative that the installation of the Governor should not be postponed beyond the end of the first session of the Legislature assembled after the election. Installation implies an act to be performed by the outgoing Governor and one to be performed by the Legislature. That to be performed by the outgoing Governor consists in placing in the hands of the incoming Governor the public property and insignia attached to the office of Governor; that to be performed by the Legislature consists in the recognition of the new Governor by acting with him in the conduct of public business. The fact that the Legislature failed in its duty in this respect did not absolve the outgoing Governor from performing that which was incumbent on him. He was, during the first session of the Legislature, under a conditional obligation to surrender the property and insignia of the office to his successor. That condition had reference solely to a day during that session to be fixed by law for that purpose. The moment that session was at an end the duty became absolute, and he was bound without delay to put his successor in possession of whatever was essential to complete performance of the functions of his office. If it were otherwise, it would happen that, as the first session of the Legislature is ended, no authority exists to fix a day, and the gubernatorial authority has lapsed for the constitutional term of two years, or, at least, is held by a mere locum tenens. The correctness of this view is so clearly apparent that further elaboration is

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altogether unnecessary. It is *clear that Wade Hampton had full right to claim possession of the office of Governor at the time he assumed to take such possession, and the color by which it is claimed that his actual exercise of authority ought to be respected is perfect.

It is hardly necessary to note much that has been said during the recent period of undue and unhealthy political excitement in regard to the powerlessness of the Courts to determine controversies of this class. It is clear that no power can be rightfully exercised unless recognized by the Courts, whether that power is claimed to be lodged in the hands of an Executive or of a Legislature.

The Courts are created to defend the Constitution as well as the laws, and this defense must be made, as against all usurpation of public authority whatever not permitted by the Constitution and laws, the duty of the citizen, under the Constitution and the laws, as measured out by the Courts. If the Courts fail to perform such duties, the fault is not in the system but in the Judges who occupy the bench, and they are capable of being removed by constitutional means. When the Courts cease to speak the law, the remedy is with the Legislature. While the Courts are enabled to perform their functions to the State and to the people, the only legitimate use that can be made of physical force is to execute their mandates. If the Courts should ever assume to deprive the co-ordinate branches of the government of their independence or rightful authority, the remedy would be clearly at hand. If, on the other hand, the Courts are stripped of their actual authority by popular violence, then it is competent for the law of force to supplant that of reason and martial authority to be installed as the last resort to maintain the government. Fortunately no such contingencies have arisen until this time. The proceedings of the Courts have been orderly and effectual, and both the rights of the people, as established by the Constitution and laws, and the rights of those exercising public authority have been respected. Under such circumstances as might have been anticipated, a resort to irregular and unsanctioned forms of force has proven abortive to defeat or prevent the irresistible force that lies at the basis of a government of law resting on right reason, which, while all-pervading and diffusive in its influence, lies in safety in its citadel and stronghold, beyond the reach of physical force, so long as the people love and trust to the principles of justice.

The pardon of Wade Hampton is entitled to be respected as the official act of the Governor of this State.

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*Ex parte SMITH.

(Columbia. April Term, 1877.)

[*Habeas Corpus* ⇨113.]

A decision of a Circuit Judge under a writ of habeas corpus discharging a prisoner from the custody of the Superintendent of the Penitentiary on the ground that he had been pardoned by the Governor is appealable to the Supreme Court.

[Ed. Note.—Cited in State v. Duncan, 22 S. C. 89; Ex parte Jones, 82 S. C. 166, 63 S. E. 743.

For other cases, see Habeas Corpus, Cent. Dig. § 104; Dec. Dig. ⇨113.]

[*States* ⇨41.]

A Governor holds his office until his successor is chosen and qualified, unless he has, by formal resignation or other act equivalent thereto, resigned or abandoned the office, or has, by

his own conduct, estopped himself from holding over.

[Ed. Note.—For other cases, see States, Cent. Dig. § 47; Dec. Dig. ⟸41.]

[*States* ⟸41.]

A candidate for Governor who receives the highest number of votes, whose election has not been contested, and who qualifies in the presence of the House of Representatives and of such of the Senators as choose to attend, after notice to the Senate, is the duly elected and qualified Governor of the State and entitled to discharge the functions of the office.

[Ed. Note.—For other cases, see States, Cent. Dig. § 47; Dec. Dig. ⟸41.]

[*Officers* ⟸79.]

Under the Constitution and laws of this State, the title to an office held by election of the people depends upon the fact of the election, and not upon the acts or omissions of Boards of State Canvassers; and when such fact is shown by any competent authority and the election is not contested, the person who has received the highest number of votes is, under the Constitution, entitled to the office.

[Ed. Note.—For other cases, see Officers, Cent. Dig. § 110; Dec. Dig. ⟸79.]

[*States* ⟸41.]

The failure of the Secretary of State to deliver the returns of the Managers of Election for Governor to the Speaker of the House of Representatives, as he is required to do by Article III, Section 4, of the Constitution, cannot deprive the person who has received the highest number of votes of his right to the office. The fact that he did receive the highest number of votes may be ascertained in some other way,—as, for instance, from the returns of the Managers of the Election on file in the offices of the Clerks of the different Counties.

[Ed. Note.—For other cases, see States, Cent. Dig. § 47; Dec. Dig. ⟸41.]

[*Elections* ⟸267.]

Where an election for Governor is not contested, the prima facie result of the election as shown by the returns of the Managers must be accepted as the true legal result and acted upon accordingly.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 242, 243; Dec. Dig. ⟸267.]

[*States* ⟸41.]

No provision of the Constitution or Act of the General Assembly requires that a Governor elect shall be installed before entering upon the duties of his office. All that is required is that he shall be qualified by taking and subscribing the oath of office prescribed by the Constitution; and although it is eminently proper and suitable to the dignity of the occasion that all the usual ceremonies should be observed, such ceremonies are not essential to the legal validity of a qualification.

[Ed. Note.—For other cases, see States, Cent. Dig. § 47; Dec. Dig. ⟸41.]

[*States* ⟸52.]

One may abandon, renounce or resign an office by act as well as by word. Where, therefore, one has been elected Governor and holds the office for two years and until his successor has been chosen and qualified, and, being a candidate for re-election, is defeated, but claims the office and qualifies as if he had been elected, such claim and qualification is a renunciation of his right to hold over; and if he cannot maintain his title to the office under the second election, he must be treated as if he had resigned it.

[Ed. Note.—For other cases, see States, Cent. Dig. §§ 43, 57; Dec. Dig. ⟸52.]

[*States* ⟸41.]

Where one holding the office of Governor is a candidate for re-election, and, being defeated, goes through the form of inauguration as if he had been re-elected, he is estopped by such conduct from afterwards admitting his defeat and claiming the office under a provision of the Constitution giving him the right to hold over until his successor is qualified.

[Ed. Note.—For other cases, see States, Cent. Dig. § 47; Dec. Dig. ⟸41.]

[*Pardon* ⟸4.]

[A pardon granted by a person who is merely claiming to hold over, after expiration of his term as Governor, and after acts and declarations tantamount to a resignation or disclaimer of any right to hold over, is void.]

[Ed. Note.—For other cases, see Pardon, Cent. Dig. § 4; Dec. Dig. ⟸4.]

[*Elections* ⟸267.]

[Cited in Macoy v. Curtis, 14 S. C. 376, 377; Verner v. Seibels, 60 S. C. Append. 576, 39 S. E. 274, to the point that the commission is only evidence of appointment or election, but does not confer the right to office.]

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 242, 243; Dec. Dig. ⟸267.]

Before Carpenter, J., at Richland, 1876.

This was a petition by Peter Smith for a writ of habeas corpus.

The material facts were that in December, 1876, the petitioner was a prisoner in the custody of the Superintendent of the Penitentiary, under sentence of the Court of General Sessions for a criminal offense of which

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he had been convicted. On the 20th day *of that month he received from D. H. Chamberlain, claiming to be Governor of the State, a paper, under the great seal of the State, purporting to be a pardon. The Superintendent refused to recognize the paper as a valid pardon, and this was an application to the Court for a discharge of the prisoner.

His Honor Judge Carpenter made an order for the discharge of the prisoner, and this was an appeal to the Supreme Court from that order.

Maxwell, for the State, filed the following printed argument:

It is submitted that, apart from the question as to whether Wade Hampton has been qualified as provided by law, he must, nevertheless, be regarded as de facto Governor.

1. Having received the highest number of votes cast at the last general election, he has the de jure title, and is in the actual discharge of the functions of the office.

2. If Daniel H. Chamberlain, his competitor, did not receive the highest number of votes, his only color of title must be derived from his right to hold over by virtue of Section 2, Title III, of the Constitution.

3. He has surrendered such right.

I propose in this argument to confine myself to the consideration of the third proposition.

It is claimed that in the event of an adjudication by this Court that neither of the ri-

val candidates for the office of Governor has been lawfully declared elected and duly inaugurated, nevertheless Chamberlain is entitled to the office in pursuance of Section 2, Article III, of the Constitution.

This Section provides that the Governor shall hold over until his successor shall be chosen and qualified.

The reverse of this proposition is true.

It is submitted that by the record in this case it appears that on the 7th day of December, Chamberlain, claiming to have been elected at the last general election, and claiming to have been duly declared to have received the highest number of votes, thereupon, by a public and notorious act, assumed to take the oath of office as such Governor elect, and submitted himself to a ceremony which he publicly avowed was an inauguration or induction into the said office under the title thereto claimed to have been deriv-

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ed from *such election and declaration. Subsequently thereto, in accordance with the custom in the case of a newly-inaugurated Governor, he wrote and published an address, which he represented to be his inaugural address, and which averred his assumption of the duties of said office by virtue of the title claimed to have been derived from said general election.

What is the legal construction of these acts?

It is respectfully submitted that Mr. Chamberlain, in assuming to clothe himself with the insignia of office as Governor by virtue of his claim to have received the highest number of votes at said election, in submitting himself to a ceremonial of inauguration, and in taking an oath of office as said pretended Governor elect, were equivalent to a surrender or resignation of all right and title to such office by virtue of his preceding term.

A resignation is defined by Bouvier to be the act of an officer by which he declines his office and renounces his further right to use it.—Bouvier's Law Dictionary.

And such resignation need not be by any particular form of words.—Dillon on Municipal Corporations, 200.

It may be by parol.—26 N. Y., 325.

The act of resignation is an act of the will. It may be manifested in any way which precludes the idea of any other purpose. It would be absurd to say that when Mr. Chamberlain assumed to enter upon the duties of the office in question under the new title he at the same time retained the idea or intention to continue to hold under the old. It was optional with him to choose between these two: nay, it was an absolute necessity that he should so choose, unless it can be said that there can be two good titles to the same office existing at the same time—an absurdity plain upon its fact. If, then, Mr. Chamberlain knew when he assumed to take possession of his office under the new title that he could not in the same breath assert a claim to such office under any other title, we have at once two courses of action presented to him, involving the necessity of a choice. A question is presented, to decide which he must, from the very necessity of the case, exercise his volition. He does exercise it. He says, in so many words, "I prefer this title rather than the other." He had the option of determining which one of two titles he would accept, and he chose the one which he thought gave him the longer lease of power. By this very act, therefore, he manifests an intention upon his part to

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relinquish the *former title. It could not be otherwise, unless one can be said to select one of two things or one of two courses of action and at the same time retain that which has not been selected, which would involve a reductio ad absurdam. Before he can assume to act under the latter title he must abandon all claim to the other. Mr. Chamberlain, in assuming to submit to the ceremony of inauguration, and in entering upon the duties of the office by virtue of that ceremony, in so many words said to the people of this State that he had abandoned all right which he had to the office by virtue of that clause in the Constitution. He was at liberty to claim by one title or the other; that he has taken the one course is sufficient proof that he has given up the other. What is this but a resignation—a laying down of the title under the old term, which cannot be held conjointly and simultaneously with the new, since, as we have shown, a resignation is not any form of words, written or spoken, but such acts as evidence an intention to relinquish or abjure the office in question?

In the case of The People against Metropolitan Police, (26 N. Y., 325,) it was said that "affirmative acts on his part are quite as effective as affirmative words, either written or spoken."

In the same case it is held that a refusal to hold an office under a particular Act and to do what that Act requires amounts to a resignation, even when the duties were the same.—Ibid, 327; Dillon on Corporations, 200.

In the absence of any prescribed forms or acts, any facts which at common law would constitute an executed agreement would be sufficient; and the acts and declarations of the party may be received as evidence of the agreement.—People v. Metropolitan Police, supra, 329.

"No case occurs to me," says the Court in the same case, "in which any office in the civil department of the government may not be vacated by the act of the incumbent alone."—Ibid, 330.

At page 332 of the same case the Court continues: "The relator refused to hold the office under this Act. What could he have

done more effectually to divest himself of the office? * * * He had a right to disclaim all title to the office; and if, in fact, he had title, such disclaimer would be a resignation."—3 Hill, 248.

In these cases it will be seen the legal conclusion of a resignation is based upon the intention of the party, evidenced by acts which would be inconsistent with the fact of

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continuing to hold the office. *The important factor in the case is the disposition or intention, which is a question of fact. The incumbent in that case, as in this, did certain things of his own volition, from which a conclusion is drawn.—which is the only reasonable conclusion,—namely, that he must have contemplated a laying down or resignation of the title, which could not, from its very nature, have subsisted simultaneously with the one assumed.

If this reasoning be correct, it requires no extended argument to make it apparent that it could make no kind of difference whether the subsequent title was or was not what was anticipated, since the intention to forsake the former title and the exercise of the will in making a selection between that and the subsequent one must, necessarily, have preceded the actual assumption of the latter.

And the intention having been expressed and the will set in operation in making the selection, the resignation was instantly complete, irrespective of the validity or invalidity of the new acquisition.

When was this intention manifested? Certainly when the selection was made. It was then transformed into an act. Before the intention is thus declared it may be withdrawn or changed; but once expressed, it would be idle to say that it could still continue inchoate and inoperative until it was ascertained that the election had been unwise or that the choice had not resulted as expected.

Millwood v. Thatcher, 2 T. R., 88: The question arose as to whether the acts of plaintiff, who, while holding the office of juror, had been elected Town Clerk, constituted a resignation.

The Court (Buller, J.,) said: "Then as to any option which the party may be said to have had, there cannot be a stronger instance of having made an option than the plaintiff accepting the office of Town Clerk and acting under it. I have no doubt his intention was to keep both offices; but if he be mistaken and choose to accept the last office, he must abide by the consequences, for it is his own act."

Grose, J., same case: "I think the fact of his accepting the latter office will probably be considered as a resignation of the former."

But, again, in addition to the argument tending to establish a resignation of the former title to this office, drawn from the acts of Mr. Chamberlain, as evidencing his intention to yield up the claim based thereupon, it is submitted that, irrespective of this intention, the said acts operate in law as a resignation.

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*This proposition is based upon the rule of law that the act of accepting an office which is incompatible with the one then held by the incumbent works a resignation or surrender of the latter.

In the case of The People v. Carrique, (2 Hill's N. Y., 98,) in which the defendant, who had been a Justice of the Peace under a certain Act, had been elected to a similar office under a subsequent Act, and was sought to be prevented from acting under his first title, upon the ground that he had accepted office and been sworn in under the subsequent Act, the Court (Cowen, J.,) says: "It is therefore said by continuing to act in the Justice's Court, this was rather an election to hold his first office, notwithstanding his accepting, taking the oath of office and entering on duties under the second. The contrary is entirely settled—that a resignation by implication may take place by being appointed to and accepting a new office incompatible with the former. This is an absolute determination of the former office and leaves not a shadow of title to the possessor."—Angell & Ames on Corporations.

"An office may be impliedly resigned or vacated by the incumbent accepting an incompatible office."—Dillon on Corporations, 200; Burnett v. Scribner, 16 Bart., 621.

It is submitted that the offices which Mr. Chamberlain has attempted to exchange are, in their nature, incompatible and inconsistent. It will not do to say that the duties of each are identical. They are held by different titles. The authority by which the incumbent of each is enabled to discharge his functions are totally different in the two cases. The office which was abandoned was filled by a general election which took place in 1874. At the entrance of his career upon that office, Mr. Chamberlain took an oath of office covering that term. That office was terminable on the qualification of his successor, or sooner, at his pleasure. It could not afterwards exist. It was a grant of power which terminated necessarily when either of those events took place. The office upon which he assumed to enter on the day of November last was, although the same in title, in all other respects a different office. He took upon himself new relations; he took a new oath of office; he went through the ceremony of a new inaugural.

The theory upon which the case in 2 Hill turns is, evidently, that the resignation was established not by any particular act of the incumbent, for none was shown except by entering upon another office, but by the fact that the two offices were incompatible. The

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*title and duties of the two offices in that

case were identical, as in this, but they were essentially incompatible in the sense that they were held by different and distinct titles.

The term "incompatible" does not relate alone to the duties of the office, but to the term or title of the office.—6 Wend., 579.

In People v. Metropolitan Police, (supra, 325,) it is said that "the duties of an office are things different and distinct from the office itself."

Therefore, while the duties of an office may be perfectly compatible with each other, as in the case at bar, and as in the case in 2 Hill, supra, it does not follow that the offices are so.

Mr. Chamberlain cannot claim to be acting under two titles to his office. He cannot claim in the same breath, to be the Governor elect and the Governor holding over. The duties of the office may not be incompatible, but their term and title are.

That this reasoning is correct, and that the dictum laid down above that acceptance of incompatible office works resignation of former office, comprehends cases where the titles to the office are incompatible. See also Ex Parte Gray, Bail. Eq. Rep., (S. C.) 87.

In Lawrence against Brown, (5 N. Y., 404,) it is said: "A surrender is worked when an estate incompatible with the one held is accepted by lessee, as when lessee takes a new lease of same lands."

This case is cited, not upon the particular question of surrender, (which will be discussed hereafter,) but to show that the "incompatibility" spoken of had no reference "to the duties or powers granted," but to the title by which the grant is derived.

There is no objection to an officer holding two or more offices at the same time when they can be discharged without interfering with each other; but how can it be pretended that a person may claim the right to hold the same office under two titles at the same time which are, from their nature, inconsistent? Either the one or the other must be invalid. There cannot be two perfect titles to the same office, any more than there can be two or more perfect titles to the same property. The grantee or lessee must derive his claim from the one or the other, and one or the other must fall to the ground. They are inconsistent with each other, and so "incompatible" from their very nature. Either Mr. Chamberlain must hold his office under or by virtue of his prior term, or else, separately and distinctly from that, by virtue of his re-election. It is absurd to say that he can hold under both at the same

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time. If *this be true, it certainly can need no further argument to show that the two offices are separate and distinct. It follows, as a logical conclusion, that before he can assume to act under the one he must abandon all claim to the other. What is this but a resignation—a giving up of the rejected office—without reference to his wish or intention?

Suppose that the person who went through this ceremonial of inauguration, instead of being the actual preceding incumbent, had been a different individual. We will suppose Mr. Chamberlain, however, present and assenting thereto,—taking part in the ceremony,—investing his successor with all the paraphernalia of the office, and proceeding to turn over to him the records and property in his custody as Governor. Mr. Chamberlain retires to private life, and the other proceeds to execute and discharge the duties of the office, (perhaps for months,) when it is ascertained that the newly-inaugurated gentleman was not elected and not entitled to hold the office. Will it be pretended that Mr. Chamberlain had not completely divested himself of all right and title to the office? Could he return to the executive office and begin again where he left off? Would there be any question in that case that he had surrendered his office? Upon no other theory could such a pretended ceremony take place. How, then, can the effect of it be changed merely because it happened to be himself to whom he resigned and transferred the office? The theory is the same. The process is identical. There must have necessarily been a surrender and giving up of the old title before the new one could be assumed, unless the paradox, as we have stated it, that a man may hold an office by virtue of two titles at the same time can be maintained.

Upon the question as to whether the acceptance of a subsequent office operates as a resignation of the former, it is believed that there has been no definite adjudication other than in the cases cited above. But there are a number of well-settled doctrines in cases which are clearly analogous and in which there can be no adverse argument derived from the idea of "incompatibility." Among these may be classed a long line of cases involving the surrender of leases. A brief reference to the nature and source of grants of this character may avail to make clear the analogy between the principle involved in the surrender of a lease and that of a surrender of an office.

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*Under the Roman law, the tenure by which lands, offices and franchises were held was identical. The land acquired by conquest was held by certain individuals, who had their villas or personal habitations and the land immediately attached thereto, and cultivated by them. The balance was leased to the freemen, who came to be termed farmers,—villeins,—and from among these the proprietor or lord of the soil appointed bailiffs and stewards, even in large cities.

All the offices were derived from the proprietors of the land.—Introduction to Reeves's History of English Law, 11, Note 2.

"As the conquest progressed, the lands conquered were allotted to the Romans or lords of the soil, and they had the appointment to offices within their domain and the leasing of lands."—Ibid, 15, Note 3.

Even judicial offices were granted by the proprietors of the soil.

"The lords exercised judicial functions. They had their Courts of law, presided over by their appointees."—Introduction to Reeves's History, (supra,) 97, and Note 3.

"And the Saxons adopted the Roman laws and customs."—Ibid, 37.

"The feudal system derived from the Romans involved the nature of territorial property—the union of sovereignty with property—(the lord having sovereign rights within his domain) and the present system of legislation, which united the possession of feuds." —Guizot, Sect. Sur le Civ. en France, Section 2.

Subsequently the ultimate sovereignty in lands and offices became vested in England —in the crown. The title in either case emanated from that source, and, in this country, so continued, with certain modifications, down to the revolution, which resulted in establishing a form of government in which the fundamental theory is that the people are the sovereign. It is easy to trace the intimate relationship, as regards their origin and nature, of the two classes of grants—leases and offices. Even now, when the fee simple in lands is held by individuals, and leases, therefore, proceed from the individual owners, leaving only leases of office inherent in the people at large, the term "lease" is applied to offices granted by them, and it is customary to speak of such grants as "leases of office," thus, by the very use of the term, acknowledging its source and applicability to offices as well as lands.—Bailey's Eq. Rep., (S. C.,) 87.

Further to show the analogy, nay, the intimate relationship, between leases of office and leases of land, it is said of the former

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*that they may be either for life, for years or at will.—7 Bacon's Abr., 307.

In the fifth volume of Bacon's Abridgment, offices and lands are spoken of indiscriminately under the head "of what a lease may be made for years." And no distinction is made as to the various rules applicable to leases in either case.—5 Bacon's Abr., 438, 439.

In a word, the analogy is clear. The lord was in all things the sovereign; now the people are the sovereign. Leases of lands and of offices were both derived from the lord. The origin of the title to lands and offices was, therefore, identical. As has been said, in our times, while the title to lands rests in individuals, the sovereignty being changed, leases of offices can come only from the people at large. They are identical in character and origin, albeit the source from which they emanate is no longer the same.

"The principles of every part of our law are to be found in their simple original forms —in the more ancient forms and proceedings. Though the form has changed, the principle endures."—Reeves, supra, 127.

That the analogy sought to be maintained is reasonable and complete is conceded by the learned Judge who decided the case below. If it can be maintained, the question of surrender involved in this case can be illustrated by a number of well-settled cases.

In Lyon v. Reed, (13 M. & W., 285,) it is said that when a party takes a new lease for premises already held by him as tenant, the fact of his so doing is evidence that the new lease has been accepted by him, and such acceptance works a surrender in law.—8 Jur., 762.

"A surrender is said to be the yielding up of an estate for life or years to him who hath the immediate estate in reversion or remainder."—5 Bacon's Abr., 657.

But it is said that in order to have such an acceptance operate as a surrender, the subsequent lease must be valid.

This proposition, which seems to derive some support from two or three cases, is based upon an entire misconception of the reason which lies at the basis of the rule.

This is succinctly stated in Bacon's Abridgment, vol. 5, page 661, thus: "Because the granter, having already made a lease, cannot make another while this is in existence."

In other words, it is a condition precedent to even assuming to give a new lease that the former should be surrendered. They cannot subsist together, and, consequently, the

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surrender is the very *first act on the part of the lessee,—performed before, and not after or even at the identical moment of, taking the new lease. If surrendered, therefore, before the acceptance of the new lease, of what consequence is it, so far as the surrender is concerned, whether the subsequent lease be good or bad?

And following this reasoning, the rule is laid down that "a lessee for life or years who takes a new lease of the same premises surrenders the first, though the second be void."—5 Bacon's Abridg., 663, and cases cited.

In the case at bar, Mr. Chamberlain, by accepting the new title, or assuming to act under it, admitted the power of his lessor or grantor, which power it could not legally have without a surrender of the first title. —Van Rensselaer v. Penniman, 6 Wend., 579.

"The reason why an acceptance of a second lease works a surrender of the first is, that without the first is dissolved the latter

could not be granted."—Livingston v. Ten Broeck, 16 Johns., 29.

Suppose A makes a lease of land for ten years to B. At the expiration of one year B agrees to give up this lease upon A's executing to him a second lease for four years. The new lease is made out and the parties proceed to carry out their agreement. Is it not plain that before B can receive the second lease, good or bad, he must give up the first? Otherwise there would be two terms subsisting together.

The learned Judge below intimated that there was no authority in this country sustaining the doctrine as above stated in 5 Bacon, 663. With all respect to him, he has overlooked a very strong authority directly in point, to which the attention of this Court is requested.

In the case of Van Rensselaer against Penniman, (6 Wendell, 579,) already cited, the principle was established in the Court of Errors of New York,—a Court which, it is but faint praise to say, has never been excelled in this country, either for the legal acumen of the Judges who composed it and whose names are illustrious in the annals of jurisprudence, or the patient and painstaking industry which characterized their decisions. Composed of such men as Chief Justice Savage, Samuel Nelson, Ogden Edwards, Esek Cowen, Monell and Gardner, there can be no hesitation in yielding to their conclusions all the respect and obedience which is due to the most eminent legal authority.

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*The learned Chief Justice, (Savage,) at the outset, states the first and principal question to be whether the acceptance of the second lease was a surrender of the first. He then proceeds to say: "It seems to be well settled that if a lessee accepts a new lease of the same premises during the term of the first lease, the first is deemed to be virtually surrendered."

"The reason is that the acceptance of the new lease admits the capacity of the lessor to make such new lease, which he could not have without a surrender of the first lease."

"The doctrine of presumption is founded on the well known disposition of a man to enjoy his own. No man would take from another a lease of that which was already his own."

Did Chamberlain know that this office was his by virtue of the old title? Then why did he assume to take the new? Can his conduct be reconciled with the doctrine above stated?

The very fact of his assuming to take this new title involves his admission that he had given up all claim to the former, and this irrespective of the character of the new lease.

"And this," proceeds the case above cited, "is the consequence, although the second lease should be void."

"The cases seem to have settled the point that simply receiving a second lease raises the presumption,"—namely, of a surrender of the first.

It is respectfully submitted, therefore, that the learned Judge who decided the case below was in error when he said that the doctrine (that such surrender was not good when the subsequent lease was void) "has been sustained by all the British Courts, and that the preponderance of authority in this country is largely adverse to the ruling said to have been made in Mellows v. May," cited in 5 Bacon's Abr., supra. Not a single American case was adduced in support of this proposition of the learned Judge, and but two English cases are referred to by him, which I propose briefly to examine.

The first case cited by him is the case of Zouch v. Parsons, 3 Burrows, 1807. "In this case an infant who was one of the heirs of a mortgagee of certain premises joined in a release of his interest on payment of the amount due, in order that the mortgagor might remortgage the premises to the grantors of the plaintiff. The infant's representatives sought to avoid this release and to reinstate the mortgage which had been re-

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leased. The question was whether, *1st. The release was void; and, 2d. If, being void, there was any surrender of the rights under the mortgage.

"The Court held that, the release being voidable only, the surrender of his interest under the mortgage was good."

Now, it will be seen at a glance that this case is not in point:

1. Because the question as to the effect of an acceptance of a void lease was not involved in the case.

2. Because it was not the case of a lease at all, but was simply a question as to whether the maker of a release had himself surrendered the thing he released, when such release was voidable.

It was as if an infant had bargained away certain rights, and the question was whether such rights were bargained away—the act of bargaining being voidable.

Is there anything in common between such a case and the case at bar?

The other case (4 Burrows, 1980,) is equally inapplicable as an authority. The question did not arise at all; but the reporter says:

"The Court held the second lease good; but they seemed to agree that the first would not have been surrendered if the second had been void."

These are the only cases cited by the Court below.

But suppose they were adopted as authority: What do they mean?

It will be noticed that in the language used in both cases the theory was that the first

lease was surrendered "in order to" or "in consideration of" the new lease; that the acceptance of the new lease was on condition that it should be good. Will it be pretended that Mr. Chamberlain had any such condition in his mind when he publicly declared that he had been elected and went through the ceremony of inauguration? Did he not know all the qualities of this second lease before he took it? Was he not fully aware of all the questions involved which would make it either good or bad? Had he not been aware of all the processes by which this second lease was created, and was there, or could there have been, any question in his mind as to the legal effect of that lease? How, then, can it be said that he had in contemplation any condition? A condition can only be inferred where the party has not the absolute means of knowing whether what he assumes to take upon the condition is what he expected.

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*I repeat, therefore, that the effect of the acceptance of this office under the new title in Mr. Chamberlain's case, whether the new title prove to be good or bad, not only upon principle and sound reason, but upon authority, operated as a surrender of the old title.

But, again, when Mr. Chamberlain publicly had himself proclaimed, by virtue of a pretended election as Governor, he, in effect, said to every officer in the State acting under his instructions: "I this day renounce all title to this office by virtue of the provision permitting me to hold over until the qualification of my successor, and I now announce that what I do hereafter I do by virtue of my election as Governor for the succeeding two years." Such being the case he cannot now be heard to say that this pardon, which he thus impliedly assumed to grant by virtue of his being the re-elected Governor, was granted by him in virtue of his old title.

Suppose he had said personally to Colonel Parmele: "Sir, I grant this pardon as Governor, claiming to be such by virtue of the recent election." And suppose it is ascertained by Colonel Parmele that he was not elected, and consequently holding no title by virtue of such election, and he thereupon refuses, as he properly should, taking the same ground as that occupied by the pretended Governor, and knowing any pretense founded on such assumption to be false, and replies: "It would be unlawful for me to recognize this pardon since the title under which you claim is invalid. I have your own words that you claim under no other." Suppose an action of false imprisonment to be begun by the prisoner, and then Mr. Chamberlain comes into Court, or his grantee, who is privy with him, and asserts that this pardon was granted, not by virtue of his pretended title, nor upon the ground stated by him, but by virtue of another title. Would such a plea avail him in any Court of justice? Would he not, upon every principle of estoppel, be prevented from setting up such a claim? In Bigelow on Estoppel, it is stated that "estoppel in pais is an indisputable admission arising from the circumstance that the party claiming the benefit of the principle has in good faith been induced by the voluntary action of the other against whom it is alleged to change his position."—Bigelow, 369, 475.

Non constat but that Colonel Parmele would have recognized and yielded obedience to the pardon but for the position taken by Mr. Chamberlain that he acted not under the old but under the new title. By publicly announcing his choice of this last title, he has

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*obliged Colonel Parmele, knowing this announcement to be without authority, to change his position. He has so spoken as to cause Colonel Parmele to take a stand which may result in an action against him by this convict for false imprisonment.

"Estoppel in pais arises: 1st. By an admission inconsistent with the evidence proposed to be given or title proposed to be set up. 2d. An action by the other party on such admission. 3d. An injury to him by allowing the admission to be disproved."—2 Smith's Leading Cases, 643.

In this case: 1st. Mr. Chamberlain made a public admission or avowal to all who were subject to his orders that he claimed to be Governor by virtue of this election. 2d. Colonel Parmele acted upon this admission; for if Chamberlain had constantly after the election claimed to be holding over under the old title, his pardon might have been recognized. 3d. He has subjected himself to an action for false imprisonment, should Chamberlain or his grantees be permitted to disprove the admission.

But, again, Mr. Chamberlain is estopped upon another theory of the doctrine of estoppel,—namely, by his recitals.

"A party is estopped by his recital from showing that his title was derived in a different way."—Bigelow, 298.

"A widow by executing a release by which she styles herself 'widow and sole devisee' cannot deny that she took under her husband's will."—Dundas v. Hitchcock, 12 How., 256; Bigelow, 297.

"When a man has entered into a solemn engagement, by deed or otherwise, as to certain facts, he shall not be permitted to deny any matter which he has asserted."—Ibid, 297.

In the case of People v. Metropolitan Police, supra, it is said of the incumbent of the office in question: "He had a right to disclaim all title to the office; and if, in fact, he had title, such disclaimer would estop him from denying that he had resigned."—Page 333.

When Mr. Chamberlain said that he accepted this office under the new title, he

estopped himself from setting up a different title.

"A tenant is estopped from setting up a paramount title, either in himself or another, after he has accepted under a lease."—2 Smith's Leading Cases, 657.

Again, in treating of surrender by operation of law, it is said, in Lyon v. Reed, (13 M. & W., 285,) that it occurs "when an act is done by the owner of a particular estate, the validity of which he would be estopped from disputing, and which could not have been done had the particular estate continued to exist."

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*In the present case the act done was inauguration, taking an oath of office, &c., which certainly could not have been done had not Chamberlain abandoned his former title.

And another case strong in point is reported in 6 M. & G., 673, cited in Bacon's Abridgment: "When a lessee for years accepts a new lease from his lessor, he is estopped from saying that his lessor had not the power to make a new lease; and as the lessor could not grant the new lease until the prior one had been surrendered, the acceptance of such new lease operates as a surrender of the former one."

Lyon v. Reed, 13 M. & W., 285, &c.

But, again, it is said in the recognized treatise on estoppel which has been referred to: "That when a party has two inconsistent courses before him, he must elect between the two."

"He cannot occupy inconsistent positions."—Bigelow, 578, 579.

"And having chosen, he must abide by it."—Ibid, 536, 537, 544.

In the case of Smith v. Smith, (14 Gray, 532,) defendant claimed title under a deed from the father of the parties, who, by his will, had devised the locus to the plaintiff and other property to defendant. Defendant had accepted the property under the will, but said he had intended to hold under the deed also, if the law would not let him have both.

The Court held that by accepting under the will he elected to hold under that title and could not go back and claim under the deed.

"If the exercise of an office can be attributed to two titles, one good and the other bad, it will be attributed to the good title, unless the party exercising the office has disclaimed the good title."—Reg. v. Thomas, 3 Nev. & P., 288; 2 Jur., 347; 7 Sergeant & Rawle, 372.

And to conclude: "Any decisive act of the party, done with a knowledge of his rights and of the facts, determines his election and works an estoppel."—Bigelow, 578.

Mr. Chamberlain did a "decisive act" when he took the oath of office and submitted to an inaugural ceremony. He had "knowledge of all the facts" and of his rights. None knew them better than he. His conduct, therefore, determined his election, and he is estopped from ever claiming under the other title.

Elliott, contra.

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*1877. The opinion of the Court was delivered by

McIVER, A. J. This is an appeal from an order made by the Judge of the Fifth Circuit, discharging a prisoner from the custody of the Superintendent of the Penitentiary who had been brought before him under a writ of habeas corpus. The prisoner based his application for a discharge upon a paper purporting to be a pardon, dated the 20th day of December, 1876, signed by D. H. Chamberlain as Governor of South Carolina. The application was resisted solely upon the ground that the paper was not entitled to be respected as a pardon, because the person by whom it was signed was not at the time entitled to exercise the powers of Governor of the State.

A preliminary question has been suggested as to whether the order of the Circuit Judge discharging the prisoner is appealable; and this we must first dispose of.

We are not distinctly informed of the grounds upon which this question is raised, as this part of the case has been submitted without argument, and we have been furnished with no authorities on the point. If it is placed upon the ground that this is practically an appeal on behalf of the State, and that the State cannot appeal in any criminal case, we are not prepared to give our assent to the proposition thus broadly stated. It is very true that there are several cases which decide that a new trial will not be granted in a criminal case where the defendant has been acquitted.—State v. Riely, 2 Brev., 444; State v. Wright, 2 Tr. Con. Rep. 517; State v. Edwards, 2 N. & McC., 13, [10 Am. Dec. 557]; and State v. Bowen, 4 McC., 254. But in all these cases the appeal was after the acquittal of the defendant; and the reason given was, that if in such a case a new trial was granted, it would be in violation of the great principle of the common law, that no person should be twice put in jeopardy for the same offense. This reason would not apply to the present case, for in the case of the State v. Fley and Rochelle (2 Brev., 338 [4 Am. Dec. 583],) it was contended that Rochelle, having been discharged from a former commitment for the same offense, for delay in the prosecution, under the 7th Section of the habeas corpus Act, could not be legally indicted and tried on the same charge; but the Court held otherwise, for the reason that such discharge could not, upon any sound principle, be considered as an acquittal, and the prisoner was accordingly tried and convicted. Again,

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may not this appeal be *regarded as taken, not in behalf of the State, but in behalf of

the Superintendent of the Penitentiary, the officer charged with the custody of the petitioner, whose duty it would be to see that, if the petitioner is discharged, the discharge should be legal? It is very obvious that this case does not belong to that class of cases of which Carmand v. Wall, (1 Bail., 209,) State v. Friday, (4 Rich., 291,) State v. Bowen, (3 Strob., 573,) and ex parte Bell (14 Rich., 9,) furnish examples, in which it is held that where, by statute, jurisdiction has been conferred upon an inferior or special tribunal, no appeal is allowed from the decision of such tribunal unless the statute expressly secures the right of appeal. For if the jurisdiction exercised by the Circuit Judge in this case should be said to have been derived from the provisions of the habeas corpus Act, as incorporated in the General Statutes of this State, then, as we shall see presently, the right of appeal is therein expressly allowed. If, on the other hand, the jurisdiction exercised was derived from the common law, then it is plain that the principle decided by the above-mentioned cases does not apply.

Should the objection be based upon the ground that an appeal from the decision of a Circuit Judge in an application for the writ of habeas corpus is not allowed, we have only to refer to the cases of ex parte Kottman, (2 Hill, 363 [27 Am. Dec. 390],) ex parte Schumpert, (6 Rich., 344,) and ex parte Williams, (11 Rich., 452,) in which such appeals have been entertained, and to the case of ex parte Pereira, (6 Rich., 149,) in which it was held that an appeal from the decision of a Circuit Judge refusing a writ of habeas corpus will not be heard if, before the application for the hearing of the appeal, the petitioner has been set at liberty and has gone beyond the jurisdiction of the Court, for the reason that it would be a nugatory proceeding. It is true that in none of these cases was the question now under consideration distinctly raised, but that very fact affords strong grounds for the inference that no doubt upon the question was entertained. In Pereira's case objection was made to hearing the appeal, and a motion submitted to strike the case from the docket of the Court of Appeals,—not, however, upon the ground that the case was not appealable, but on the ground that, the defendant being then beyond the jurisdiction of the Court, it would be a useless waste of time to proceed further with the case.

We think, however, that the question is settled by the provisions of Section 19, Chapter CVIII, General Statutes, p. 546, which is

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*in these words: "An appeal from all final decisions rendered on applications for writs of habeas corpus shall be allowed as is provided by law in civil actions."

If it should be contended that this provision only applies to cases in which the writ is issued under the habeas corpus Act and does not cover the case in hand, which does not come within the provisions of that Act, inasmuch as the prisoner is in custody under a charge of felony, we would answer that the terms used in the Section are very broad, —broad enough to cover both classes of cases. The language is "an appeal from all final decisions rendered on applications for writs of habeas corpus," &c., not from decisions on applications for the writ of habeas corpus provided for by this Chapter or this Act. There are no words in the Section implying that the Legislature intended to limit the right of appeal to any particular class of cases.

Again, when the Legislature, by Section 6, Chapter CV, General Statutes, p. 494, conferred upon "each of the Justices of the Supreme Court" the power to issue various writs, among others the writ of habeas corpus, we see that they were very careful to secure the right of appeal to "either party;" and when we find, in the case of Braker v. Knight, (3 McC., 82,) Johnson, J., in speaking of the right of appeal, using such language as this: "From the first organization of a Court possessing appellate powers, it has, so far as I have been able to learn, been the usage of the Court to entertain appeals from all orders made at chambers which in their operation were conclusive as to the rights of the parties," followed by the equally strong language of O'Neall, J., in Pinckney v. Henegan, (2 Strob., 255, [49 Am. Dec. 592],) approved in the State v. Hunt, (4 Strob., 339,) we are admonished that the right of appeal should not be abridged or denied, except where the law denying or abridging such right is very clear.

Turning, then, to the merits of the case, we find that the Circuit Judge, after reaching various conclusions of fact, (which it is unnecessary to state here in detail, as the facts which we regard as conclusive of this case are not controverted and will be hereinafter stated in their appropriate place,) found as conclusions of law: "1st. D. H. Chamberlain was not, on the 7th day of December last, legally installed as Governor of South Carolina. 2d. Wade Hampton was not, on the 14th day of December, 1876, legally installed into the office of Governor of said State. 3d. The attempted installation of D. H. Chamberlain being illegal and void, it

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did not *operate in law as a resignation of the office of Governor which he held at that time. As by the Constitution the Governor holds his office for two years, and until his successor is chosen, and qualified, and as there has been no legal qualification of his successor, D. H. Chamberlain is lawfully in the possession of the Executive office and entitled to discharge the legal functions of the same until such qualification takes place."

It will be conceded, for the purposes of

this case, that Mr. Chamberlain was entitled under the provisions of Section 2, Article III, of the Constitution to hold the office of Governor until his successor was "chosen and qualified," unless he had by formal resignation, or other act equivalent thereto, resigned or abandoned the office, or had by his conduct estopped himself from claiming to hold over under that Section.

It becomes necessary, therefore, to consider three questions: 1st. Had the successor of Mr. Chamberlain been "chosen and qualified" on the 20th December, 1876? 2d. Had Mr. Chamberlain, on the 20th December, 1876, resigned or abandoned the office of Governor which he had been holding for the preceding two years, by virtue of the election held in 1874? 3d. Had he estopped himself from claiming to hold over under the provisions of Section 2, Article III, of the Constitution of this State? An affirmative answer to either of these questions will show that the paper purporting to be a pardon can have no legal efficacy as such, and therefore that the circuit decision was erroneous and should be overruled. The first question has so recently undergone a thorough consideration in this Court, in the case of Ex parte Tilda Stephens, alias Tilda Norris [8 S. C. 408], and the conclusion then reached is so well sustained by the able and elaborate argument contained in the opinion of the present Chief Justice, that it would be a useless effort to attempt to add anything to it. But as the case involves the gravest of inquiries, it has been thought proper that we should state some of the reasons, without elaborating the arguments, which have led us to the conclusion heretofore announced in this case. There are certain facts bearing upon this question which are conceded on all hands, namely, that on the 7th November, 1876, an election was held, for the purpose, amongst other things, of choosing a successor to Mr. Chamberlain, the then incumbent of the office of Governor: that at such election there were but two persons voted for to fill that office—Wade Hampton and

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D. H. Chamberlain; that the re*turns of the Managers of the election showed that Governor Hampton had received the highest number of votes: that the election was not contested: that on the 14th December, 1876, Governor Hampton qualified as Governor by taking the oath of office in the presence of the body of men which, by the recent decision of this Court in the case of The State, ex rel. Wallace, v. Hayne and Mackey [8 S. C. 367] had been determined to be the lawful House of Representatives of this State, and in the presence of such members of the Senate as saw fit to attend, upon an invitation sent to that branch of the General Assembly by the House of Representatives; and that immediately thereafter Governor Hampton entered upon the discharge of the duties of the office of Governor, in so far as he was not prevented by the refusal of Mr. Chamberlain, backed by the military power of the United States government, to surrender the office of Governor, and so continued until the 20th December, 1876, and afterwards. On this state of facts it is clear to our minds that at the time Mr. Chamberlain undertook to sign the pardon in question his successor had been "chosen and qualified." It is very obvious that in a government like ours, where the people are the source of all powers, that the title to an elective office depends upon, and is derived from, the election—the choice of the people, as manifested at the ballot box; and that it cannot be made to depend upon the acts or omissions of individuals, whether assembled in the form of Returning Boards or Boards of State Canvassers, or by whatever other name they may be styled. Otherwise the choice of officers would not rest with the people, but with these Boards, which, viewed in the light of recent events, are regarded by some as devices contrived by the ambitious and unscrupulous to defeat, rather than to carry into effect, the choice of the people. Accordingly, we find in the Constitution of this State (Article VIII, Section 10,) a general provision declaring that "in all elections held by the people under this Constitution the person or persons who shall receive the highest number of votes shall be declared elected." And in Article III, Section 4, this general provision is applied specially to the election of Governor: "The person having the highest number of votes shall be Governor." Whenever, therefore, it is ascertained, by any competent authority, that a certain person has received the highest number of votes for the office of Governor, that person must, under the Constitution, be entitled to the office, unless the election is contested in the mode prescribed by law. Now,

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in this case, this *Court, invested with competent authority to determine the issues involved, one of which is whether any person, and, if so, who, was chosen Governor at the election in November last, sees the fact to be that, on the face of the returns of the Managers of Election, Governor Hampton has received the highest number of votes, and the result necessarily follows that, prima facie, he is the person whom the people have chosen Governor.

It is wholly unimportant to consider what conclusions the Board of State Canvassers reached, for it is admitted that they had no authority whatever to canvass the vote for Governor; and the fact that in canvassing the votes for other officers voted for at the same election they reached certain conclusions, could, at the very utmost, furnish only a presumption that the results which they had reached in reference to others would also be reached in reference to the office of

Governor, provided we could persuade ourselves to adopt the same questionable mode of proceeding which they saw fit to do, to which we are very far from being inclined, and provided also that the vote for Governor was not essentially different from that for other State officers: but even then it would be very far from being conclusive. Indeed, to ask a Court of supreme jurisdiction to be governed by the decision of an inferior tribunal, composed not only of partisans but of persons, some of whom were directly interested in the result of the decision, is a proposition of so novel and extraordinary a character that it is difficult to treat of it in language becoming to a judicial opinion. It is said, however, that the only mode by which it can be ascertained who received the highest number of votes for Governor is pointed out in Article III, Section 4, of the Constitution, and unless that mode is pursued the fact never has and never can be legally ascertained. That Section of the Constitution is in the following words: "The returns of every election of Governor shall be sealed up by the Managers of Elections in their respective Counties and transmitted by mail to the seat of government, directed to the Secretary of State, who shall deliver them to the Speaker of the House of Representatives at the next ensuing session of the General Assembly, and a duplicate of said returns shall be filed with the Clerks of the Courts of said Counties, whose duty it shall be to forward to the Secretary of State a certified copy thereof, upon being notified that the returns previously forwarded by mail have not been received at his office. It shall be the duty of the Secretary of State,

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after the expiration of *seven days from the day upon which the votes have been counted, if the returns thereof from any County have not been received, to notify the Clerk of the Court of said County and order a copy of the returns filed in his office to be forwarded forthwith. The Secretary of State shall deliver the returns to the Speaker of the House of Representatives at the next ensuing session of the General Assembly; and during the first week of the session, or as soon as the General Assembly shall have organized by the election of the presiding officers of the two houses, the Speaker shall open and publish them in the presence of both houses. The person having the highest number of votes shall be Governor; but if two or more shall be equal and highest in votes, the General Assembly shall, during the same session, in the House of Representatives, choose one of them Governor viva voce. Contested elections for Governor shall be determined by the General Assembly in such manner as shall be prescribed by law."

It will be observed that the language of this Section is, not that the person having the highest number of votes shall be declared Governor, but that such person "shall be Governor." Inasmuch, however, as the word votes clearly means legal votes, the Section proceeds, after providing for a difficulty which might arise from two persons having the same number of votes, to provide a means of ascertaining whether the votes set down to one person or another were legal votes, by making provision for a contested election. The other provisions of this Section requiring the Managers of Elections to transmit the returns to the Secretary of State, who is required to deliver them to the Speaker of the House of Representatives, to be by him opened and published in the presence of both houses, are not essential to the validity of the election or the ascertainment of the result. The Section does not provide that the person then or thus found to have the highest number of votes shall be Governor, as it doubtless would have done if the intention had been to make these provisions essential. It is much more probable that these provisions were inserted for the purpose of informing the General Assembly officially whether the returns exhibited a result,—two persons having the same number of votes, which would render it necessary for them to take action in the matter,—or for the purpose of enabling the General Assembly to take such action as would be necessary in case the election was contested. The prima facie result of the election would necessarily

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be known before that time, *as by one of the provisions of this Section the returns of the Managers of Election are required to be filed in the offices of the Clerks of the Courts of the several Counties,—offices which are at all times open to public inspection. There is not a word in the Section which would either expressly or by implication convey the idea that the General Assembly were to canvass the returns. The Speaker is not directed to open the returns and lay them before the General Assembly, which might imply that they were to be considered by that body, and accepted or rejected as they might determine. He is not directed to ascertain and publish the result of the returns, but he is simply to "open and publish them,"—that is, the returns, which speak for themselves: and if they say that a certain person has the highest number of votes, then the Constitution steps in and says that person "shall be Governor." The Secretary of State and the Speaker have scarcely more than mere mechanical acts to perform; and to say that the omission of these acts of mere formality, whether proceeding from ignorance, carelessness or from something worse, can have the effect of defeating the choice of the people, would be sacrificing the substance to the shadow, and would be putting a construction on the terms of the Constitution by which an instrument framed to protect the rights of the people would be perverted so as to defeat

those rights if at any time an officer should, through ignorance or carelessness or contumacy, fail to perform a merely formal act.

The foregoing views are not without the support of authority. In Johnson v. Wilson, (2 N. H., 202,) Woodbury, J., says: "On general principles, the choice of a person to fill an office constitutes the essence of his appointment. * * * After the choice, if there be a commission, or an oath of office, or any ceremony or inauguration, these are forms only, which may or may not be necessary to the validity of any acts under the appointment, according as usage and positive statute may or may not render them indispensable." It is curious to note that this very principle has been practically recognized and acted upon in this State ever since its reconstruction. For by the terms of Article III, Section 2, of the Constitution, it is provided that the Governor "shall be installed during the first session of the said General Assembly, after his election, on such day as shall be provided for by law." As no day for this purpose has ever yet been provided for by law, and as Governor after Governor has been installed and acted without

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question, this is probably one *of the instances in which Woodbury, J., would say this is a mere form following after the material matter of the election, which usage had rendered not indispensable. (See also Marbury v. Madison, 1 Cr., 137 [2 L. Ed. 60]; McBee v. Hoke, 2 Speers, 138; and Kottman v. Ayer, 3 Strob., 92.) If it was supposed that the prima facie result, as indicated by an inspection of the returns of the Managers of Election, was not the real and true result of the election, on account of fraud or from any other cause, then the Constitution, as we have seen, provided for contested elections, by which these returns could have been subjected to the most rigid scrutiny. But as this, the only mode provided for in the Constitution by which the returns could have been scrutinized and corrected if found to be in any respect erroneous, was not resorted to, (there being no pretense that any step whatever was taken looking to a contest of the election,) the prima facie result must necessarily stand as the correct and legal result of the election. But the Circuit Judge, without deciding the question as to who was "chosen" Governor at the election in November last, has found that neither Chamberlain nor Hampton were "legally installed" as Governor under that election, and therefore concludes that Chamberlain held over under his election in 1874. This renders it necessary for us to inquire, not whether, as the Circuit Judge puts it, Governor Hampton had been legally installed as Governor prior to the 20th of December, 1876, for the Constitution is entirely silent as to the mode in which the Governor shall be installed, and we are aware of no act of the Legislature prescribing any particular mode of installation, from which it would seem that one mode of installation is quite as legal as any other, but whether, prior to that day, Governor Hampton had "qualified" as Governor. For, as we have seen, the Constitution, in Article III, Section 2, does provide that the Governor shall hold his office for two years "and until his successor shall be chosen and qualified" —not installed.

To determine this question, it is necessary to inquire what is meant by the term "qualified" as used in this Section of the Constitution. The only provision of that instrument which throws any light upon that inquiry is the 20th Section of Article III, which is in these words: "The Governor and Lieutenant Governor, before entering upon the duties of their respective offices, shall take and subscribe the oath of office as prescribed in Article II, Section 30, of the Constitution." This being the only thing required of the

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*Governor before entering upon the duties of his office, it is difficult to conceive of any other appropriate signification of the word "qualified" than that he shall take the oath of office. What is the object to be attained by requiring the Governor elect to qualify? As he is not required to give bond or do any other act, except to take the oath of office, there can be no other object but to signify his acceptance of the office to which he has been chosen and to pledge himself, in the most solemn manner, to the performance of its duties. It is conceded that Governor Hampton did, on the 14th December, 1876, take and subscribe the oath of office, as prescribed in the Constitution, and while all of the ceremonies usual on such occasions were not observed, owing to the refusal of the Senate to attend as a body, we are aware of no law which makes such ceremonies, although eminently proper and suitable to the dignity of the occasion, essential to a legal qualification. It follows, therefore, that Mr. Chamberlain could not successfully claim to hold the office of Governor on the 20th of December, 1876, under the provisions of Article III, Section 2, of the Constitution, as decided by the Circuit Judge, because prior to that time his successor had been "chosen and qualified." The error of the circuit decision may also be made to appear from other considerations growing out of the following state of facts, which are conceded: Mr. Chamberlain was a candidate for re-election at the election held on the 7th November, 1876, and, claiming to have received the highest number of votes, he on the 7th December, 1876, (to use the language of the Circuit Judge,) "assumed to take the official oath prescribed by the Constitution and deliver the address usual upon installation, and from that time has claimed to be Governor by virtue of his last election and installation." Two views of this conduct of Mr. Chamberlain's may be

taken: First, That he thereby resigned the office of Governor which he held under the election of 1874. 2d. That by electing to claim the office under the election of 1876, he is estopped, when such claim proves groundless, from falling back upon his right to hold over under the provisions of Article III, Section 2, of the Constitution. There can be no doubt but that a person may resign an office by his acts as fully and completely as by the most formal declaration in words.

The question in such cases is one of intention. What, then, was Mr. Chamberlain's intention, as manifested by his act, in going through the ceremony of inauguration on the

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7th December, 1876, *and asserting his claim to the office of Governor by virtue of the election in November last? His right to hold over ceased the moment his successor was elected and qualified, and this right he could, of course, resign at any moment he saw fit. What does he do? He not only asserts a claim that his successor has been chosen and qualified, but he acts upon such assertion. This he could not do without renouncing or resigning a previous claim so wholly inconsistent that the two could not for a single moment coexist. The moment the intention was formed in his mind to claim the office under the last election, there must necessarily have been an intention to abandon, renounce or resign his claim to hold over, as the existence of one claim necessarily presupposed the non-existence of the other. It is very true that if this intention had remained in the mind of Mr. Chamberlain, unexpressed by any word or act, it would have amounted to nothing. But the moment such intention was expressed by his acts, he as fully and completely resigned his office as if he had done so in the most formal words. It is wholly immaterial that his claim to hold under the last election proved unsuccessful. His resignation resulted from his assertion of the claim, and from his acting upon such assertion. The moment he asserted his claim to hold under the last election he necessarily thereby asserted that his successor had been chosen and qualified; and when he proceeded to act upon such assertion, he at that very moment, by necessary implication, asserted that he abandoned, renounced or resigned his claim to hold over, because such claim could not possibly exist after his successor was chosen and qualified. It will not do for him to say, after he has discovered that he cannot successfully assert his claim under the last election: "I withdraw my claim and thereby annul my implied resignation." Suppose that Mr. Chamberlain had, in the most formal manner, resigned his former title, under the belief that he was elected at the last election, and that it was necessary for him to resign his former title before he could accept the office under the last election,—could he, upon discovering his mistake, repudiate such resignation and claim that it was null? Surely not. The question in such a case would be, has he resigned? The reason which induced him to resign, whether well or ill founded, could not affect the inquiry.

Or, suppose that Mr. Chamberlain, believing himself elected to the United States Senate, had, without any formal resignation of his office of Governor, done such acts as

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would necessarily imply *an acceptance of the office of Senator, as by receiving his credentials and presenting them to the Senate, —could he, upon being refused admission to a seat in that body upon the ground that he was not really elected, after an absence in Washington of months perhaps, as has been the case in at least one notable instance, come back to South Carolina and claim that he still held the office of Governor, upon the ground that, though he had intended to resign or abandon the office of Governor and take that of Senator, under the belief that he had been legally elected to the latter office, yet, finding he was mistaken, his conduct, which, otherwise, it must be admitted, would have amounted to a resignation, induced by a false hope into which he had deceived himself, ought not to be so regarded, because he had acted under a mistake? The answer certainly would be: "No. If you were induced to resign your office as Governor under the mistaken hope and belief that you had been elected to another office, that is your misfortune; but your mistake and disappointment cannot have the effect of altering the fact that you did resign no matter what was the motive which induced you to do so." This view is supported by the case of ex parte Gray, (Bail. Eq., 78,) in which Hunt, upon being defeated by Gray for the office of Commissioner in Equity, at the election held in 1829, refused to surrender the office upon the ground that, under the Constitution and laws of the State, the tenure of that office was during good behavior and not for four years only. The Court of Appeals, per Colcock, J., uses this language: "But if we could support the respondent in his construction of the Acts, and believed that it was the intention of the Legislature, in the first establishment of his office, to put him, in all respects, upon a footing of equality with the then Master in Equity, and that they considered him consequently as holding during good behavior, yet, in this case, I am of opinion that the respondent, by having become a candidate for the office under the terms prescribed by the Act, had voluntarily resigned all right to the first tenure and could not now claim the office." If, however, the conduct of Mr. Chamberlain in claiming the office of Governor under the last election and going through the form of inauguration did not amount to a resignation of the office under the preceding election, the third question still remains, whether Mr. Chamberlain is not thereby estopped from

now setting up a claim to hold over under the provisions of Article III, Section 2, of the

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Constitution of this State. Mr. Bige*low, in his treatise on estoppel, states the doctrine thus: "A party cannot occupy inconsistent positions; and where one has an election between several inconsistent courses of action, he will be confined to that which he at first adopts. * * * Any decisive act of the party, done with a knowledge of his rights and of the facts, determines his choice and works an estoppel." Now in this case Mr. Chamberlain had before him two inconsistent courses of action,—so inconsistent that the one was necessarily based upon the assumption that his successor had not been "chosen and qualified;" the other, that his successor had been "chosen and qualified." With a full knowledge of his rights and of the facts, he does a decisive act, and in the most public and formal manner proclaims to the world the choice which he has made, and, in the language of the writer above quoted, "he must abide by it." The fact that the course of action which he chose did not yield the fruits which he expected can in no way affect the question. The estoppel results from the fact of his having made the choice, and does not depend upon the value of the thing obtained by such choice, or indeed upon whether anything at all was obtained. If it did, this doctrine of estoppel could rarely, if ever, be practically applied. For, if a party got by his choice what he desired and expected, he would not be likely to make any controversy, and, therefore, the question of estoppel could not arise; and if the doctrine is not to be applied because the party did not get what he expected and desired by his choice of a course of action, then it is difficult to conceive of any case in which the doctrine would be of any practical importance.

In accordance with the views herein announced, the order reversing the judgment of the Circuit Judge and remanding the prisoner to the custody of the Superintendent of the Penitentiary has heretofore been granted.

WILLARD, C. J., concurred.

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[End of Volume 8 S. Car.]

REPORTS OF CASES

HEARD AND DETERMINED BY

THE SUPREME COURT

OF

SOUTH CAROLINA

VOLUME IX

FROM NOVEMBER, 1876, TO NOVEMBER, 1877, INCLUSIVE

BY J. S. G. RICHARDSON

STATE REPORTER

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JUDGES AND OTHER LAW OFFICERS

DURING THE PERIOD COMPRISED IN THIS VOLUME

JUSTICES OF THE SUPREME COURT.

HON. F. J. MOSES, CHIEF JUSTICE.
HON. J. J. WRIGHT, ASSOCIATE JUSTICE.
HON. A. J. WILLARD, ASSOCIATE JUSTICE,
AND AFTERWARDS CHIEF JUSTICE.
HON. HENRY McIVER, ASSOCIATE JUSTICE.
HON. A. C. HASKELL, ASSOCIATE JUSTICE.

JUDGES OF THE CIRCUIT COURTS.

1ST	CIRCUIT—	HON.	J. P. REED.
2D	"	"	P. L. WIGGIN.
3D	"	"	A. J. SHAW.
4TH	"	"	C. P. TOWNSEND.
5TH	"	"	R. B. CARPENTER.
6TH	"	"	T. J. MACKEY.
7TH	"	"	L. C. NORTHROP.
8TH	"	"	T. H. COOKE.

ATTORNEY GENERALS.

WILLIAM STONE AND JAMES CONNER, ESQS.

CLERK OF SUPREME COURT.

A. M. BOOZER, ESQ.

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REPORTS OF CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT OF SOUTH CAROLINA

JUSTICES OF THE SUPREME COURT DURING THE PERIOD COMPRISED IN THIS VOLUME.

HON. A. J. WILLARD, CHIEF JUSTICE.
HON. HENRY McIVER, FIRST ASSOCIATE JUSTICE.
HON. A. C. HASKELL, SECOND ASSOCIATE JUSTICE.

9 S. C. *1

*GREENVILLE COUNTY v. RUNION.

(Columbia. Nov. Term, 1876.)

[*Counties* ⇐=101.]

A County may maintain an action against a County Treasurer and his sureties, on the official bond of the Treasurer, for moneys collected by him as County Treasurer for the use of the plaintiff.

[Ed. Note.—Cited in Kaminer v. Hope, 9 S. C. 254.

For other cases, see Counties, Cent. Dig. § 156; Dec. Dig. ⇐=101.]

[*Officers* ⇐=140.]

The party aggrieved by the misconduct of a public officer may maintain an action under the Code, as the real party in interest, on the official bond of such officer.

[Ed. Note.—For other cases, see Officers, Cent. Dig. §§ 243, 244; Dec. Dig. ⇐=140.]

[*Counties* ⇐=217.]

Under the law of this state, a county is a body corporate, and may bring, in its own name, such actions as are necessary to the care and custody of the moneys derived from taxation and applicable to County purposes.

[Ed. Note.—Cited in Wheeler v. County of Newberry, 18 S. C. 135; Aiken County v. Murray, 35 S. C. 510, 14 S. E. 954.

For other cases, see Counties, Cent. Dig. § 348; Dec. Dig. ⇐=217.]

Before Cooke, J., at Greenville, June Term, 1876.

This was an action by Greenville County against James M. Runion, County Treasurer, and James Darby, Williams Cox, William McKinney, Hardy Solomon, W. P. Shockly, Wm. M. Linderman, James E. Cox and Isaac Kelley.

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*The complaint alleged that on the day of December, 1874, the defendant, James M. Runion, was appointed County Treasurer for Greenville County, and on the 23d day of the same month and year, he, the said James M. Runion, and the other defendants (naming them) entered into bond in the penal sum of twenty thousand dollars, conditioned that he, the said James M. Runion, shall well and truly perform the duties of the said office of County Treasurer for the said County of Greenville as now or hereafter required by law during the whole period he may continue in said office; that the said James M. Runion, under and by virtue of his office as County Treasurer, and upon the duplicate furnished by the County Auditor between the 15th day of January, 1875, and the 15th day of March of the same year, collected large sums of money in the way of taxes, some thirty thousand dollars of which was collected for and on account of the plaintiff, and which the law required him to hold and disburse upon the checks of the County Commissioners of said County.

The complaint further alleged that the said James M. Runion, as County Treasurer, received from the State Treasurer the sum of $13,691.45, the amount of the free school fund to which the plaintiff was entitled out of the State appropriation, to which add $2,355, the amount of the poll tax collected by him, and $749.64, the amount received by him from his predecessor in office, making $16,795.09 as the amount of the free school fund received by him to the credit of the plaintiff. That, as plaintiff is informed, this amount has been disbursed, excepting $4,728.50, and that the defendant, as County Treasurer, has disbursed the amount col-

lected for plaintiff in the way of taxes, excepting $4,920, which, added to the amount of the school fund, makes $9,720, and this amount the plaintiff charges that the defendant, James M. Runion, has fraudulently and in breach of his trust appropriated and converted to his own use. And the complaint further alleged that the said defendant, James M. Runion, as County Treasurer, on the 15th day of September, 1875, made his report to the County Commissioners, showing that he was then indebted to the plaintiff in the said sum of $9,720, upon which said sum the County Commissioners drew their checks, payment of which has been and still is refused by the defendant.

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*The plaintiff demanded judgment that the said bond be declared forfeited and that judgment be awarded against the defendants in the sum of $20,000 and the costs of the action.

The defendant filed a demurrer on the ground that the complaint does not state facts sufficient to constitute a cause of action.

His Honor the presiding Judge, after hearing argument, made an order that the demurrer be overruled and that plaintiff have judgment thereon, but with leave to the defendants to withdraw their demurrer and put in an answer within sixty days.

The defendants James M. Runion and Hardy Solomon appealed.

Clark, Elliott, Earle and Wells, for appellants.

Simpson & Moore, Perry & Perry, contra.

April 26, 1877. The opinion of the Court was delivered by

WILLARD, A. J. The demurrer admits that the defendant, Runion, as County Treasurer of Greenville County, had received certain moneys belonging to said County, and had appropriated them to his own use,—failing to apply them in the manner provided by law. This admission establishes a case of official misconduct that constitutes a breach of the bond given by him as Treasurer with the other defendants as sureties. The question then arises, can the plaintiff, the County of Greenville, maintain an action in its own name upon such bond? The Code (Section 134) provides that "every action may be prosecuted in the name of the real party in interest, except as otherwise provided in Section 136." The provisions of Section 136 do not prevent the application of the general rule to this case. "The bond of any public officer in this State may at all times be sued on by the public, any corporation or private person aggrieved by any misconduct of any such public officer."—Gen. Stat., 218, Sec. 11. Is, then, the County of Greenville a party aggrieved by the official misconduct alleged and admitted; and does it answer the description of persons that may sue therefor? If so, then, by the force of these provisions, the County of Greenville is the real party in interest in an action on the bond by reason of such breach, and, under it, as well as under the general provision of the Code, it may sue in its own name. The capacity of the County as a corporation depends on the following statute provisions: "Said County shall be a body

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politic and corporate for *the following purposes: To sue and be sued, purchase and hold for the use of the County personal estate and land lying within its own limits, and to make necessary contracts and do necessary acts in relation to the property and concerns of the County."—Gen. Stat., 145, Sec. 36. The Constitution (Article IX, Sec. 10,) defines the powers of the Counties as to certain subjects, and vests the exercise of these powers in certain County officers by the following provisions: "The qualified electors of each County shall elect three persons for the term of two years, who shall constitute a Board of County Commissioners, which shall have jurisdiction over roads, highways, ferries, bridges, and in all matters relating to taxes, disbursements of money for County purposes, and in every other case that may be necessary to the internal improvement and local concerns of the respective Counties."

This provision as to jurisdiction, relative to taxes and disbursements of money for County purposes, clearly vests in the County, as represented by its proper officers, the County Commissioners, general authority to provide for the care and custody of the moneys derived from taxation and applicable to County purposes. This would clearly include the right to take all necessary and proper steps to secure accountability on the part of the Treasurer, the actual custodian of such funds. The right to maintain an action to compel the Treasurer and his sureties to make good to the County treasury funds of the County lost through the official misconduct of the County Treasurer is essential to the discharge of this duty, and, therefore, clearly implied in the grant of jurisdiction. This jurisdiction is lodged, for administrative purposes, in the hands of the County Commissioners, but the substantial interest in demanding its discharge is in the County as a body politic and corporate. The right conferred on the County to sue and to be sued must be deemed and taken as commensurate with the duties and rights conferred upon the Counties by the Constitution and laws passed under it; it would, therefore, extend to the actions to secure the proper accountability of the County Treasurer prosecuted against these officers and their sureties. The demurrers are properly overruled, and the appeal should be dismissed.

WRIGHT, A. J., concurred.

9 S. C. *5

*WHIPPER v. REED.

(Columbia, June, 1877.)

[*Judges* ⇐8.]

A Circuit Judge elected by the Legislature under Article IV, Section 11, of the Constitution of the State, to fill a vacancy in the office, holds, under Section 13 of the same Article, for the full term of four years, and not merely for the unexpired term of the Judge in whose place he was elected.

[Ed. Note.—Cited in Simpson v. Willard, 14 S. C. 202, 205, 208, 209, 210; Smith v. McConnell, 44 S. C. 493, 494, 495, 22 S. E. 721; McDowell v. Burnett, 92 S. C. 472, 75 S. E. 873. For other cases, see Judges, Cent. Dig. § 39; Dec. Dig. ⇐8.]

[This case is also cited in Simpson v. Willard, 14 S. C. 191, and distinguished therefrom.]

This was an action entitled The State, ex relatione W. J. Whipper, against J. P. Reed. It was brought originally in the Supreme Court, and was in the nature of a quo warranto to determine the title to the office of Judge of the First Judicial Circuit of the State.

It was referred to a Referee to ascertain and report upon the facts, and from his report the case, so far as it related to the only question considered and determined by the Court, may be briefly stated thus:

On January 18th, 1872, R. F. Graham was duly elected Judge of the said Circuit for the full term of four years, commencing August 26, 1872. He received his commission, qualified thereunder, and held and continued to hold the office until October, 1874, when he died.

In November, 1874, thereafter, the Legislature passed a resolution that the two houses meet in joint assembly on the 2d day of December, 1874, "for the purpose of electing a suitable person to fill the vacancy in the Judgeship of the First Judicial Circuit, occasioned by the death of the Hon. R. F. Graham." The election was held, and J. P. Reed, the defendant, was elected. He received his commission, qualified as Judge, and took possession of the office.

On the 11th day of December another election was held by the Legislature for Judge of the First Judicial Circuit. At that election W. J. Whipper, the relator, was elected. He received a certificate of his election to the office from the President of the Senate and the Speaker of the House of Representatives, attested by the Clerks of the House and Senate, and, having qualified thereon, he now claimed that he was entitled to the office for the term of four years from the 26th day of August, 1876.†

†The Reporter regrets that he has not been furnished with the pleadings nor with a brief containing a statement of the facts, and that he has been compelled to gather them from another source. He also regrets that he has not been furnished with the argument of the counsel for the defense nor even with their names.

W. J. Whipper, for the relator.

————, contra.

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*June 7, 1877. The opinion of the Court was delivered by

WILLARD, C. J. This is an action in the nature of quo warranto, brought originally in this Court by W. J. Whipper, claiming to have been elected by the General Assembly a Circuit Judge for the First Circuit, to fill a vacancy anticipated at the expiration of the term of office of Judge Reed, the present incumbent and defendant. The defendant alleges, among other matters, that his term of office has not expired. The defendant was elected under a concurrent resolution providing for electing a suitable person to fill the vacancy caused by the death of Hon. R. F. Graham, the previous incumbent. If the defendant was entitled to hold the office for four years from his election, which took place in December, 1874, then his term of office has not yet expired, and the action must fail. Several grounds for dismissing the complaint have been urged, some of which relate to matters of form only; but as the main question arising upon the merits ought to be decided, in order that no uncertainty may exist as to the tenure of the Circuit Judges, that question will at once be considered.

The Constitution (Article IV, Section 13,) provides that "this State shall be divided into convenient Circuits, and for each Circuit a Judge shall be elected by joint ballot of the General Assembly, who shall hold his office for a term of four years," &c. The only provision of the Constitution relative to filling vacancies in judicial offices is contained in Article IV, Section 11, and is as follows: "All vacancies in the Supreme Court or other inferior tribunal shall be filled by election as herein prescribed, provided that, if the unexpired term does not exceed one year, such vacancy may be filled by Executive appointment." The question that arises on the provision just recited is whether one elected to fill a vacancy under Section 11 is entitled to hold for the full term of four years provided for in Section 13, or holds only for the unexpired portion of the term remaining at the time of his election and qualification.

This Court held in Wright v. Charles, (4 S. C., 178,) in effect, that when the duration of a term of office is fixed by the Constitution, and the mode of filling it prescribed, and the time when the term is to commence is not fixed, the officer chosen to fill it in the mode prescribed, although to fill a vacancy, holds for the full term fixed by the Constitution. This principle was there applied to a

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*case where the Act under which the vacancy was filled provided in terms for filling vacancies. The conclusion just stated is

manifestly sound and has an important bearing on the present question. There are two leading objects that naturally present themselves in adjusting succession to public offices in a scheme of government—the one having regard to the duration of official authority, and the other to regularity of succession, whether periodic or otherwise. In fixing the duration of public authority in an office, or, technically expressed, in prescribing the duration of his term of office, regard is had, on the one hand, to stability in the administration of the office, which is usually promoted by long occupancy, and, on the other hand, to increasing the sense of official responsibility on the part of the officer by subjecting him to that scrutiny that results from the frequent exercise of the appointing power in filling the office. The other general object, namely, that of securing regular succession to public office, looks to the means of securing a peaceful transfer of the office in obedience to the authority which, under the law, ought to determine the order of that succession, and to the times when such office should begin to be exercised by one entitled to succeed to it. As it regards certain offices, a regular succession at stated periods has been found most convenient, influenced by the nature of the office and the mode of appointment to it. Political offices, whose incumbents exercise more or less political discretion, being closely related to the prevailing ideas of public policy and economy, are usually filled at stated periods, in accordance with our political theory that regards a general election, as, in some degree, an expression of the popular mind as to methods of administrative policy. As such expression is only indirectly made through the selection of public officers, it has become a very general practice to fill the several principal political offices at the same time and at stated periods. In the case just mentioned it is the nature of the office that is consulted in fixing its commencement.

As has been observed, the mode of choosing public officers has an important influence as it regards the time of filling an office. When filled by Executive appoinfment, no special reason seems to arise from the nature of that kind of appointment for filling such offices at fixed periods, for the Executive power can act at any time. When chosen by the General Assembly, as there must be intervals during which that body is not in session, special means of supplying vacancies during the absence of that body are very

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commonly *employed for obvious reasons. During the sessions of the Legislature its appointing power can be exercised conveniently at any time. The mode of choice that seems to render most important provisions of a general nature requiring a considerable body of public officers to be chosen and installed at the same time is that of popular elections. This is occasioned by the nature of such elections, at all times imposing a large amount of labor upon the public officers, as well as upon citizens at large, and attended with large expense. The general considerations that have been thus briefly stated have had more or less effect in influencing the arrangements made by our Constitution as to the modes and times of filling its offices. Our Constitution assumes to make provision for nearly all the contingencies likely to arise in this respect as affecting the offices created by it. As a general thing, it determines the modes of choice and the duration of the tenure of offices. With regard to some, including those of a political character, it provides for fixing a definite period when these offices shall be assumed, (Article III, Section 2). In some instances it contemplates and provides for casual vacancies, such as occur from death, resignation and other similar causes. In some it leaves the mode of supplying such casual vacancies to the discretion of the Legislature. It is important, then, as it regards the question of the time and mode of filling any office created by the Constitution and the duration of its term, to inquire first whether the Constitution has assumed to provide for all contemplated contingencies or has left a certain discretion in that respect with the Legislature; and, second, what is the true intent of the Constitution in those cases where it has assumed to control the subject exhaustively. Such an inquiry is materially advanced by the statement of such a proposition as that referred to as embodied in the decision of Wright v. Charles.

When the Constitution fixes the duration of a term of office, and, at the same time, provides for its being filled at a fixed time, occurring periodically, it necessarily follows that, a casual vacancy occurring during such term of office, necessity must arise for filling it for the unexpired term; and, although the mode of filling such vacancy is prescribed by the Constitution, yet the incumbent only holds until the time arrives for filling the office in the regular mode and at the regular time prescribed by the Constitution. In that case the officer taking a term of office less than that prescribed for the office is placed in that position, by the effect of the Con-

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stitution *itself, reached by treating one class of provision as necessarily as limitation of the other. The proposition derived from Wright v. Charles involves a different case from that just stated, namely, where the Constitution contains no provision as to the time when the offices ought to be filled, necessarily interfering with the possibility of holding it for the full term prescribed. In that case that proposition holds that no such limitation can be imposed by the Legislature through the effect of any attempt to fix the time when the office should be fill-

ed, but, on the contrary, when the officer is chosen in the manner prescribed by the Constitution, he is entitled to hold for the full constitutional term, if the appointing power should attempt to declare otherwise. This is simply saying that when the Constitution has not seen fit to impose a limitation to general terms employed by it in fixing the important features of a high office, the Legislature cannot supply such a limitation—a proposition that is self-evident, considering the relations of statute to fundamental law. It follows that a casual vacancy occurring during a term of office, the duration of which is fixed by the Constitution, cannot authorize the choice of a person to fill such office for an unexpired term, unless the Constitution either directly or indirectly recognizes the existence of such unexpired term as entitled to be filled as such. As we have seen, such indirect authorization may result from provisions of the Constitution fixing the commencement in point of time of an office of a fixed tenure. So it may directly recognize the existence of an unexpired term, to be filled as such by any language importing such a recognition.

Having these principles in view, let us look into the Constitution to see whether there is anything to sustain a conclusion that the Constitution has imposed a limit to the duration of the office of Circuit Judge of such a nature that persons elected to fill a casual vacancy cannot claim the full term attached to the office, but can hold only for the unexpired term. In the first place, there is no provision indirectly accomplishing such a result by fixing the time when the Circuit Judges shall take their offices. Such a provision exists, as we have already noticed, in the case of the officers described as "State officers."—(Article 4, Section 2, and Article 19, Section 10.) Such a limitation is inferable as affecting the Justices of the Supreme Court from the provisions requiring that one of those Justices shall be elected every two years; but none is found affecting the Circuit Judges. This omission is evidently

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not acci*dental, but intentional. In the case of the Supreme Court, that body being composed of three Justices, there was reason for placing regular intervals of two years between the elections of the respective Judges, so that no sudden change should be made in the organization of this Court—an important safeguard against irregularity in the administration of the law. As the Circuit Court is held in every case by a single Judge, that reasoning does not call for a similar provision as it regards the Circuit Judges.

We will see hereafter that this same general end is attained in a form suited to the organization of the Circuit Court, by leaving the duration of the term unalterable and allowing the times when the Circuit Judge should be chosen and take office to be influenced by the various casualties affecting its regular recurrence. In the next place it remains to inquire whether there is any direct recognition of vacancies in the office of Circuit Judge for an unexpired term, and whether such a vacancy existed at the time the incumbent of the office in question was chosen. It is clear that the Constitution does recognize the possibility of an unexpired term in the office of Circuit Judge where a vacancy has occurred at such time as to leave only one year of the original term yet unexpired, and has in this case directly authorized the Governor to fill such vacancy. It is contended that this is an implied admission that an unexpired term for a longer duration than that of one year may exist, and that in directing the Legislature to fill such vacancies it was intended that the person chosen should hold only until the end of the original term of office. The argument just adverted to holds in substance that the language under consideration presents merely a case of loose utterance that ought to be reformed from the standpoint of supplying what is necessary to give it fullness and symmetry. But the principles of constitutional construction require that we look more thoroughly into the matter and determine whether there was not a reason for the apparent incompleteness of the text that precludes the idea that it is a case to be dealt with on the principles of connecting the sense of loose utterances.

In conformity with what has already been said, we are not to impair the force of the important provision that the Circuit Judges shall hold their offices four years by imposing limitation to it resting on doubtful constructions. The duration of the office is a matter of vital importance, as it concerns the stability of the administration of justice, and it must be regarded as so considered

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*by the Constitution. If it is important, as a general rule, that Circuit Judges should hold for four years, it is equally important that at all times the office should be held in a manner equally stable. The provision authorizing the Governor to appoint when the unexpired term does not exceed one year can be fully explained as consistent with the requirement that the General Assembly shall always elect for four years upon principles already briefly discussed. It has been said that the nature of appointments by the General Assembly is such as to require temporary provisions to fill vacancies during the time when that body is not in session. It would not be unreasonable to hold that this was the object had in view by the Constitution; indeed, if it was not, it is impossible to say what that object was. It will be observed that the language as to filling vacancies by the Governor follows as a proviso after the following language: "All vacancies occurring in the Supreme Court or other inferior tribu-

nal shall be filled by election as herein prescribed." Then follows the proviso in this language: "Provided, If the unexpired term does not exceed one year, such vacancy may be filled by Executive appointment." We shall assume, what is obvious, that the Circuit Court is intended as embraced in this clause, for, if it is not, then clearly, there is nothing in the Constitution that can authorize any abbreviation of the full constitutional term of four years. The language introduced as a proviso may be read not only in the sense of calling for a different appointing power from that contemplated by the previous language, but as referring to a different and distinct case, and ground for exercising that appointing power. The words following the proviso do not necessarily imply that the language qualified imparts authority to fill vacancies for an unexpired term by the General Assembly. The matter of a proviso may be something properly belonging to a preceding statement and omitted from it, or it may be something quite foreign to it and yet capable of affecting it incidentally. Before we read the matter of the proviso, together with that preceding it, so as to treat it as a connected whole, we must find a necessity, or, at least, propriety, for so doing. It is possible that the framers of the Constitution intended that all elections by the Legislature to fill vacancies should be for the full term, for no good reason appears why vacancies for more than a year of the unexpired term should not be filled by persons chosen to hold for the full term of four years, and yet when a vacancy for a

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year occurred *that the Governor should fill the office for this period, leaving it to the next meeting of the General Assembly to fill the office permanently. There is no lack of reason of that construction nor want of symmetry. It is in harmony with the general object of the Constitution, which was to give that degree of stability to the office of Circuit Judge resulting from the continuance of his term for four years, and with the necessity of keeping the office filled when the Legislature might not be in session. It has been said that it was possible that this might have been the intention of the Constitution. If so, then the attempt to limit the constitutional term is made on doubtful grounds and cannot be allowed.

But we may go further and say that there is strong reason for believing that such was the actual intention of the Constitution. We have shown that it was reasonable, while on the other hand no reason can be assigned, fairly drawn from the Constitution or suggested by it, why, when the General Assembly meet to choose a Circuit Judge, they should appoint one to serve a shorter term than four years. The Constitution has not indicated that the Circuit Judges should all be elected at the same time; it is not desirable that they should be. The same reason that led the Constitution to provide that not more than one of the Justices of the Supreme Court should be elected by any one General Assembly would have prevented the introduction into that instrument of provisions compelling the General Assembly to elect all the Circuit Judges at the same time, and yet the consequence of the argument that the Circuit Judges have a term of four years fixed as to its commencement and end would have been that, as all the Circuit Judges were originally chosen by the same General Assembly, under the Constitution, they would continue to be so chosen for all time, and every four years would witness a simultaneous revolution in every circuit. It is enough to say, however, that we are not called upon by any necessity arising from the language and intent of the Constitution to hold that the term of four years is limited in duration in the case of a casual vacancy filled by the General Assembly. It has been contended that the term vacancy implies a vacancy for an unexpired term. Such is not the case. The fact of vacancy is one thing; the effect of it upon the term or tenure of the office put in abeyance is another thing. When an office having a certain duration is vacant, it does not necessarily follow that such vacancy is for an unexpired term. If there is a term

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of definite beginning in *point of time and duration, then vacancy clearly implies an unexpired term, to be filled as such; not from the fact of vacancy, however, but from the nature of the term made vacant.

That which the Constitution was looking to when it provides for filling vacancies was primarily to secure the regular performance of the official duties. What might be the effect of such vacancies as it regarded the term of the successor might well be regarded as a secondary matter, properly left to follow as a consequence from the provisions primarily intended for a more general purpose.

Judge Reed was clearly entitled to hold for a term of four years from his election to succeed Judge Graham, and was properly in office at the time this action was brought, and accordingly the complaint should be dismissed.

McIVER, A. J., concurred.

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9 S. C. 13

WARE v. MILLER.

(Columbia. April Term, 1877.)

[*Appeal and Error* ⇐795; *Motions* ⇐14.]

A motion to dismiss an appeal, on the ground of irregularity in taking the appeal, will not be allowed where it does not appear that the party making the motion has complied

with the rules of Court prescribing the practice in such cases.

[Ed. Note.—Cited in Moody v. Dickinson, 54 S. C. 533, 32 S. E. 563.

For other cases, see Appeal and Error, Cent. Dig. § 3142; Dec. Dig. ⟸795; Motions, Cent. Dig. § 8; Dec. Dig. ⟸14.]

[*Bail* ⟸18.]

No action lies upon a bail bond taken by the Sheriff in March, 1867, where the liability of the bail was not fixed, in the manner prescribed by the law then existing, before imprisonment for debt was abolished.

[Ed. Note.—For other cases, see Bail, Cent. Dig. § 80; Dec. Dig. ⟸18.]

[*Constitutional Law* ⟸169.]

A State may constitutionally abolish imprisonment for debt as to existing contracts, for, though by so doing it impairs the remedy of the creditor, it does not "impair the obligation of the contract" in the constitutional sense of the term.

[Ed. Note.—Cited in Willis v. Heighway, 40 S. C. 481, 19 S. E. 135.

For other cases, see Constitutional Law, Cent. Dig. § 502; Dec. Dig. ⟸169.]

[*Bail* ⟸21.]

[Unless a ca. sa. be regularly sued out against the principal, and returned non est, the bail is not held.]

[Ed. Note.—For other cases, see Bail, Cent. Dig. § 85; Dec. Dig. ⟸21.]

Before Northrop, J., at Spartanburg, July Term, 1876.

This was an action by James H. Ware against W. T. Miller. The case is as follows:

On the 11th March, 1867, the plaintiff commenced an action of assumpsit against H. N. Maddox. The writ was endorsed with an order for bail.

On November 12th, 1867, the Sheriff of the County (Spartanburg) arrested Maddox, who, on the next day, gave a bail bond to the sheriff, with W. T. Miller, the defendant, as bail. The bond was conditioned in the usual form to appear at the next Court,

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&c., * "to answer to James W. Ware, the plaintiff, of a plea of trespass on the case, and so forth, and, also, for certain promises and assumptions by the said defendant to the said plaintiff made," &c.

The plaintiff recovered judgment in his action against Maddox on the 9th May, 1870, and on the same day sued out an execution thereon against him, which, on the 18th June, 1870, was returned nulla bona.

On 7th November, 1871, the bond was assigned by the Sheriff to Ware, the plaintiff, who, on the same day, commenced this action thereon against Maddox and Miller.

The complainant in this action, after stating the facts hereinbefore set forth in reference to the first action, alleged "that said Maddox failed to appear and abide by said judgment," (that is the judgment in the first action,) "but removed himself and property beyond the limits of the State, and that neither he nor Miller has paid the said judgment, which is still due and unsatisfied."

The defendant, Miller, in his answer, submitted to the Court as his defense to the action, that, on account of the military orders of the General commanding in this State at the time, and the provisions of the State Constitution of 1868, prohibiting imprisonment for debt, Maddox could not at any time have been surrendered; and that at no time after the giving of the bond had any process been issued by the Court for the arrest of Maddox, and the defendant therefore submitted that the plaintiff had no right of action against him.

The defendant, by his attorneys, requested His Honor the presiding Judge to instruct the jury as follows:

1. That bail were entitled until return day of ca. sa. against the principal in which to surrender their principal.

2. That there must be a ca. sa. issued before the liability of bail can be fixed.

3. That in order to fix such liability there must be a return of non est inventus to the ca. sa.

4. That bail had the right for one term after such return in which to produce the principal.

5. That, imprisonment for debt having been abolished, the defendant was relieved from any liability not already incurred on said bond.

6. That, no ca. sa. having been issued, the jury should find for the defendant.

7. That the plaintiff had no cause of action.

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*The request was denied, and the jury were instructed to find for the plaintiff, which they accordingly did,—the verdict being for $369.

The defendant appealed on the ground that His Honor the presiding Judge erred in refusing to instruct the jury as requested.

Evins & Bomar, for appellant, cited the authorities mentioned in the opinion of the Court, and other authorities, and contended that the Circuit Judge erred in denying the instructions asked for by the defendant; that the liability of the bail had never been fixed, and, therefore, the plaintiff could not maintain his action.

J. C. Winsmith, contra, read a certificate of the Clerk of the Circuit Court, and his own affidavit, which stated that the verdict in the Circuit Court was rendered August 1st, 1876; that judgment was entered on the 9th of August, 1876; execution thereon was lodged with the Sheriff 30th of August, 1876; that the notice of appeal was served 30th of September, 1876, and that the bond for appeal was filed October 11th, 1876; and he thereupon submitted that, under Rule LV of the Circuit Court, and the Revised Statutes, page 675, Section 420, the appeal was irregular and should be dismissed. He cited Hill

on New Trials, 702; 4 Waite's Pr., 220, 221. He contended that by the removal of Maddox from the State, and the failure of Miller to pay the judgment, the bond was forfeited; and he further contended that the bail bond could not be affected by any regulation made after it was given.—Cosgrove v. Butler, 1 S. C., 241; Crotwell v. Boozer, 3 S. C., 600.

July 24, 1877. The opinion of the Court was delivered by

McIVER, A. J. Before proceeding to a consideration of the merits of this case, it will be necessary to dispose of an objection, made in a very informal and irregular way, to the hearing of this appeal. This objection, based upon purely technical grounds, not having been made in the manner prescribed by the rules of this Court, cannot be considered; for by the amended rules of this Court, in force from and after the 1st day of October, 1873, when a party desires to move this Court that an appeal be dismissed, or the cause stricken from the docket, for any irregularity in taking the appeal, it must be upon eight days' notice, upon affidavits, copies of which should be served on the opposite

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party. In the *papers submitted to us we find no evidence that this requirement has been complied with, and, as we think that parties who assail others upon purely technical grounds should be careful to see that their mode of attack is itself technically accurate, we are not disposed to enter upon a discussion of the merits of the objection.

Turning, then, to a consideration of the case, we find that the plaintiff issued a bail writ in assumpsit against the defendant, H. N. Maddox, on the 12th March, 1867, who, having been arrested, on the next day executed a bail bond, in the usual form, with the defendant, W. T. Miller, as his bail, to the Sheriff of Spartanburg. On the 9th May, 1870, the plaintiff recovered judgment in his original action, and issued his execution to enforce the same, which, on the 18th June, 1870, was returned nulla bona. On the 7th November, 1871, the plaintiff having on that day procured an assignment of the bail bond from the successor in office of the Sheriff who had taken the bond, commenced this action, alleging the foregoing facts and the further facts "that said Maddox failed to appear and abide by said judgment, but removed himself and property beyond the limits of the State, and that neither he nor Miller had paid the judgment, which was still due and unsatisfied."

The defense set up by Miller, no answer having been put in by Maddox, was "that on account of the military orders of the General commanding in this State, and the provisions of the State Constitution prohibiting imprisonment for debt, the body of said Maddox could not at any time have been surrendered, and, further, that at no time after the giving of said bond had any process been issued by the Court for the arrest of said Maddox, and said defendant, therefore, claimed that the plaintiff had no right of action." The plaintiff offered in evidence the bail bond and the Sheriff's return of nulla bona on his execution against Maddox, while the defendant put in evidence the military orders prohibiting imprisonment for debt. The defendant submitted sundry requests to charge, which it is not necessary to particularize, as they all amounted to a request to charge that, under the case as made, the defendant, Miller, could not be held liable. These requests the Circuit Judge refused, and, on the contrary, instructed the jury to find for the plaintiff, which they accordingly did.

The defendant having excepted to the refusal of his requests, we are now to consider whether such exceptions were well taken. The plaintiff certainly cannot maintain this

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action unless he has shown *a breach of the condition of the bond, which is the foundation of it. What, then, is really the condition of this bond? It is not merely, as its terms imply, that "the above bound H. N. Maddox, defendant, do appear at the next Court, &c., * * * to answer to James H. Ware, the plaintiff, of a plea of trespass on the case, &c.," for, as the law then stood, he might have so appeared and answered, and yet might have afterwards committed a breach of the bond. Nor does the condition require that he should answer to the demand of the plaintiff, in the sense of satisfying any judgment that might be obtained against him, for this would be converting the bail into a surety for the debt. The condition of this bond amounted simply to this: that he would have his body within reach of any process which the Court might lawfully issue against it for the enforcement of such judgment as might be rendered against him. It would, therefore, seem to follow, necessarily, that, if from any cause, whether from want of power in the Court, or from want of will in the plaintiff or in the Court, such process has never been issued, there could be no breach of the condition of the bond, and, therefore, no cause of action. Because for anything that the Court can possibly know, it may be that if such process had been issued the party bound would either have voluntarily surrendered himself, in exoneration of his bail, or the bail might, by exercising the right formerly secured to him, have brought his principal within reach of such process.

An examination of the authorities will show that they fully sustain the foregoing views. In Anerum v. Sloan (1 Rich., 421,) the question was whether the liability of the bail had been fixed; in other words, whether there had been such a breach of the condition of the bond as would enable the plaintiff to maintain the action against the bail. A ca.

sa. was issued against the principal on the 21st June, and on the 8th July the Sheriff made an entry on it of non est inventus, and on the 4th of October, the day before the regular return day of the ca. sa., the plaintiff commenced his action on the bail bond against the bail. A motion was then made to confirm the surrender of his principal by the bail, which had been made some time before, —exactly when is not stated, but certainly after the commencement of the action against the bail,—and the motion was granted.

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*Butler, J., in delivering the opinion of the Court, after deciding that a return of non est inventus cannot be made on a ca. sa. so as to fix the liability of the bail before the regular return day of such ca. sa., (the return of non est inventus in this case having been made prior to such return day,) uses this language: "No action can be commenced against the bail until they are fixed by a ca. sa. and non est returned upon it against the principal." And, again, he says: "For the purpose of fixing the bail, it is indispensable that a ca. sa. should be sued out."

In Stevens v. Meeds (1 Mill, Const. 318,) there had been a return of nulla bona, but no ca. sa., against the principal, and it was held that the bail was not fixed by the return of nulla bona. In Antonio v. Arthur (1 Nott & McC., 251,) the action was against the Sheriff for refusing to assign a bail bond, and the Court held that the action could not be maintained, because, the principal having died before the issuing of a ca. sa. against him, the bail could not be made liable, and, therefore, the plaintiff sustained no damage from the refusal of the Sheriff to assign the bail bond. In Saunders v. Hughes, (2 Bail., 513,) O'Neill, J., in considering the meaning and effect of the words "to abide the event of the Court and jury," which had been improperly incorporated into the condition of the bail bond, which was the subject matter of the action in that case, says: "If they have any meaning, they cannot mean anything more than that the defendant (Colonel Hughes) will legally abide the judgment of the Court—that is, that he shall remain within the reach of its process of satisfaction. This is exactly the obligation which the bail incurred by undertaking for his appearance."

In Saunders v. Bobo, (2 Bail., 492,) the question was what effect the discharge of the principal under the Insolvent Debtors Act, at the suit of another plaintiff, before the bail had been fixed by the return of non est inventus on a ca. sa. against the principal, would have upon the liability of the bail, and the Court, through Johnson, J., uses this language: "Unless the bail has become fixed, it must, for very obvious reasons, operate to discharge them. Until then they owed no debt, for the judgment is exclusively the debt of the principal. After they are fixed it becomes their own proper debt and the discharge of their principal cannot discharge them. * * * It follows, therefore, that bail are fixed by the return of non est inventus to a ca. sa. against their principal and not before." Apply this doctrine to the case now in hand. The principal having been

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*discharged from liability to arrest under a ca. sa. by the provisions of the Constitution of the State, and the obligation of the bail being, as we have seen, merely that his principal shall hold himself answerable to such process, would not the discharge of the principal from his liability to arrest operate as a discharge of the bail from his obligation, when such discharge of the principal has taken place, as in this case, before the liability of the bail became fixed?

In Watson v. Bancroft, (4 Strob., 218,) Evans, J., says: "The bail stipulated for nothing else but that the principal shall be put back in the possession of the Sheriff, 'out of whose custody he has been taken.' At the time this bail bond was executed such a stipulation was lawful. The bail had a right to capture his principal wherever he could find him and deliver him into the custody of the Sheriff, who was bound to receive and safely keep him until discharged by due course of law. But before any liability was or could have been fixed upon the bail, by the issue of a ca. sa., this right was not only taken away from him, but it became absolutely unlawful for him to perform his stipulation, and hence he is relieved of his obligation. For if one agrees to do a thing which, at the time of such agreement, is lawful, and it afterwards is made unlawful by an Act of the Legislature, passed before the time arrives at which such thing is to be done, the Act avoids the promise and the party is relieved from his obligation."—2 Pars. on Con., 674; see also 1 Sel. Pr., 173–4.

The views hereinbefore presented are not in any respect weakened by the cases of Longstreet v. Lafitte, 2 Sp., 667; Jarvis v. Giberson, Dud., 223; following Despany v. Davis, 3 McC., 16, and Jarvis v. Alexander, Chev., 143; for, in fact, the case of Longstreet v. Lafitte, rather recognizes the correctness of our position than otherwise, while the other cases are confined to the consideration of the effect of the Act of 1824, exempting females from arrest under a ca. sa., upon the right to hold a female to bail, and the obligations which such bail would assume. And it is quite manifest that the respondent's citations from the General Statutes do not support his position; for Section 10, at page 751, relates exclusively to fines and forfeitures, and whether a fine or a forfeiture is to be regarded as a debt, within the meaning of that term as used in the clause of the Constitution which abolishes imprisonment for debt, we deem it unnecessary now to consider; for, if so regarded, then that Section is in conflict

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with the Constitution, *and, therefore, invalid. If not so regarded, then that Section has

no application to the question under consideration.

The other reference to page 716, Section 4, which must be a misprint, possibly intended for some one or more of the Sections in Title VI, Chapter CXXIII, of the General Statutes, is equally inapplicable, as the provisions of that Chapter must be regarded as confined to those cases in which imprisonment for debt is not abolished by the Constitution, to wit, "in cases of fraud," or to cases arising under Section 10, page 751, above referred to. If it was the intention of the respondent, when he used the language "this bail bond could not be affected by any regulation made after it was given," to contend that, imprisonment for debt having been abolished after the execution of this bond, such legislation was retroactive and impaired the obligation of the contract, the language of Cooley, in his work on Constitutional Limitations, at page 287, furnishes a complete and conclusive answer. He says: "Without impairing the obligation of the contract, the remedy may certainly be modified as the wisdom of the nation shall direct. To take a strong instance: Although the law at the time the contract is made permits the creditor to take the body of his debtor in execution, there can be no doubt of the right to abolish all laws for this purpose, leaving the creditor to his remedy against property alone." This proposition finds support in numerous cases cited.

We think, therefore, that the exceptions were well taken, and the motion is granted.

WILLARD, C. J., concurred.

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9 S. C. 20

MONTGOMERY v. SCOTT.

(Columbia. April Term, 1877.)

[*Mortgages* ⇨88.]

Where a party brings an action for equitable relief from a bond and mortgage which she had executed, against a bona fide holder for value, who received them through the hands of a third party without any notice or suspicion of the fraud, it is not enough for the plaintiff to show that she was induced to execute the instruments by the false and fraudulent representations of such third party, but she must go further and show that the execution was without negligence on her part, and this, although she was old, infirm and illiterate.

[Ed. Note.—Cited in Ballou v. Young, 42 S. C. 170, 175, 20 S. E. 84; Maxwell v. Foster, 67 S. C. 386, 45 S. E. 927; Baldwin v. Postal Telegraph Cable Co., 78 S. C. 423, 59 S. E. 67; Mobley v. Quattlebaum, 85 S. E. 589.

For other cases, see Mortgages, Cent. Dig. § 197; Dec. Dig. ⇨88.]

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*Before Carpenter, J., at Richland, February, 1877.

This was an action by Eliza Montgomery against Edwin J. Scott & Son and Clifton J. Houston to set aside a bond and mortgage for one thousand dollars to the said Edwin J. Scott & Son, bearing date the 1st day of April, 1875. The mortgage was of a lot, with buildings thereon, in the city of Columbia, and was recorded 22d April, 1875. The complaint alleged that at the time the plaintiff executed the said instruments she was old, infirm and uneducated, not able to read or write, and, by reason thereof, was incapacitated from attending properly to business; that on that day Clifton J. Houston, one of the defendants, fraudulently taking advantage of the plaintiff's said incapacity and ignorance, procured her to sign the said bond and mortgage, which he falsely and fraudulently represented to be a recognizance for his appearance at Court in May, 1875, to answer to a bill of indictment; that the plaintiff signed said writing, believing that she was signing a paper to keep Houston out of jail, but, that having been since informed of the true character of the instruments, she has demanded of the defendants, Edwin J. Scott & Son, that the said bond and mortgage be canceled; that she has never had any transaction with the said Edwin J. Scott & Son, nor did she receive any consideration for the said bond and mortgage. The prayer of the complaint was that Edwin J. Scott & Son give up said bond and mortgage to be canceled, and that the same be marked null and void.

The complaint was served on the defendants in December, 1875. Houston neither appeared nor answered. Edwin J. Scott & Son answered in January, 1876, denying all knowledge of the fraud charged, if any there was, which they did not believe, and stated as a defense that they did, in the course of business as bankers, and for full consideration, and without notice or suspicion of fraud, receive the joint and several bond of the plaintiff and the defendant, Houston, secured by the mortgage of the plaintiff, as mentioned in the complaint.

By an order dated March 28th, 1876, J. P. Carroll, Esq., was appointed Referee to hear and determine all the issues of law and fact in the case.

On the 14th of October, 1876, the Referee submitted his report as follows:

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*By the order of March 28th, 1876, herein made by His Honor R. B. Carpenter, I, the undersigned, J. P. Carroll, was appointed Referee to hear and determine all the issues of fact and law in the above entitled case. The attorneys, respectively, of the plaintiff, Eliza Montgomery, and the defendants, Edwin J. Scott and Henry E. Scott, have appeared before me, have produced their witnesses and proofs, and have submitted arguments on behalf of their respective clients. The defendant, C. J. Houston, has neither pleaded to the complaint nor appeared to the action. Of the evidence adduced, a state-

ment will be found in the within papers accompanying this decision.

The plaintiff by this action seeks to have annulled and delivered up to be canceled the bond and mortgage mentioned in her complaint. She demands this relief upon the ground that she was induced to execute the written instruments referred to by the false and fraudulent representatons of the defendant, C. J. Houston, that they were nothing more than a bond for his appearance at the Court of General Sessions to answer to a bill of indictment to be there preferred against him. This charge of fraud against the defendant Houston is fully sustained by the testimony of the plaintiff herself and of Eliza Levy, who was examined as a witness on her behalf, if their testimony is to be believed. But it is urged on the part of the defendants, E. J. Scott & Son, that both those witnesses have been contradicted directly by other and unquestionable evidence in the cause in regard to several of the circumstances to which they testify as connected with the execution of the bond and mortgage referred to, and that their testimony ought, therefore, to be wholly rejected. That two separate papers (the bond and mortgage to the defendant Houston) were executed by the plaintiff cannot well be doubted, and it is certain that afterwards two other separate papers (the bond and mortgage to the defendant, E. J. Scott & Son,) were also executed by the plaintiff. Yet the plaintiff and the witness, Eliza Levy, both testify in effect that upon each of these occasions but a single paper was signed by the plaintiff. So, likewise, the strong probability seems to be that there must have been an interval of some weeks between the plaintiff's execution of the bond and mortgage to the defendant Houston and her execution of the bond and mortgage here in question. Yet the plaintiff and Eliza Levy both testify positively that that interval was but a single day. The plaintiff also testifies

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that Eliza Levy was present *when she (plaintiff) signed the papers attested by W. A. Carr and W. Rose, as subscribing witnesses, and they, on the contrary, state that Eliza Levy was not so present. The testimony of these witnesses, the plaintiff and Eliza Levy, as I apprehend, cannot, however, be wholly discredited because of these misstatements, unless they were willfully false or at least made recklessly and without due regard to the oath they had taken. The plaintiff, in her testimony as to what occurred when the bond and mortgage were made to the defendant Houston, does not say positively that she then signed but one paper. Her statement is that she "thinks she signed but one paper" on that occasion. The confident statement of the witness, Eliza Levy, that but one paper was then signed by the plaintiff is weakened by another part of her own evidence. She was certainly not immediately present throughout the whole of the interview between Houston and the plaintiff, for she says that while Houston read aloud a paper to the plaintiff she (the witness) was in an adjoining room and could hear him reading, but could not understand the words. For aught that appears to the contrary, the plaintiff might have signed one paper while the witness was absent from the room and another after her return, and the witness having seen but the one paper signed might naturally have supposed that it was the only one then executed. As to the number of papers signed by the plaintiff when the bond and mortgage now in question was executed, the witness, Eliza Levy, does not testify positively, but two papers, she states, were signed by the plaintiff for Houston "so far as witness knows," and the witness "thinks she must have known the fact had the plaintiff signed any other paper." This witness and the plaintiff must be regarded as incorrect in their testimony as to the time which intervened between the signing, at the request of Houston, of the several papers of which they speak. But dates are difficult of remembrance, and the plaintiff's age naturally suggests its usual incident, an infirm memory. As the witness, Eliza Levy, according to her testimony, was present very shortly before and also immediately after the plaintiff's signing the last of the papers which she executed for Houston, it may well have been that the plaintiff failed to notice her absence in the interval and was thereby led into the mistake of supposing that the witness was present at the moment of her signing the same. Eliza Levy is a negro woman and was then living with the plaintiff in the capacity of her servant, as I infer, and it may well have happened, under

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*the circumstances stated, that her presence upon that occasion was not observed by the witnesses Carr and Rose.

The contradiction and disproof of the several statements referred to of the plaintiff and Eliza Levy certainly tend to cast doubt and suspicion upon their whole testimony. But, on the other hand, there is not wanting evidence which operates to sustain these witnesses in the more important facts to which they testify. The plaintiff's testimony as to what occurred when she signed the bond and mortgage here in question is confirmed in all essential particulars by the subscribing witnesses Carr and Rose, and, in especial, when they testify that Houston said to her "that there was something wrong about those papers you signed the other day; that they were legal papers, and had to be drawn carefully; that he had brought some other papers to be signed by her, and they were just like those that she had already signed;" and that the papers were not read to her, and that they (the witnesses) did not read them and knew nothing of their contents or purport. The plaintiff is a mulatto, is old and

illiterate, being unable to read or write, and seems to have had great confidence in Houston; while he is intelligent, shrewd and utterly unscrupulous. She seems to have been an easy subject for the fraud which she charges upon him, and he entirely capable of perpetrating it. He was proved to be of "very bad general character," and unworthy of belief, and the counsel for the defendants, E. J Scott & Son, admitted that he was so. They examined him as a witness, and did so, as announced by their counsel, not because they had the least confidence in his testimony, but because they wished to avoid all appearance even of suppressing any of the facts connected with the execution of the bond and mortgage which they held against the plaintiff. In Belcher v. Connor, (1 S. C., 90,) the rule of law as declared by the Court seems to be that the testimony of a discredited witness is not to be wholly rejected, but may be considered in estimating the weight of other evidence in the case. If, for this purpose, the testimony of Houston be examined, it will be found that, in one most important particular at least, it indirectly but strongly supports and confirms the testimony of the plaintiff. He testifies that some time in April, 1875, in a conversation with the plaintiff about his pecuniary troubles and embarrassments with the defendants, E. J. Scott & Son, the plaintiff "volunteered to aid and assist him by giving, as a security for his debt to those defendants, a mortgage upon her

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*house and lot in the city of Columbia. That the plaintiff, in her aged and helpless condition, should propose of her own accord, and without any request from him to encumber with a lien for so large a sum almost the entire property and estate which she owned, and for the purpose of securing the debt of another, unconnected with her by blood or affinity, is a story too strangely and wildly improbable to be believed. It was also in evidence that, about the time the bond and mortgage here in question was executed, the defendant, C. J. Houston, had been arrested under a warrant for fraudulent breach of trust, John Agnew being the prosecutor; and it should be added that no attempt was made to impeach the testimony either of the plaintiff or Eliza Levy upon the ground of their general character. With the conflict of testimony presented, the safer and more satisfactory course, perhaps, would have been to have submitted to a jury the issue between the parties as to the fraud which the plaintiff alleges against the defendant Houston. Upon consideration of the whole evidence, my judgment (after much hesitation, however,) is that the testimony of the plaintiff and of Eliza Levy has not been discredited as to the fraud which they charge upon the defendant Houston. It is "rash and unphilosophical," says a distinguished writer, "to reject the substance of a story by reason of some diversity in the circumstances with which it is related."—Stark. on Ev., 831, note 1.

It is urged on behalf of the defendants, E. J. Scott & Son, that, though the bond and mortgage in their possession were procured from the plaintiff by the fraud of Houston, yet the plaintiff's proper remedy is by a proceeding against him, and that she cannot be allowed to impeach those securities in their hands, because they (Edwin J. Scott & Son) obtained the same from C. J. Houston in good faith, and upon valuable consideration, and without the slightest notice or suspicion of such fraud. The law, as adjudged in Thoroughgood's case, (2 Coke, 9 b.) has never been overruled, as I believe. It was then held that when a deed is procured by false representation of its purport and effect it is invalid and void, and that it is not material whether such representations be made by the grantor or a stranger, "so as he who maketh the writing be thereby deceived." Nor will it vary the result though the obligee was not aware of the fraud until after he had accepted the bond.—Schuylkill County v. Copley, 57 Penn. R., 383; 5 Am. R., 441. It is further contended that the defend-

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ants, Edwin J. Scott & Son, *should be regarded as having purchased the bond and mortgage in question for valuable consideration without notice of the fraud alleged. It may well be doubted whether such defense can avail them. In Maybin v. Kirby (4 Rich. Eq., 105,) it is held "that the assignee of a chose in action is not within the rule which protects a purchaser for valuable consideration without notice, and that the assignee takes such interest as the assignor had, and is bound by all the equities binding upon the latter;" and such, undoubtedly, is the general rule in regard to all unnegotiable instruments.

After due consideration, I find as matters of fact:

1st. That between the seventh and the twenty-second days (inclusive) of April, 1875, the plaintiff, Eliza Montgomery, executed the bond and mortgage mentioned in the complaint, and now held by the defendants, Edwin J. Scott & Son, and that the said plaintiff was induced to execute the said instruments by the false and fraudulent representations of the defendant C. J. Houston; that they were but a bond, in the penalty of one thousand dollars, conditioned for his appearance at the Court of General Sessions for the said County of Richland to answer to a bill of indictment to be then preferred against him.

2d. That upon the execution, by the plaintiff, of the said bond and mortgage deed, the same passed into the hands of the defendant, C. J. Houston, and, on or about the twenty-second day of April, 1875, were delivered by him to the defendants, Edwin J.

Scott & Son, to secure a debt of some sixteen hundred dollars which he owed them for so much money by them lent and advanced to him: that upon receiving from said C. J. Houston the said bond and mortgage deed, the defendants, Edwin J. Scott & Sons, delivered and returned to said C. J. Houston other securities for his said debt which he had previously deposited with them, amounting to a large sum, and that when the said bond and mortgage deed were so delivered to them by the said C. J. Houston, they, the said Edwin J. Scott & Son, had no knowledge, notice or suspicion of the said fraudulent means by which said C. J. Houston had procured the said bond and mortgage from the said plaintiff.

And I also find as conclusions of law:

1st. That the said mortgage deed in the hands of the defendants, Edwin J. Scott & Son, is invalid and void, and that the plaintiff is entitled to have the same delivered up and canceled.

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*2d. That the said bond of the plaintiff, in the hands of the said Edwin J. Scott & Son, is, as against her, also invalid and void, and that the said plaintiff is entitled to have the same canceled as against herself as one of the obligors of the same.

3d. And that the costs of all the parties to this suit ought to be paid by the defendant C. J. Houston, and I direct that judgment be entered accordingly.

The plaintiff excepted to so much of the report as directed that the costs be paid by the defendant Houston. The defendants, Edwin J. Scott & Son, also excepted to the report on the grounds:

I. They except to the finding of the Referee as to the matters of fact numbered 1st in his report for the following reasons:

1st. That from the weight of the evidence he should have found to the contrary, and that no fraud was committed on the plaintiff.

2d. That to upset the deed of the plaintiff the testimony should have been free from suspicion of interest, uncontradictory in itself, and corroborated by testimony of persons and circumstances free from suspicion likewise: whereas the case of the plaintiff relies almost altogether on her own testimony, contradictory in itself, admitted to be found false in certain particulars, and relying mostly for corroboration on that of her dependent and co-dweller in the same house, Eliza Levy, evidently concerted with her and liable to precisely the same objections as her own.

II. They except to the general finding on matter of law of the Referee, to wit: That, supposing the fraud to have been committed, as found by him, and these defendants to be innocent of the same or any knowledge of it, and to have parted with full value for the bond and mortgage, as also found by him, the plaintiff has redress as against these defendants, and the right to have the bond and mortgage aforesaid delivered up and canceled as to those defendants, and except for the following reasons:

1st. That these defendants, though undoubtedly bona fide holders for valuable consideration without notice, are not purchasers of the securities in the sense of the common signification of the term purchaser as used by the Referee, but are actual parties to the same, and not assignees of a chose in action as claimed, and as such parties used due diligence.

2d. That the plaintiff, the defendant Houston, and these defendants, all being parties to the same transaction, and the plaintiff

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*having chosen to place confidence in the defendant Houston, and thereby negligently enabled the defendant Houston to defraud these defendants, and more especially having made a bond and mortgage to the defendant Houston, whereby he was enabled to impose upon their confidence, and, in spite of due diligence on the part of these defendants, to defraud them out of securities of even greater value, the well known rule of law should be applied, to wit: That whenever one of two innocent parties must suffer by the acts of a third, he who has enabled the third party to occasion the loss must sustain it.—Kerr on Frauds, 137.

3. That these defendants are bona fide purchasers for valuable consideration without notice, and as against them equity will not relieve.

III. They except to the special findings of law of the Referee numbered 1st and 2d, ordering the bond and mortgage to be delivered up and canceled, for the reasons before given, and because the same are contrary to the law and the evidence.

The decree of His Honor the Circuit Judge is as follows:

On hearing the pleadings, evidence and report of the Referee in this case, and argument of counsel for the plaintiff and defendants, it is ordered that the exceptions be overruled, and the report of the Referee be and is confirmed.

Both parties appealed. Edwin J. Scott & Son upon the ground that the Circuit Judge erred in overruling their exception to the report, and the plaintiff upon the ground that he erred in overruling her exceptions.

[For subsequent opinion, see 10 S. C. 449.]

Rhett, for Edwin J. Scott & Son, after commenting upon the testimony and the report upon the facts, said he did not deny the rule laid down in Thoroughgood's case "that a deed procured by false representations of its purport and effect is void, whether such representations are made by the grantor (grantee?) or a stranger;" but contended that since that decision was made an important qualification had been added to the rule

by numerous cases for which the occasion did not arise in Thoroughgood's case. The qualification is this: "That the grantor must have used due diligence: must have been guilty of no negligence when this defense is sought to be used against an innocent party

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who has parted with full value." The *second resolution in Thoroughgood's case laid down the rule which is considered appropriate to ours, and that is "that an illiterate man need not execute a deed before it is read to him in a language he understands; but if he do, without desiring it to be read, the deed is binding." He commented on the position of the plaintiff and the authorities relied on on her behalf, and then proceeded as follows:

We contend that when a person is deceived by a third party into signing a paper entirely different from what he was informed that he was signing, and the grantee, for value in the case of a deed, or purchaser for value in the case of a negotiable instrument, is innocent of all participation in the fraud or knowledge of it before he parted with value, the party signing is liable on the paper notwithstanding, unless he be guilty of no negligence in so signing, and it is incumbent on him to show that he is not. Of course we are here presuming as a matter of fact that we have satisfied the Court that the plaintiff was guilty of negligence. If not entirely, we think that some of the cases that we will cite will satisfy them on this point.

It is conceded (to be perfectly fair) that the majority of the cases hereafter cited (not all) are on instruments originally negotiable; but we contend that the reason of the rule is not drawn from the negotiability of the instrument, (fitting equally such a case as our own, possibly not the assignee of a chose in action,) but rather from the well known rule of law stated in the second exception on matters of law, "that whenever one of two innocent parties must suffer by the acts of a third, he who has enabled the third party to occasion the loss must sustain it." It is his negligence that has enabled the third party. Without that he could not be held liable.

Moreover, it is asserted on our part that this is not simply a point contended for by us from our own deductions, but that it is plainly to be seen in the cases cited by us. Moreover, in notes to Basset v. Nosworthy, L. C. in E., edition 1852, p. 71, and Swan v. Ligon, 1 McC. Ch., 232, it is said in ascertaining who is a purchaser for value without notice we may resort to the analogies of the commercial law.

The first and leading case that we cite on our side (not meaning, however, to omit the second resolution in Thoroughgood's case, cited before,) is Shirts v. Overjohn, Supreme

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Court of Missouri, May *Term, 1875, reported in Central Law Journal of 2d July, 1875, pp. 423, 424 and 425. Special attention is respectfully requested to this case, and more especially the able note of the editor, summing up the whole doctrine and giving a full résumé of all the principal cases, English and American.

The syllabus of the case is as follows:

"When it appears that the party sought to be charged intended to bind himself by some obligation in writing, and voluntarily signed his name to what he supposed to be the obligation he intended to execute, having full and unrestricted means of ascertaining for himself the true character of such instrument before signing it, but neglecting to avail himself of such means of information and relying on the representations of another as to the contents of the instrument, signed and delivered a negotiable promissory note instead of the instrument he intended to sign, he cannot be heard to impeach its validity in the hands of a bona fide holder."

The fact of the case is that the party thought he signed a receipt, but in fact he signed a note. He did not read the paper, nor did he have it read to him.

In the last part of the decree, (p. 425) the observations of the Judge in Briggs v. Ewart, respecting the qualification of negligence, and announcing the broad doctrine that to be binding the instrument must be executed as and for the paper it purports to be, and if the party did not intend he cannot be held bound at all, are expressly disapproved.

In the able note of the editor, appended at the close, referring to an attempted distinction in favor of parties whose signatures are obtained when they are unable to read, it is said "he ought, before becoming a party to a written obligation, to have its contents examined by some person in whom he may reasonably place confidence; and even then, if his confidence should be misplaced, he ought to suffer for the wrongful act of his agent rather than be allowed to shift the burden to the bona fide holder."

The next case we refer to is Indruck v. Clemens, Central Law Journal, 1876, p. 28. It is in the same direction. Also a case before the Supreme Court of Pennsylvania, Brown v. Reed, Central Law Journal, 1870, p. 83. This case bears but indirectly, but goes to show how far the Courts will go in the direction we claim.

We would like next to call attention to the short but able editorial in the Law Journal of March 10, 1876, on p. 153, on the point

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*that the rule is not confined to instruments negotiable in their inception, and to the case cited in it of Lickbarrow v. Mason, (2 T. R., 70,) whence comes the rule laid down in the second exception on law, and thence taken from Kerr, 137.

The next case is that of Citizens' National Bank v. Smith, Superior Court of New Hampshire, Central Law Journal, March, 1876, p. 163. This case is similar to Shirts v. Over-

john as to the facts. It is very full, ably argued and decided,—more than any other that I have been able to find. Special attention to it is respectively requested, more specially to the opinion of Chief Justice Cushing, on page 166, where, in closing, he rests his doctrine, not on commercial law but on the broad rule laid down in Lickbarrow v. Mason, by Ashurst, and quoted by him: "We may lay it down as a broad principle that whenever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it." Cushing says: "This rule is based on a sound legal principle and commends itself to the good sense of every intelligent person. It has long been established by numerous authorities, both English and American."

As to the point, what constitutes a purchaser for value, in its fuller sense, as distinguished from the special case of an assignee of a chose in action,. I would refer to the case of Basset v. Nosworthy, and notes thereon, and especially to page 50: "If two parties are deceived, the latter (the holder or grantor) is not bound to postpone his rights to amends."

Also, Zorn, v. Railroad Company, 5 S. C., 90.

See opinion of Judge Maher, quoting Chancellor Walworth, on page 97, on that point, and that of Associate Justice Willard confirming Circuit decree.

It is clear that we are within the rule of that case as to purchasers.

As to the third exception under the head of findings of law, that as against these defendants, bona fide purchasers for value without notice, equity will not in any case relieve, but leave the party entirely to his remedy at law, the case being one of pure exclusive equity jurisdiction, and one in which it is not possible for the Court to do equity to the defendant also by restoring him to his original position, or decreeing compensation therefor, we cite as authorities: Fonb. Eq., 412; Adams' Eq., 191, et seq.; Jeremy Eq., 487, 488; Kerr on Frauds, 48, 51, 137, 138, 312, 313;

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413; Basset v. *Nosworthy, Lead. Cas. Eq. Vol. 2, Part I, pp. 2, 34, 41, 42, (notes) 50; Story's Eq., Vol. 1, pp. 75, 77, § 1108; also, pp. 194, 424; Vol. 2, pp. 6, 8, 23. Our own cases: McMeekin v. Edwards, 1 Hill Ch., 288, and the cases cited therein notably; 2 P. Williams, 203, and 2 Vesey, § 516; also, Bank v. Toomer, 2 Hill, 27, where it is said "that the preponderance of authority" is to the effect "that the purchaser must be a party to the fraud."

All that is contended for under this head is, that however good a case the plaintiff may have as a defense to the action for foreclosure, when brought by these defendants still it does not, as against these defendants, entitle her to affirmative relief in equity. In this regard she has mistaken her forum. And it will be observed that almost all the cases cited as authorities are where the party claiming to be defrauded appears as defendant.

As to the third general head, that the decree is contrary to the law and the evidence, it is submitted that the same has been fully argued under the two previous general heads of the exceptions.

In answer to the plaintiff's ground of appeal, on the subject of costs, we would respectfully submit that if our view of the case be correct the plaintiffs should pay the costs to these defendants; but if, on the other hand, the decree below is correct, then it cannot be doubted but that the costs in the case, being one of pure equity, is entirely in the discretion of the Court below. And surely no more proper case could be found where the costs should be laid upon the defaulting defendant, Houston, or all costs disallowed the plaintiff, which latter is apt to be the practical effect of the decree on this point. The Referee's fee, of course, must then be equally divided between the plaintiff and these defendants, as it is not believed that anything can be collected from Houston.

Marshall, contra.

August 29, 1877. The opinion of the Court was delivered by

McIVER, A. J. The object of this action is to have a bond and mortgage of real estate, which had been signed in due form by the plaintiff, in the presence of two subscribing witnesses, in favor of the defendants, Scott & Son, canceled, upon the ground that the plaintiff had been induced to sign the same by the false and fraudulent representations of the defendant Houston that the paper she was signing was only a recogni-

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zance for his appearance at the *Court of Sessions to answer to an indictment to be preferred against him, whereas, in fact, the bond was the joint and several obligation of Houston and the plaintiff to pay Scott & Son $1,000 one year from its date, secured by a mortgage of real estate, the property of the plaintiff, signed by the plaintiff alone. The defendants, Scott & Son, in their answer, (the other defendant, Houston, having made default,) deny all knowledge or suspicion of the fraud alleged, and say that, having received the bond and mortgage for full consideration and without notice or suspicion of the fraud alleged, the plaintiff has no cause of action against them, but that, if she has suffered loss, it is the result of her own misplaced confidence in the defendant Houston, and to him alone must she look for redress. The issues of law and of fact having been referred to a Referee, he made his report, wherein he finds as matters of fact:

1. That the bond and mortgage were executed by the plaintiff but that she was indue-

ed to do so by the false and fraudulent representations of Houston that they were nothing but a bond for his appearance at Court.

2. That upon the execution of these papers they passed into the hands of Houston, who very soon afterwards delivered them to Scott & Son "to secure a debt of some $1,600 which he owed them for so much money by them lent and advanced to him; that upon receiving from the said C. J. Houston the said bond and mortgage deed, the defendants, Edwin J. Scott & Son, delivered and returned to said C. J. Houston other securities for his said debt which he had previously deposited with them, amounting to a large sum, and that when the said bond and mortgage deed were so delivered to them by the said C. J. Houston, they, the said Edwin J. Scott & Son, had no knowledge, notice or suspicion of the said fraudulent means by which said C. J. Houston had procured the said bond and mortgage from the said plaintiff."

And he finds as matter of law that the bond, so far as the liability of the plaintiff thereon is concerned, and the mortgage are invalid, and that she is entitled to have the same delivered up and canceled, and that the costs should be paid by defendant Houston.

To this report exceptions were filed, both by the plaintiff and by the defendants, Scott & Son, which, being overruled by the Circuit Judge, are again presented here by way of appeal. The defendants Scott & Son, take several exceptions, as well to the findings of fact as to the conclusions of law, which, from

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the view we take *of this case, it will be unnecessary to consider in detail. For, while this is a case in which it would be entirely competent for this Court to review the findings of fact as well as the conclusions of law of the Court below, and while such review might well be invited by the conflict in the testimony, which seems to have been so great that the able and experienced Referee could only reach his conclusions after much hesitation, prompting him to a suggestion that perhaps the safer and more satisfactory course would have been to have submitted the issue of fraud to a jury, in which suggestion we fully concur, though, of course, we are not to be understood as interfering with the right of parties to choose their own mode of trial by ordering such a trial, yet, as the case must go back for a new trial upon another ground hereafter to be noticed, we do not propose to prejudice the interest of either party upon such new trial by giving expression to any views which we might take of the testimony. The only question, therefore, which we propose to consider is that raised by one of the exceptions taken by the defendants, Scott & Son, namely, whether it is not necessary that it should be made to appear not merely that the plaintiff was induced by the fraud of a third person (Houston) to sign the bond and mortgage, but that, without negligence on her part, she was so induced to sign these papers, before she can ask the Court for the relief demanded against the holders, who were innocent of any knowledge of such fraud at the time they, for valuable consideration, took such bond and mortgage. It will be observed that this is a case in which the plaintiff seeks relief, which was formerly obtainable alone in a Court of equity, and the rule of that Court, which we consider still binding on this Court in the adjudication of a case to which it is appropriate, notwithstanding the fact that the Court of Equity has been abolished, was that "a party coming into a Court of equity is bound to show that his title to relief is unmixed with any gross misconduct or negligence of himself or his agents."—Story Eq., § 105. Chief Justice Marshall, also, in Marine Insurance Company v. Hodgson, (7 Cr., 332 [3 L. Ed. 362],) seems to have recognized the correctness of this rule. In speaking of the power of a Court of equity to restrain parties from availing themselves of the benefit of judgments obtained at law, he uses this language: "It may safely be said that any fact which clearly proves it to be against conscience to execute a judgment * * * of which he might have availed himself at

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law, but was prevented by fraud or *accident, unmixed with any fault or negligence in himself or his agents, will justify an application to a Court of Chancery." (See, also, Penny v. Martin, 4 Johns. Ch., 566.)

Again, Story, in Section 200, a, in speaking of a purchaser who asks to be relieved from a purchase made on the ground of misrepresentations by the vendor, says: "If he does not avail himself of the knowledge or means of knowledge open to himself or his agents, he cannot be heard to say that he was deceived by the vendor's misrepresentations. * * * It is his own folly and laches not to use the means of knowledge within his reach, and he may properly impute any loss or injury in such a case to his own negligence and indiscretion. Courts of equity do not sit for the purpose of relieving parties, under ordinary circumstances, who refuse to exercise a reasonable diligence or discretion." This rule, which has received the sanction of this eminent text writer, as well as of Courts of the highest authority, is but the expression of a natural feeling of equity which would prompt any just man to say that where one comes into a Court of equity and asks, against an innocent party, the interposition of its extraordinary powers, to protect him from danger or loss occasioned by the fraud of a third party, he ought to be required to show that he has in no way, either by his misconduct or negligence, contributed to the perpetration of the fraud, from the consequences of which he seeks to be relieved at the expense of such innocent party. An examination of the decided cases,

which seem to be but few in number, will show that this rule has been applied even by Courts of law in cases analogous to the one now under consideration. In Foster v. McKinnon, 38 L. J. R., (N. S.) 310, which may be regarded as the leading case, the action was by the endorsee, a holder for value before maturity without notice of any fraud against the endorser of a bill of exchange, and the defense set up was that the endorsement had been obtained by fraud, the party obtaining it representing to the defendant that the paper he was signing was nothing but a guaranty. The jury were instructed that if the defendant signed not knowing that it was an endorsement, but being induced by the fraudulent and false representations made to him to believe that it was a mere guaranty, and if the defendant was not guilty of any negligence in so signing the paper, then the defendant would be entitled to the verdict. On a rule for a new trial this instruction was endorsed as correct, and the Court, per Byles, J., in delivering its opin-

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ion, uses *this language: "It seems plain, on principle and authority, that if a blind man or a man who cannot read, or who for some reason (not implying negligence) forbears to read, has a written contract falsely read over to him, the reader misreading to such a degree that the written contract is of a nature altogether different from the contract pretended to be read from the paper which the blind or illiterate man afterwards signs, then, at least, if there be no negligence, the signature so obtained is of no force." And after citing Thoroughgood's case, 2 Co. Rep., 9 b, and other cases, says: "Accordingly it has been recently decided in the Exchequer Chamber that if a deed be delivered and a blank left therein be afterwards improperly filled up, (at least if this be done without the grantor's negligence,) it is not the deed of the grantor."—Swan v. The North British Australasian Co., 2 Hurls, &c., 175 S. C. 32, L. J. R. 573. A new trial was, however, granted upon the ground that the verdict was against the evidence. And although it is not so stated, the facts of the case would seem to imply that the Court was not satisfied with the verdict upon the question of negligence, and this is the inference drawn by the Court in the case of Chapman v. Rose, hereinafter cited. In the case of Douglass v. Matting, (26 Iowa, 498, 4 Am. Rep., 238,) the action was on a negotiable note by an innocent holder before maturity for value, and the defense was that the maker had been induced to sign under the false and fraudulent representation that the paper was of a different character from what it proved to be. The Court held the maker liable, saying: "It would be manifestly unjust to permit the maker, while admitting the genuineness of his signature, to defeat the note on the ground that, through his own culpable carelessness while dealing with a stranger, he signed the instrument without reading it or attempting to ascertain its true contents. * * * The maker had it in his power to protect himself from the fraud, but failed to do so. When the consequences of this act are about to be visited upon him he seeks to make another bear it, on the ground that he was defrauded through his own gross negligence."

Garrarel v. Hadden, (67 Penn. St., 5 Am. Rep., 412,) was also an action on a negotiable note, by an innocent holder, before maturity, and the defense was that the note, which was on a printed form, had been altered by the insertion of the words "and fifty" in the blank space left after the word "hundred." The Court held the maker liable on the ground

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of his negligence in not taking some *precaution, as, for example, by scoring the blank space with his pen, by which such alteration could have been prevented or detected. The Court places its decision upon the maxim cited from Story, § 387: "That where one of two innocent persons must suffer, he shall suffer who, by his own acts, occasioned the confidence and the loss," and from the doctrine cited from the same author, as "but an elaboration of a great principle of justice, that if one, by his own acts, or silence or negligence, misleads another, or in any manner affects a transaction, whereby an innocent person suffers a loss, the blamable party must bear it." In the case of Chapman v. Rose, (56 N. Y., 137, 15 Am. Rep., 401,) the action was on a negotiable note by an innocent holder before maturity, and the defense was that defendant's signature had been obtained by the false representations of the payee that the paper was an order for a hay fork and two pulleys, instead of a promissory note, as it proved to be. It was held that the maker, if guilty of negligence in signing the paper, would be liable, notwithstanding the fact that he was induced by the payee to believe that the paper signed was a mere order of the kind above stated and not a promissory note. The Court reviews the authorities, and rests its decision, not upon any doctrine peculiarly applicable to negotiable paper, but upon a principle stated in the following language: "He who, by his carelessness or undue confidence, has enabled another to obtain the money of an innocent person, shall answer the loss. If it be objected that there must be a duty of care in order to found an allegation of negligence upon the neglect of it, it must be answered that every man is bound to know that he may be deceived in respect to the contents of a paper which he signs without reading. When he signs an obligation without ascertaining its character and extent, which he has the means to do, upon the representations of another, he puts confidence in that person, and if injury ensues to an innocent third person, by reason of that confidence, his act is the means of the

injury, and he ought to answer to it." In the Citizens' National Bank v. Smith, (55 N. H., 593, reported also in 3 Cent. Law Jour., 163,) the subject is fully discussed, and, after a review of the authorities, the conclusion is reached that, to sustain such a defense, it is necessary to show that the maker was not guilty of negligence; and this doctrine is based upon the broad general principle that "whenever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occa-

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sion the loss *must sustain it," and not upon any doctrines peculiar to negotiable notes.

The case of Brown v. Reed, decided by the Supreme Court of Pennsylvania in November, 1875, and reported in 3 Cent. Law Jour., 83, is somewhat peculiar in this respect: that the paper in question was not, in its inception, in the form of a negotiable note, but was, when it was signed, nothing but an agreement in writing, by which the maker bound himself to pay to the payee or bearer $50 whenever he should sell $250 worth of hay and harvest grinders, and was signed by Brown, "agent for hay and harvest grinders." But, by an ingenious device, the paper was so written that, by cutting it into two pieces, one of them, to all appearances, would be a perfect promissory note, with the name of Brown signed to it, without the addition of the words "agent for hay and harvest grinders;" and upon this piece of paper the action was brought by Reed, an innocent holder, for value, before maturity. The defense was that no such paper had ever been signed by the maker, and yet the Court held that negligence of the maker, which was a question for the jury to pass upon, would preclude such a defense. Now, while it is true that in the most of these cases the question arose under actions brought on negotiable notes by innocent holders for value before maturity, it is equally true, as we have seen, that the decisions are not based upon any doctrines peculiar to negotiable paper; for, although the Judges have, in some of the cases, fortified their conclusions by suggesting the tendency that a contrary rule would have to destroy confidence in commercial paper, such suggestions are merely additional reasons for, and do not constitute the basis upon which, such decisions rest. This is obvious from the consideration that the very gist of such a defense is that the paper sued upon is not a negotiable paper; for, while it is so in form, yet the fact that the signer was deceived into the act of signing, that "his mind never went with his act," that "he never intended to sign, and, therefore, in contemplation of law, never did sign, the contract to which his name is appended," it is argued, deprives it of that character and demonstrates that it is not his note. This defense must necessarily be placed upon this ground, as it cannot possibly stand upon any other; for the very moment it is conceded that the paper in question is the negotiable note of the maker, it immediately becomes subject to the incidents which belong to such a paper in the hands of an innocent holder

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for *value before maturity. How, then, a defense, which necessarily rests upon the theory that the paper in question is not a negotiable paper, can be said to derive its efficacy from doctrines peculiar to negotiable paper, it is difficult to perceive.

This seems to be the view taken by Dixon, C. J., in Walker v. Egbert, (29 Wis., 194, 9 Am. Rep., 548,) where, in discussing this question, he uses this language: "The inquiry in such cases goes back of all questions of negotiability, or of the transfer of the supposed paper to a purchaser, for value, before maturity and without notice. It challenges the origin or existence of the paper itself; and the proposition is to show that it is not in law or in fact what it purports to be, namely, the promissory note of the supposed maker. For the purpose of setting on foot or pursuing this inquiry, it is immaterial that the supposed instrument is negotiable in form, or that it may have passed to the hands of a bona fide holder for value. Negotiability in such cases presupposes the existence of the instrument as having been made by the party whose name is subscribed: for, until it has been so made, and has such actual legal existence, it is absurd to talk about a negotiation or transfer, or bona fide holder of it, within the meaning of the law merchant. That which, in contemplation of law, never existed as a negotiable instrument, cannot be held to be such; and to say that it is and has the qualities of negotiability because it assumes the form of that kind of paper, and thus to shut out all inquiry into its existence, or whether it is really and truly what it purports to be, is petitio principii—begging the question altogether. * * * For the purposes of this first inquiry, which must be always open when the objection is raised, it is immaterial what may be the nature of the supposed instrument, whether negotiable or not, or whether transferred or negotiated, or to whom or in what manner, or for what consideration or value paid by the holder. * * * In these and all like cases no additional validity is given to the instruments by putting them in the form of negotiable paper." While it may be very true, as a general rule, that a party ought not to be bound by a mere mechanical act which his mind did not accompany, because such act is not, in truth, the act of the party, it is equally true that such party may, by his acts or omissions, be estopped from denying that he did such act; for we know that it not unfrequently happens that parties, by reason of some act or omission on their part, debar themselves from taking positions which, abstractly considered,

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are *incontestably correct, both in law and in fact. Now, in this case, the plaintiff knew that she was signing some kind of written obligation, and if she, through carelessness or negligence, signed a paper of a different character from that which she intended, and that paper has been received by an innocent third person, for value, she ought not to be allowed, when called upon to respond to the obligations imposed by terms of the paper, to say: "It is true I performed the mechanical act of signing the paper, but my mind did not accompany the act, and, therefore, it is not in reality my act, and I am not bound by it," unless she can at the same time say that the act, which she now disavows, was brought about solely by the fraud of a third person, and was in no way occasioned by or resulted from any fault or negligence on her part; still less ought she to be allowed to say this when she invokes the active aid of the Court, by the exercise of its extraordinary powers, to relieve her from the consequences of such an act at the expense of an innocent third person, unless she can show that these consequences are in no way attributable to any fault or negligence on her part. This would be allowing a party in a Court of equity, in violation of every principle governing such a Court, to trace his title to relief through his own misconduct or negligence. There are other cases in which the question of negligence has been recognized as an important and necessary inquiry.—Putnam v. Sullivan, 4 Mass., 54; Gibbs v. Linabury, 22 Mich., 479, 7 Am. Rep., 675; Walker v. Egbert, 29 Wis., 194, 9 Am. Rep. 548; and even Taylor v. Atchison, 54. Ill., 196, 5 Am. Rep., 118, which, in some of the cases, is cited as an authority to the contrary. This case, however, can have but little influence in determining the question as it is rested mainly upon the terms of a statute of that State, and in it there is not a single authority cited. We may also add the case of Burson v. Huntington, 21 Mich., 417, 4 Am. Rep., 497, in which the question was whether, in an action by an innocent holder, for value before maturity, a person could be made liable who had signed but had not delivered a negotiable note, it having been taken from the table by the payee, where the parties were sitting engaged in a negotiation which had not been completed, during a temporary absence of the maker. The Court, in discussing this case, after declining to apply to it the rule that where one or two innocent parties must suffer, the loss must fall upon him by whose act or omission it was caused, upon the ground that such rule "is mainly confined to

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cases where *the party who is made to suffer the loss has reposed a confidence in the third person whose acts have occasioned the loss," uses this language: "We do not assert that the general rule we are discussing (that where one of two innocent parties must suffer, &c.) must be confined exclusively to cases where a confidence has been placed in some other person (in reference to delivery) and abused. There may be cases where the culpable negligence or recklessness of the maker in allowing an undelivered note to get into circulation might justly estop him from setting up non-delivery."

The decision of the Court below is based upon the authority of Thoroughgood's case (2 Coke, 9 b,) and the case of Schuylkill County v. Copley, (67 Penn. St., 386, 5 Am. R., 441); but even Thoroughgood's case seems to recognize the question of negligence as important to be considered in cases of this kind; for in the second resolution we read: "That such layman, not learned, is not bound to deliver the deed if there be not one present which can read the deed to him in such language that he who should make the deed may understand it; and that is the reason that if it be read to him in other words than are contained in the writing, it shall not bind the party who delivereth it, for it is at the peril of the party to whom the writing is made that the true effect and purport of the writing be declared, if it be required, but if the party who should deliver the deed doth not require it, he shall be bound by the deed, although it be penned against his meaning." Now, does not this necessarily imply that if the grantor is guilty of negligence he shall be bound? For the doctrine announced in this case rests upon the idea that, as the mind of the party did not accompany the merely physical act of signing, it is not in reality his act, and, therefore, he is not bound; and yet in this second resolution two conditions of things are presented, in neither of which does the mind of the grantor go with the physical act of signing —one where the deed, at the request of the grantor, an illiterate person, is read wrongly, in which case the grantor is not bound. Why? Because he has used proper precautions to inform himself of what he was signing; the other where the grantor omits to require the reading of the deed, in which case he is bound by the deed, "although it be penned against his meaning." Why? Because he has omitted to use proper precautions to protect himself, that he has been guilty of negligence. In the case of Schuylkill County v. Copley, it was held that where an illiterate person signed a paper which

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was falsely *represented to be a petition, but which was really a bond, he was not liable thereon, although the obligee was not aware of the fraud until after the bond had been accepted. The only controversy in this case, not mentioning a question of evidence irrelevant to the matter we are considering,

was whether the obligor would be liable unless it was shown that the obligee was aware of the fraud before accepting the bond, and this is the only point that can be said to have been decided. No question of negligence was raised or considered in the case; and, therefore, this case cannot be regarded as any authority upon the question now under consideration by this Court. So, too, the case of Jackson v. Hayne, (12 Johns. 469,) cited to sustain the decision below, cannot be regarded as authority upon the question we are considering, for there the action was by a purchaser at Sheriff's sale, to which the doctrine of caveat emptor applies, the purchaser only getting whatever title the defendant in execution may have had, and of course, therefore, if the assignment of the lease under which such defendant held was void for fraud, the purchaser, though innocent of any participation in or knowledge of such fraud, bought nothing. The cases of Green v. Buffalo (6 P. F. Smith, 110,) and Gourdin v. Read, (8 Rich., 230,) which were also cited in support of the Circuit judgment, do not, in our opinion, conflict with the view we take of this case; for in the former the abstract proposition, taken from the first resolution in Thoroughgood's case, is announced as law. But the Court did not have occasion to consider, and did not decide, the point which is now under consideration; and in the latter the only point decided is, that if a surety on a bond who, by parol, has authorized his principal to fill up blanks in the bond with the date and name of the obligee, has, before such blanks are filled, revoked such authority, he would not be liable to the obligee, whose name had been subsequently inserted, even though such obligee had no notice of such revocation when he took the bond, and hence it cannot affect the question now before the Court.

The case of Briggs v. Ewart (51 Mo., 245, 11 Am. R., 445,) is also relied on as authority for the proposition that negligence of the maker cannot affect the inquiry; but an examination of that case will show that no such point was there decided, and, on the contrary, the instruction asked for, which, on exception, was endorsed, recognized the qualification of negligence, although the Judge who delivered the opinion of the Court

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did seem to ignore *the question of negligence as an unnecessary and unimportant inquiry in a case of this kind. But the same Court, in the subsequent case of Shirts v. Overjohn, decided in May, 1875, and reported in 2 Cent. Law. Jour., 423, decided that "where it appears that the party sought to be charged intended to bind himself by some obligation in writing, and voluntarily signed his name to what he supposed to be the obligation he intended to execute, having full and unrestricted means of ascertaining for himself the true character of such instrument before signing the same, but by his failure to inform himself of its contents, or by relying upon the representations of another as to the contents of the instrument presented for his signature, signed and delivered a negotiable note in lieu of the instrument intended to be signed, he cannot be heard to impeach its validity in the hands of a bona fide holder." In this case the Court, with a view, doubtless, to correct any misapprehension which the language used by the Judge who delivered the opinion in Briggs v. Ewart might give rise to, says: "In the cases of Briggs v. Ewart (51 Mo., 245,) and Martin v. Smylee, (55 Mo., 577,) which were similar to the case at bar, the instructions which were brought under review, and which received the approval of this Court, declared the law to be that a person signing a promissory note could not be held liable as maker by a bona fide holder, if his signature was obtained without his fault or negligence, on the fraudulent representations of the payee that the paper offered for signature was not a note, and that the party sought to be charged did not know it was a note and did not intend to sign a note. Some observations, however, of the Judge who delivered the opinion of the Court in the case of Briggs v. Ewart seem to reject the qualification of negligence and to announce the broad doctrine that, to be binding, the instrument must be executed as and for the paper it purports to be, and if the party to be charged did not intend to make a promissory note he cannot be held bound even in favor of a bona fide holder for value. These observations and the subsequent case of Corley v. Weddle, (57 Mo., 452,) in so far as it is based upon them, are disapproved."

This question of negligence seems to have been wholly ignored, both by the Referee and the Circuit Judge, although distinctly made and insisted upon by the defendants, Scott & Son; for, although it is stated in the brief submitted by the counsel for the plaintiff that the Referee found "that the plaintiff

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was guilty of *no negligence," we have been utterly unable, after a most careful examination of the report, to discover any such finding, or even any evidence that the Referee considered the question at all, and we must, therefore, conclude that this statement in the brief of the plaintiff's counsel is an error, doubtless altogether inadvertent.

Holding, then, as we do, that the question whether the plaintiff was guilty of negligence in allowing herself to be imposed upon by Houston, if, in fact, she was so imposed upon, is not only an important, but an essential inquiry, and this question not having been passed upon by the Court below, the case must go back for a new trial. It is, therefore, unnecessary, at this time, to con-

sider the question of costs raised by the plaintiff's exception.

A new trial is ordered.

WILLARD, C. J., concurred.

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9 S. C. 44

STATE, ex rel. BROOKS, v. SMITH.

(Columbia. April Term, 1877.)

[*Mandamus* ⇐168; *States* ⇐123.]

The principles decided in Dunton v. Cobb (8 S. C., 123–127,) and Coleman v. Smith (8 S. C., 128–129,) affirmed.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 372; Dec. Dig. ⇐168; States, Cent. Dig. § 122; Dec. Dig. ⇐123.]

This was a petition to the Justices of the Supreme Court praying for a writ of mandamus to compel the County Treasurer of Newberry County to pay certain school claims.

The facts were, that William Brooks, the relator, was a school teacher and held eight pay certificates against the County treasury for fifty dollars, each properly drawn and approved, and all past due November 1st, 1873; that Jesse C. Smith was the County Treasurer of Newberry County and had in his hands a sufficient amount of the funds mentioned in the Act of March 3d, 1874, to pay said certificates but declined paying them, though required so to do, on the ground that he was prohibited from paying them by the Act of 17th March, 1874, and by the provisions of Article IX, Sections 2 and 3, and Article X, Section 5, of the State Constitution.

Jones & Mower, for relator.

Suber & Caldwell, contra.

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*September 22, 1877. The opinion of the Court was delivered by

WILLARD, C. J. All the questions raised in the present case have already been decided in the cases of Dunton v. Cobb (8 S. C., 123–127.) and Coleman v. Smith, (8 S. C., 128–129). It appears that the relator in the present case holds claims entitled to be paid by the respondent as County Treasurer of Newberry County under the Act of March 3, 1874, and that there are funds sufficient in the hands of the respondent as Treasurer, applicable by law to the payment of such claims, for their payment. A peremptory writ of mandamus should therefore issue commanding payment thereof as prayed by the relator.

McIVER, A. J., concurred.

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9 S. C. 45

WEST v. CAUTHEN.

(Columbia. Nov. Term, 1876.)

[*Executors and Administrators* ⇐304.]

A testatrix, who died in 1859, bequeathed one-twelfth of her estate to her daughter, a married woman, "for her sole and separate use, and it is not to be subjected to the debts or contracts of any person else." The executor, under a power to sell, given by the will, sold the property and collected the proceeds, without fault on his part, in Confederate currency. He made some payments to the married woman; invested part of the funds in interest-bearing bonds of the Confederate States, and retained the rest until the close of the war, when the whole bonds and currency, became worthless in his hands. The legatee died April 5, 1874: *Held*, That the executor was not liable to account to the administrator of the legatee for the fund thus lost in his hands.

[Ed. Note.—Cited in Wilson v. Braddy, 16 S. C. 521; Dickerson v. Smith, 17 S. C. 296; Brabham v. Crosland, 25 S. C. 547, 1 S. E. 33.

For other cases, see Executors and Administrators, Cent. Dig. § 1244; Dec. Dig. ⇐304.]

[*Executors and Administrators* ⇐304.]

The executor of a testator, who died in 1859, giving to his daughter, a married woman, a legacy "for her sole and separate use," not to be subject "to the debts or contracts of any one else," could not lawfully pay the corpus of the legacy to the daughter during coverture, but could only pay the same to a trustee legally appointed.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1243, 1244; Dec. Dig. ⇐304.]

[*Executors and Administrators* ⇐118.]

An executor *held* not to be liable to account for a fund which he rightfully received during the war in Confederate currency, part of which he invested in Confederate interest-bearing bonds, and the other part of which he retained until the close of the war, there being no one to whom he could rightfully pay over the fund, until it became worthless in his hands.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 475; Dec. Dig. ⇐118.]

Before Mackey, J., at Lancaster, May, 1876.

This was an action by Eli West, as administrator of Milly West, deceased, against Thomas J. Cauthen, as executor of Rebecca Truesdel, deceased.

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*The case is fully stated in the following judgments of the Probate Judge of Lancaster County, and of His Honor the Circuit Judge.

The decree of the Judge of Probate is as follows:

In the Fall of 1859 Rebecca Truesdel died, leaving of full force and effect her last will and testament. In her will she bequeathed to Mrs. Milly West one-twelfth of her estate. That Thomas J. Cauthen was appointed executor of Mrs. Truesdel, acting under the will. The executor sold the property in 1860. The payments were made in notes, with twelve months' credit. None of the notes were collected until 1862 and 1863. All of the money received by executor was in Confederate currency. The executor, on the day of the sale, let Mrs. West have $191 in property. This is all, except $75, that there is any evidence of having been paid Mrs. West by the executor. It seems that the statement of Mr. Cauthen is that he acted as trustee for Mrs. West, as she was a married

woman, and to prevent the marital rights of her husband, Eli West, from attaching to the property, which, by the will, was left to her sole and separate use. Mr. Cauthen also said that, by the advice of the then Commissioner in Equity, he was to retain the money of Mrs. West until the Court would again convene and until there was a trustee appointed. Eli West, husband and administrator of Milly West, brings suit to recover the balance due on the claim. It is my opinion—

1. That where the property was left to Mrs. West, a married woman, the executor of the will of her mother is not thereby made a trustee of her share. It would have been his place to have paid it over to Mrs. West and to have taken security. Where there is no trustee of the separate estate of a wife, the husband should act.

2. That, if he had acted as trustee, as he claimed, he was entitled to pay only the interest of the trust estate to Mrs. West; whereas he paid near $200 before any interest could have accrued, and did not pay the interest yearly as it fell due, having paid in the year 1863 $75, all of which payment, with interest thereon until the date of the settlement, would amount to the sum of $300, which was far more than the interest on the funds of the trust estate.

3. That the property was sold, and the funds were all in Confederate currency; that the notes paid to the estate and all the debts due by the estate were paid in Confederate

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notes, to which *no objections were made by any of the parties in interest. All the funds that came into the executor's hands were in Confederate currency, and his objections to pay it out was incurred so as to entitle him to the benefits of the Corbin Bill.

4. That at the time of the settlement, which was in the year 1863, the executor was still owing and due the legatee, Mrs. West, the sum of $468, which she at that time, or during that year, demanded of the executor.

It is adjudged that Thomas L. Cauthen, executor, was indebted to Mrs. West, as legatee under the will of Rebecca Truesdel, on the 1st day of January, 1863, in the sum of $468, which, after being scaled in accordance with Section first of the fifty-fifth Chapter of the Revised Statutes of the State, amount to two hundred and three 48 100 dollars, with interest thereon from the 1st day of January, 1863, to this date, amounting, in the aggregate, to the sum of three hundred and eighty-eight 86 100 dollars, which said amount it is decreed that the defendant shall pay to the plaintiff, together with the costs of this action.

The plaintiff appealed to the Court of Common Pleas on the following grounds:

1. Because the legacy to the plaintiff's intestate, which is the subject of this suit, having been paid to defendant in Confederate currency notes, and bequeathed to the sole and separate use of the legatee, a married woman, so that he could not pay out to her the principal thereof, and the investments thereof having been such as were usual and considered prudent at that time, and the same having perished in the hands of defendant, by reason of the results of the late war between the States, without fault on his part, he was not liable for the same, and the decree should have been for defendant.

2. Because, if liable at all for the value of the balance of Confederate currency, or investments in his hands, as found by the Probate Judge, the balance should have been estimated according to its value in the Spring of 1864, instead of January, 1863, as decided by the Probate Judge, because the testimony shows that the balance, adopted by him as the basis of his decree, was made up at the former date, and included interest to that date, and the decree should have been accordingly.

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*3. Because, if not made up in the Spring of 1864, the said balance should have been struck and its said value estimated as of the 1st day of January, 1864, the proof being that the fund was received in the latter part of 1862 and the early part of 1863, and that there were debts of considerable amount due by the estate, and the defendant, as executor, was not chargeable with the balance until the end of the year 1863, and the decree should have been accordingly.

4. Because the decree is in other respects erroneous.

After the hearing of the appeal, His Honor Judge T. J. Mackey entered the following decree:

Mackey, J. This case comes before me on appeal by the defendant from the decree of the Probate Judge of Lancaster County. The argument herein was submitted to me in writing by the solicitor for the appellant, J. B. Kershaw, Esq., and by the solicitors for the respondent, Messrs. Wm. D. Trantham and J. T. Hay. After due consideration of the pleadings and the testimony, and the argument submitted thereon, I find as the issues of fact the following:

1. That in the Fall of 1859, Rebecca Truesdel, the testatrix of the defendant herein, died, leaving him, the said Thomas J. Cauthen, executor of her last will and testament, and that he duly qualified and acted as sole executor under the will of the said testatrix.

2. That the third clause of the said will is in the following words, to wit:

"It is my will and desire that all the balance of my property, both personal and real, that I may die possessed of, be sold by my executor, and the proceeds thereof, together with all notes, accounts and everything else of value that I may die possessed of, be equally divided betwixt my surviving children and the children of my deceased children; that is to say: one-twelfth to my son

James R. Truesdel; one-twelfth to my daughter Elvira Cauthen; one-twelfth to my daughter Jane Cauthen; one-twelfth to my daughter Mahaley Fletcher; one-twelfth to my daughter Matilda Horton; one-twelfth to my daughter Polly Williams; one-twelfth to my daughter Thirza Ingram; one-twelfth to the children of my deceased son John Truesdel; one-twelfth to the children of my deceased son Henry Truesdel; one-twelfth to the children of my deceased son George

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*H. Truesdel; and one-twelfth to the children of my daughter Sarah Jones; and one-twelfth to my daughter Milly West. This, the one-twelfth of my estate, I give to my daughter Milly West, for her sole and separate use, and it is not to be subjected to the debts or contracts of any person else."

3. That, pursuant to the above cited clause of the will, the executor, Thomas J. Cauthen, did sell all the property, both personal and real, belonging to the estate of his testatrix, and that the sale thereof took place on the 26th day of October, 1860.

4. That the executor, Thomas J. Cauthen, the defendant, appellant in this case, realized on said sale and collected on the notes and accounts due the estate of his testatrix the sum of dollars, in the currency of the Confederate States, the whole of which sum was received by him at sundry times between the 26th day of October, 1860, and the 1st day of January, 1863, up to which last named date (January 1st, 1863,) the said executor had received of the funds subject to distribution under the third clause of the will, after discharging all debts and liabilities of the estate, the sum of nine thousand two hundred dollars ($9,200).

5. That the distributive share to which the legatee, Milly West, was entitled under the will was seven hundred and sixty-six 66⅔-100 ($766.66⅔) dollars, being one-twelfth of the net proceeds of sales and collections, etc., etc.

6. That although the legatee made frequent demands upon the executor for her distributive share of the estate of the said testatrix pursuant to the terms of the will, the said executor failed and refused to pay to her the said distributive share of one-twelfth, but, as is shown by his own admission, is still indebted to her administrator, the plaintiff, respondent herein, in the sum of four hundred and sixty-eight dollars ($468) on account of the said distributive share.

7. That the aforementioned sum of four hundred and sixty-eight dollars, Confederate currency, was in the hands of the said executor, the defendant, appellant, and applicable to the payment of the balance due the said legatee, Milly West, on the first of January, 1863, and that no part thereof had been paid to the said legatee up to the time of her death, on the 5th day of April, 1874.

Having thus recited in brief my finding as to the material facts of this case, it is proper for me to consider, before determining the issue of law involved, the special ground upon which the defendant, appellant, claims to be exempt from present liability at law or in

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*equity for the payment of the sum of $468 found to be due the legatee, Milly West, at the date of her decease, as the balance unpaid of her distributive share under the will of the defendant's testatrix, Rebecca Truesdel.

That ground is embodied in paragraph 7 of defendant's answer, wherein it is alleged "that the said Milly West was the wife of the plaintiff, Eli West, and he was an insolvent, thriftless man, and the testatrix for that reason was unwilling that the said legacy should be paid over and become subject to the marital rights of the said plaintiff; and she therefore bequeathed the same to the sole and separate use of the said Milly West, which she did not in regard to the legacies given to her other married daughters; and for this reason, under the direction of the then Ordinary for Lancaster District, defendant did not pay over to the said Milly West any more of the said legacy, nor did she desire that the same should be paid over to her; and defendant submits that under the terms of the will he became a trustee to preserve the said legacy from attaching to the marital rights of the plaintiff."

The defendant also alleges in his said answer that the entire sum received by him on account of the estate of his testatrix was in Confederate currency notes, and that he paid out, in due course of administration, as much of the said notes as he could, and funded the balance (except some four or five hundred dollars) in Confederate bonds, and that he has still in his hands the said currency notes, and that both the Confederate bonds and notes have become worthless without fault of defendant.

It is sufficient to observe here, in reference to the averments contained in the foregoing extract from the answer of the defendant, that his allegations that the legatee, Milly West, did not desire the residue of the legacy due her paid over to her is overwhelmingly refuted by the evidence. On the contrary, it is conclusively shown by the testimony of unimpeached witnesses that the legatee, Milly West, was in needy circumstances, and that she persistently importuned the said defendant to pay over to her the balance due on her distributive share of her mother's estate; nor was her indigence alleviated in any degree by the fact, as alleged by the defendant, that her husband "was an insolvent and thriftless man."

The defendant furnishes no proof in support of his statement that he invested the greater portion of the funds belonging to the

estate in Confederate bonds; and the force

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of his statement, as a credible *allegation, is greatly impaired by his omission to specify, even approximately, the amount of currency so invested, or the rate at which such bonds were purchased, the rate of interest that they bore, or when, where or from whom he purchased them.

Nor is any testimony adduced to show, as stated by defendant, that he was "directed" to make such investment by the Ordinary of Lancaster District; while the defendant alleges in his answer that he acted in the premises "under the direction of the Ordinary," he states, in his sworn testimony, that he "was advised by the Ordinary."

The Ordinary of Lancaster District could express no judgment in the matter of the withholding, by the executor, of the payments due the legatee, Milly West, or the investment of her funds in Confederate bonds, by virtue of the executor's alleged authority and duty as a trustee under the will, for the jurisdiction and judgment of the said Ordinary were never invoked in a case involving any such issue by this executor or any of the parties in interest.

Having thus duly considered the facts in this case as they appear in the testimony, and having stated my finding as to such facts as are material to the issue here involved, I now proceed to consider and determine the question of law arising thereon.

The fiduciary character of an executor as such does not vest him with the powers or impose upon him the duties of a trustee. The trusteeship of an executor consists wholly in the execution of implied trusts, unless he be distinctly charged by the testator with the execution of an express trust plainly appearing in the terms of the will.

The trusts of the executor in the case now under consideration were limited by the terms of the third clause of the will to the sale of the property, real and personal, of the testatrix; the collection of notes and accounts due to her estate; the liquidation of lawful debts due by her estate, and the payment of the legacies as provided for in her last will and testament. After making payment of the debts of the estate, it was the bounden duty of the executor to apply the funds in his hands to the payment of the legacies, in which fund the legatee, Milly West, had an absolute, legal and equitable fee to the amount of one-twelfth thereof. When the executor invested the ascertained distributive share of the said legatee in bonds, as alleged by him, he committed a devastavit as to her.—Vide Williams on Executors, Vol.

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2, p. 1630; Bacon's Abr. *Executors, 50. The trust with which this executor was charged was purely an executed trust; that is, it was a trust created by the will, so clear and certain in all its terms and limitations that the executor had nothing to do but to carry out the provisions of the instrument according to its letter.—Wright v. Pearson, 1 Eden Ch. Rep., 125; Austin v. Taylor, 1 Edwards' N. Y. Ch., 367; Perry on Trusts, 328.

By the express terms of the will the powers of this executor were limited to the two-fold function of selling the estate and dividing the proceeds thereof equally between the surviving children of the testatrix, Rebecca Truesdel, and the children of her deceased children, in the proportion of one-twelfth to each legatee or class of legatees. The words "sole and separate use," annexed to the paragraph in which the distributive share of Milly West is designated, were not intended to qualify her absolute right to one-twelfth of the proceeds of the estate sale, after the payment of the debts of testatrix, but were designed as a safeguard to protect that right from invasion by its being subjected, without the consent of the legatee, to the debts or control of her husband. The legacy being for the benefit of the wife, exclusive of all other persons, and no remainder over, created a separate estate in her.—Nix v. Bradley, 6 Rich. Eq., 48; Barton v. Bricoe, Jacobs Ch. R., 603.

The interposition of a trustee was not necessary to carry out the intent of the testatrix, or, if necessary, the husband would have been construed to take the legal title to the legacy in trust for the wife, and could have been compelled to act accordingly.—Parker v. Brooke, 9 Ves., 583; Lee v. Prideaux, 3 Brown's Ch. R., 383.

But in this Court it was no part of the duty of executor to consider the marital relations of the legatee, Milly West; this was a matter entirely foreign to his functions. For aught that appeared in the terms of the will she was a femme sole. His whole duty would have been performed as to this legatee by the payment into her hand of one-twelfth of the clear fund of the estate. Her receipt for that amount would have been a good and unquestionable discharge for the executor from all future liability therein.—Wms. on Ex., vol. 2, 1279; Pritchard v. Ames, 1 Turner & Russell's Ch. R., 222.

The executor thus having taken upon himself to act in regard to the legacy in question otherwise than was required by his trust, he

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*is liable for all losses that may thereby have accrued to the legatee.—2 Wms. on Ex., 1670; Piely v. Stace, 4 Ves., 622.

His withholding payment of this legacy and investing the fund applicable thereto in Confederate bonds, not only without the consent of the legatee, but in the face of her reiterated demand for payment, and in view of her known indigence, was a flagrant breach of his trust on the part of this executor; and, indeed, his entire action herein, as disclosed by the testimony, bears upon its face all the features that may define a fraud.

If an executor or trustee commits a breach of the trust or acts beyond the line of his duty, and an inevitable calamity destroys the property, he must account for it, and is liable for all losses.—Caffrey v. Darbney, 6 Ves., 496; Fyler v. Fyler, Beav., 568; Cocker v. ———, 1 Ryan & Moody's N. P. R., 535; Kellaway v. Johnson, 5 Beav. Ch. R., 324.

The ground taken in the eighth clause of defendant's answer is without merit, and does not appear to have been insisted upon, as no evidence, either record or otherwise, was offered in its support. On the contrary, the proof is that the said Milly West was not a party to the suit brought by the legatee, Thirza Ingram, in 1866, in the Court of Equity for Lancaster District, against this defendant, as the executor of Rebecca Truesdel; if she were, the suit has abated by her death, and is itself dead as to her, on the absence of a bill of revivor, and her administrator is estopped by this proceeding from being a party plaintiff to such bill.

In the view that I have taken, in the exercise of my best judgment as to the law and the facts determinative of the issues involved in this case, I have not deemed it requisite to consider in detail the authorities voluminously cited by the learned solicitors for appellant and respondent, who have argued this cause with signal ability and great wealth of research.

Having duly considered and determined the issues herein, I do hereby affirm the decree of the Probate Judge of Lancaster County, and, in pursuance thereof, do adjudge and decree, and it is hereby adjudged and decreed, that the defendant appellant, Thomas J. Cauthen, executor of Rebecca Truesdel, do pay unto Eli West, as administrator of the estate of Milly West, the sum of three hundred and eighty-eight and 86-100 dollars, ($388.86,) the same being the estimated value in lawful money of the amount of four hundred and sixty-eight dollars ($468) Confed-

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erate currency, (Gen. *Stat., § 1, Ch. LV,) with interest from the 1st day of January, 1863, as adjudged in the said decree, together with all the costs of this action, and that execution do forthwith issue for the same.

The defendant excepted and appealed to this Court on the following grounds:

1. The facts, as stated by the Probate Judge, are not warranted by the testimony, and especially in this, that the evidence tends to show that the money with which defendant is charged was received by him partly in 1862 and partly in 1863: whereas His Honor has stated the fact to be that the same was in his hands on the first day of January, 1863, and has charged him with interest from that time.

2. In this also, that the evidence tends to show that the balance found to be due by the defendant was ascertained in the Spring of the year 1864, upon an accounting before the Ordinary, and included interest to that time, whereas His Honor has taken the balance as of January 1st, 1863.

3. In this also, that there was evidence tending to show that the defendant did fund or invest in Confederate States bonds, in 1864, all that he then had on hand, being the old issue of Confederate currency notes, and furnished the means of ascertaining approximately the amount and an excuse for the want of greater accuracy; whereas His Honor finds that no such proof was furnished, and the want of particulars (fully accounted for) threw suspicion upon the defense.

4. Because the defendant could not lawfully pay to the plaintiff's intestate more than the interest on her share of the estate, and having paid her more than the amount of interest due her, and, having lost the principal without fault on his part, he is not liable to plaintiff for anything.

5. Because, if liable at all, he is only chargeable with the value of four hundred and sixty-eight 66-100 dollars in Confederate money, to be scaled as of January 1st, 1864, or the Spring of 1864.

6. Because the money collected by defendant was received in 1862 and 1863, and none until after 1861, and it was error to charge him with the value of Confederate notes as of January 1st, 1863, as was done by the decrees.

Kershaw, for appellant:

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*1. Was the legacy to Milly West—"to her sole and separate use"—couched in such language as created a separate estate in her, distinct from her husband?

a. Any words are sufficient to create such an estate that indicate an intention to give to the wife and exclude the husband.—Ballard v. Taylor, 4 DeS., 551.

b. Nor is any trustee necessary to be named to create such estate.—Franklin v. Crayon, Harp. Eq., 250.

c. The executor is bound to execute the trust.—Ashe v. Ashe, Rich. Eq. Ca., 383.

2. Being the trustee of such an estate, could the executor pay over the fund to the cestui que trust?

a. The wife, in this State, (contrary to the rule in England,) could neither charge nor dispose of her separate estate without the consent of the Court.—Ewing v. Smith, 3 DeS., 462.

b. Where there was a bequest to the "sole and separate use of the wife," etc., and it was added that the wife's receipt alone should be considered as a sufficient discharge to the executors, the Court would not order the money paid to the husband upon the joint application of husband and wife, though he offered security for the forthcoming of the capital.—Robinson v. Dart, Dud. Eq., 130.

This case explodes the notion that the

husband in such case is entitled to the fund as trustee for the wife.

The wife, in this case, tendered her "separate receipt." If the Court would not order the payment of the fund when such separate receipt was declared by the will a sufficient discharge to the executors, how can it be contended here that the executor should have paid over this fund upon his own responsibility without any declaration of the will of the sufficiency of the wife's receipt?

c. Equally conclusive is the case of Ex parte Hunter, Rice's Eq., 293.

It declares as a rule, which the Court would not "knowingly depart from," that the husband should never be introduced into the execution of a trust for the wife.

3. Being then compelled to hold the fund, is the appellant to be made liable for investing in Confederate bonds?

a. The sale notes became due during the war, and were collected in Confederate currency, of the old issue. By the laws of the Confederacy, if he held the money, it would be reduced in value thirty-three and one-third per cent. He acted for the best, and

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will not *be held liable.—Martin v. Smith, 1 DeS., 123; Boggs v. Adger, 4 Rich. Eq., 408; Manning v. Manning, 13 Rich. Eq., 410; Haile v. Shannon, 15 Rich. Eq.; McClure v. Steele, 14 Rich. Eq., 113; McPherson v. Gray, 14 Rich. Eq., 121; Whitlock v. Whitlock, 13 Rich. Eq., 170; Thorrington v. Smith, 8 Wall., 14; Head v. Talley, U. S. Sup. Court, Am. Law Times, 155; Smith v. Prothro, 2 S. C., 373; Hinton v. Kennedy, 3 S. C. 490.

The legatees were willing to receive Confederate currency, and it is not now objected that the executor ought not to have received it.

4. If liable at all, for what would he be liable?

a. The funds were collected in 1862 and 1863, the greater part in the latter year. There were debts to be paid, and the money was not wrongfully withheld. No balance was ever stated against him until the Spring of 1864. The value ought to be ascertained as of that date; certainly not before January 1st, 1864.—Walter v. Creswell, 4 S. C., 359; Pettus v. Clawson, 4 Rich. Eq., 92; Wright v. Wright, 2 McC. Ch., 185.

Trantham, Hay, contra:

1. The findings of the Probate and Circuit Courts as to the amount due Milly West, the respondent's intestate, and as to the date from which the executor should be charged with the balance due her, together with interest, are amply supported by the evidence. The testimony of the respondent is that the sum of sixty ($60) dollars was paid to Milly West in 1861 by appellant as interest due to that date upon her share of her mother's estate; and sixty dollars, at the rate of seven per cent. per annum, is the interest upon the sum of eight hundred and fifty-seven and 14-100 ($857.14) dollars. This statement was not contradicted by appellant.

Again, the appellant testifies that he collected the funds of the estate in the latter part of 1862 and the first of 1863. But as he paid interest on a large sum of money to Milly West prior to January 1st, 1863, and as it appears from his own evidence that he settled the debts of the estate, paid the other legatees, and invested the funds remaining in his hands in bonds of the Confederate States of America during the year 1863, the Courts below, acting as juries, were justified in the conclusion, deduced from the whole evidence, that the balance due Milly West, together with interest, should be charged against him from the 1st of January, 1863. The appellant

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*cannot claim that the balance should be struck and interest charged against him from the 1st of January or the Spring of 1864, when, by his own admission, it appears that the funds of the estate were not only in his hands during the latter part of 1862 and the first of 1863, but were actually paid out by him during the year 1863, in liquidation of claims against the estate and in the settlement of legacies due the other heirs, or were invested in Confederate bonds. The inference is reasonable that an executor would not pay interest upon funds not in his hands, liquidate debts of the estate, pay legacies or invest the remainder in any securities whatever, when the proceeds of the estate were not yet in his possession.

The Courts below were compelled to make up their verdicts from a review of the whole mass of conflicting and frequently indefinite evidence introduced at the trial, and this Court will not disturb their finding in matters of fact, unless it should appear that some gross and palpable error has been committed.

2. The statement of the appellant that he did invest the amount due Milly West in Confederate bonds was unsupported by any evidence sufficient to satisfy a Court of justice that such an investment was in fact made. No evidence was offered as to the denomination of the bonds, from whom purchased, at what time and in whose name they were issued, or what amount of money was so invested; and it is submitted that such vague allegations, made by one supposed to be entirely conversant with that concerning which he testifies, are not sufficient to carry with them the conviction of their truthfulness.

3. The appellant had no right to hold the funds due Milly West any longer than was necessary to enable him to settle the estate; much less was he authorized, even admitting that he did so, to invest the same in Confederate bonds or any other kind of security. He was not a trustee for any other purpose than to sell the estate, settle the debts and divide the remainder among the

legatees. His duty was, as soon as possible, to pay over Milly West's share to her or her husband and take their receipts for the same.

A trust must either be created in express terms or be inferred from the nature of certain duties imposed. The will of Rebecca Truesdel did not in words appoint the appellant a trustee for Milly West. Was that character imposed upon him by any duties required of him? Nothing is said in the will as to what the executor was to do with the share of Milly West. The twelfth of the

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*estate was given to her to her sole and separate use, without any limitation over, and the executor had no more control over it than over any other distributive share.

In order to give a separate estate to the wife a trustee is not necessary.—2 Story Eq. Jur., § 1380; Harp. Eq., 243; 9 Ves., 583.

The law will regard the husband as trustee of the wife's separate estate.—2 Hill, 200; 9 Ves., 583; 3 Brown's Ch. Rep., 383.

The executor should have paid the share of Milly West to her and taken her receipt for the same.—2 Story Eq. Jur., § 1303; 2 Wms. on Exs., 1275, 1280.

The only trust in this case was to settle the estate, determine the shares and pay them out to the legatees. Not having done this as to Milly West, the executor is responsible.—2 Wms. on Exs., 1630, 1670, et passim.

Allowing that the executor was trustee, he had no right to change character of the estate.—2 Story Eq. Jur., § 978.

The appellant must show express authority under the will to hold and invest funds, or an absolute necessity from the circumstances of the case that such a trust should be implied. There being no necessity for him to act as trustee further than to pay Milly West her share of the estate, no trust to hold and invest funds will be implied.—Story Eq. Jur., title "Implied Trusts."

Since the duty of the appellant was to pay over to Milly West (or her husband for her use, taking from him sufficient security that the money would be properly applied,) her share of the estate, he was guilty of a breach of trust and a devastavit when he, as he asserts, invested the same in worthless bonds. There was no limitation over as to Milly West's share; the property was hers in fee simple, and no other interests than hers called for protection. The purposes of the testatrix's bounty were defeated by the so-called trust in the hands of the executor, and more particularly so when, as the appellant alleges, the husband of the legatee was an "insolvent and thriftless man." It must be presumed that the testatrix intended the money for the benefit of Milly West, as she made no limitations over after her estate, and not that it should be held by the executor or invested in worthless bonds while the legatee was, as appears from the evidence, in great want of money with which to purchase the necessaries of life and constantly applying to the executor for her share of the estate.

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*June 15, 1877. The opinion of the Court was delivered by

WILLARD, A. J. The plaintiff, E. West, as administrator of Milly West, deceased, claims of the executor of R. Truesdel the amount of a legacy left to Milly West by the will of such testator. The legacy was as follows: "And a twelfth to my daughter, Milly West. This one-twelfth of my estate I give to my daughter, Milly West, for her sole and separate use, and it is not to be subjected to the debts or contracts of any person else." Milly West was, at the time of this legacy, a married woman, and so remained until her death. The estate that came into the hands of the executor subject to the payment of this legacy consisted of Confederate currency. It is not alleged or shown that the executor was at fault in receiving such currency, and he must be held, for the purposes of this suit, to have rightfully possessed himself of such currency as proper assets of his testator's estate. It is contended that it was the duty of the executor to have paid Milly West's proportion of this fund into her hands, or into those of her husband, and that the subsequent loss of the estate is chargeable to neglect of this duty. The decree of the Probate Court so holds, and that decree has been affirmed by the Circuit Court.

It is very clear that the terms of the legacy imported the creation of a trust fund, for, without the intervention of a trustee, the purpose of the testator could not be effectively accomplished. As the will did not designate a trustee, nor provide the means of his appointment, it was necessary, before the fund could be paid out by the executor, that a trustee should be appointed by legal authority. No such appointment was made. It is contended that the plaintiff, who was the husband of Milly West, was entitled to assume the authority of trustee and to receive the fund in question. He could not exercise the rights of a trustee without appointment by competent authority, nor could he have been properly appointed trustee of his wife's estate under this legacy.

One of the clear objects of the special provisions of this legacy was to protect such legacy against the marital rights of the plaintiff as husband of Milly West, and it is inconsistent with such an intent that the fund should be subjected to the control of the plaintiff. Without appointment and security, a payment to the plaintiff during the lifetime of Milly West would have been a breach of duty on the part of the executor.

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*The foregoing propositions are fully es-

tablished by Robinson v. Dart, (Dud. Eq., 130 [31 Am. Dec. 569]) and again in Dunn v. Dunn, (1 S. C., 350). It is equally clear from these authorities that the receipt of Milly West herself for the corpus of the legacy would have afforded no protection to the executor. It is evident that the decree below was erroneous in this respect.

It appears that the executor converted the Confederate currency in his hands belonging to the estate of his testator into interest-bearing Confederate bonds. The decision of this Court in Hinton v. Kennedy (3 S. C., 459,) was in a case precisely parallel to the present one as it regards the claim under consideration. In accordance with that case, we must hold that the executor was guilty of no breach of trust in such change of securities. It fully appears that the entire estate subject to the payment of the legacy to Milly West was lost through the depreciation of Confederate securities.

As it is not made to appear that the executor was at fault in retaining in his hands such securities down to the time when, by the course of public events, they became valueless, there is no ground for maintaining the complaint.

The decrees of the Circuit and Probate Courts must be set aside and the complaint dismissed.

McIVER, A. J., concurred.

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9 S. C. *61

*BAMBERG v. SOUTH CAROLINA RAILROAD COMPANY.

(Columbia. April Term, 1877.)

[*Trial* ⇐191.]

Where a request to charge involves the determination by the Court of a disputed question of fact, which it is the province of the jury to decide, it is not error to deny it.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 420; Dec. Dig. ⇐191.]

[*Trial* ⇐194.]

In an action against a common carrier, a request by the defendant to charge "that the facts disprove negligence on the part of the defendant:" *Held*, To have been properly denied. 1st, because it undertook to decide a question of fact; and, 2d, because the defendant was liable, as at common law no question of negligence was involved.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 465; Dec. Dig. ⇐194.]

[*Negligence* ⇐136.]

Questions of negligence, though mixed questions of law and fact, are for the jury to decide, under proper instructions from the Court.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 277-353; Dec. Dig. ⇐136.]

[*Carriers* ⇐216.]

The common law liability of a carrier for delivery of live animals is the same as that for the delivery of inanimate things, with this exception to the rule, as generally stated, that he is not liable for injuries caused by the peculiar character and propensities of the animals.

[Ed. Note.—Cited in Comer v. Columbia, N. & L. R. Co., 52 S. C. 51, 29 S. E. 637.

For other cases, see Carriers, Cent. Dig. § 929; Dec. Dig. ⇐216.]

[*Carriers* ⇐124½.]

In an action against a common carrier for goods injured or lost, the jury cannot, where no counter claim for the freight has been made, deduct the amount of the freight from the damages to which the plaintiff may be entitled.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 603; Dec. Dig. ⇐124½.]

Before Maher, J., at Barnwell, January, 1876.

This was an action by F. M. Bamberg v. The South Carolina Railroad Company, to recover damages for an injury to a mare of the plaintiff's, which the defendants had transported for the plaintiff from Augusta, Ga., to Bamberg, S. C.

The action was brought before a Trial Justice, who gave judgment for the plaintiff for $46.50, and an appeal was taken to the Circuit Court. At the trial in that Court the defendant requested the Court to give certain instructions to the jury, which were denied.

The defendant excepted, and, a verdict having been found for the plaintiff for $87.50, the defendant appealed to this Court.

The brief contained the testimony, written and oral, given at the trial, but it contained no case.

The requests of the defendant are contained in the opinion of this Court, and the facts will be sufficiently understood from what is therein stated.

Skinner, for appellant.
Dibble & Izlar, contra.

July 24, 1877. The opinion of the Court was delivered by

McIVER, A. J. This was an action to recover damages from the defendant as a common carrier for injuries sustained by a horse,

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the *property of the plaintiff, in its transportation from Augusta, Ga., by the defendant's cars, to Bamberg, S. C. The horse in question, with a number of others, forty-two in all, was forwarded from Augusta by G. W. Conway, the agent of the plaintiff, to the plaintiff, who is a dealer in stock at Bamberg. A. W. Lewis, an assistant agent of the defendant at Augusta, was charged with the duty of superintending the loading of cars with live stock, being furnished with hands for that purpose. It appeared from a paper offered in evidence and headed "Rates of transportation on the South Carolina Railroad," that special rates for the transportation of live stock from Augusta to Bamberg had been established, whereby the charge for the transportation of a single horse, &c., was nine dollars; ten to twenty horses, each three dollars and a half; for a "car load of any of

the above stock, passenger to accompany each car of stock, but one kind of stock to be put in each car, and load not to exceed 16,000 pounds, thirty dollars." This paper also contained sundry rules and stipulations, amongst which are the following: "The company will not be responsible for any damage occasioned by delays from storms, nor will they guarantee special dispatch in the transportation; nor will they hold themselves liable for damages, or as common carriers, for any article, after its arrival at its place of destination and unloaded in the company's warehouses or depots." Conway, in reply to the question as to what arrangements he made with the railroad officials for the transportation of these horses, said "that he did as usual, engage a car for their shipment," while Lewis testified that "G. W. Conway applied to him for two cars for shipment of live stock to Bamberg. The two cars were chartered to Conway at thirty dollars each and placed at his disposal for loading." The plaintiff, however, testified that "I have never, at any time, made any special arrangement with defendant or its agents in regard to the transportation of my stock. When I have had stock to ship I have always notified defendant's agents and they have the cars placed in position to receive my stock, and I have always paid the regular rates of freight. I never have chartered a car from defendant; my stock shipped on their road have always been shipped in the manner just stated, and, as I have before testified, the company has always paid me for stock injured in transportation until this instance." The horse was found to be injured when taken from the cars at Bamberg, but there was

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no *evidence showing the cause of the injury complained of. The defendant requested the Circuit Judge to charge the jury as follows:

1. "That the plaintiff having chartered the car in question from defendant upon a fair view of same, the liability of defendant, as a common carrier, does not attach, nor can the defendant be held liable for any amount in this action."

2. "That in this instance the defendant was only liable for the proper transportation of the cars from Augusta to Bamberg."

3. "That the facts disprove negligence on the part of the defendant."

4. "That the defendant is not liable at common law as a carrier of live stock."

5. "That if they find for the plaintiff they must deduct the freight of the two cars of stock, forty-two head, at three dollars and a half per head, from the amount so found."

All these requests were refused, to which refusal the defendant excepted, and, the jury having found a verdict for the plaintiff, we are now to determine whether any error was committed by the Circuit Judge in refusing to charge as requested. The first and second requests may properly be considered together. It is very manifest that the Circuit Judge could not have given the instructions asked for without invading the peculiar province of the jury by determining the disputed question of fact as to whether the cars were chartered by the plaintiff. And as the case is presented to us it becomes unnecessary for us to volunteer an opinion as to whether, looking at the facts in the most favorable light for the defendant, the transaction amounted to a chartering of the car in the proper sense of that term, or whether the plaintiff, being tendered by the printed paper offered in evidence three different rates of transportation,—one by the single horse, one by the lot of ten to twenty, and one by the car load, did not simply make his selection of the one which he regarded as most favorable. Nor is it necessary for us to determine what would be the effect upon the liability of a railroad company as a common carrier, where a shipper charters, in the proper sense of that term, one of its trains, assuming full control and management of it.

The third request is open to the same objection. For while it is true, as stated by Moses, C. J., in Scott, Williams & Co. v. Crews, (2 S. C., 538,) that "negligence is a mixed question of law and fact," which expression, we take it, was simply designed to

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convey *the idea that, while it would be the duty of the Court to lay down the rules by which it is to be determined whether certain given conduct falls within the one kind of negligence or the other, it would, at the same time, be the duty of the jury to determine what facts were proved in a given case, and, applying the rules furnished by the Court to the facts thus ascertained, determine whether any negligence, and, if any, of what kind, had been proved. The very fact that it is a mixed question shows that the instruction asked for was properly refused, for it was asking the Court not only to perform its own duty by laying down the rules of law applicable to questions of negligence, but to go on and usurp the prerogative of the jury by determining what facts were proved in the case. This request is also open to another objection. For if the defendant, when it undertook the transportation of the horse in question, assumed the liability of a common carrier at common law, then the question for the jury to solve was not a question of negligence as in the case of an ordinary bailee, but the sole question was whether the defendant had shown that the damage sustained resulted from any one of the causes which would exempt a carrier from responsibility—the act of God, or the public enemy, or other causes hereafter to be mentioned. For the rule that, in an action against a common carrier, the onus is upon him to show that the damage complained of was occasioned by causes which exempt him from responsibility, and that it is not enough for him to prove that he was not guilty of any negligence, but had used the utmost care and diligence, is so

well settled as to admit of no question.—Ewart v. Street, 2 Bail., 157 [23 Am. Dec. 131]; Smyrl v. Niolon, 2 Bail., 421 [23 Am. Dec. 146]; Cameron v. Rich, 4 Strob., 168 [53 Am. Dec. 670].

This brings us to the consideration of the question raised by the fourth request: whether the defendant is liable at common law as a carrier of live stock, or, to state the question more precisely, whether a railroad company, in the transportation of live stock, is not exempt from the operation of the common law rule by which the liability of a common carrier is tested. This question, so far as we are informed, has never before been distinctly raised in this State, though it has received consideration at the hands of the Courts of other States in this country, as well as in England, and, as we shall see, no uniform result has been reached. It is true that there are many cases in which damages have been recovered from railroad companies

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and from ferrymen, who have been held *to be common carriers, (Cook v. Gourdin, 2 N. & McC., 19; Cohen v. Hume, 1 McC., 439, and Wilson v. Hamilton, 4 Ohio St., 422,) for injuries done to live stock in its transportation, under circumstances which indicated clearly that the Courts regarded carriers of live stock as subject to the same common law rule which governs in actions for damages to inanimate property; yet the cases in which the precise question has been distinctly raised and decided are comparatively few. There is also another class of cases in which the question has been complicated with, or made to depend upon, inquiries as to whether the common law liability of a carrier could be, or had been, limited by printed notices appended to bills of lading, or by express contract. Yet the exceptions taken do not present this case under any such aspect, and, indeed, could not well do so, as the only evidence offered which in any respect tended to show that there was any design on the part of the defendant to limit its liability was that contained in the "rules and stipulations" embraced in the printed rates, and these only asserted exemption from liability for damage occasioned by delays from storms, or from the want of special dispatch in the transportation, or for damages to any article after its arrival at its place of destination and delivery in the company's warehouses or depots; and as there was no pretense that the damage complained of in this case arose from delay by reason of a storm or from the want of special dispatch, or that it occurred after the arrival of the property alleged to have been damaged at its point of destination and after it was unloaded in the warehouses or depots of the company, there was no room for such an element in the case, and hence there is no necessity to consider the further question as to whether the contract, having been made in Georgia, could be controlled by our Act of 1864 forbidding railroad companies from limiting their common law liability by notice or by special contract. There are, however, two cases which distinctly decide that railroad companies are not liable as common carriers in the transportation of live stock.—The Michigan Southern and Northern Indiana Railroad Company v. McDonough, 21 Mich. Rep., 165, reported also in 4 Am. Rep., 466; and the Lake Shore and Michigan Southern Railroad Company v. Perkins, 25 Mich., 329, 12 Am. Rep., 275. While the reverse is held in the following cases: Smith v. New Haven and Northampton Railroad Company, 12 Allen, (Mass.,) 531; Kansas Pacific Railroad Company v. Reynolds, 8 Kan., 623; Kansas Pacific Railroad Company

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*v. Nichols, 9 Kan., 235, 12 Am. Rep., 494; Clark v. Rochester and Syracuse Railroad Company, 14 N. Y., 570; to which may be added the case of The Great Western Railway Company v. Blower, 2 Eng. Rep., (Moak's,) 700.

In the case of the Michigan Southern and Northern Indian Railroad Company v. McDonough, the conclusion reached that a railroad company is not liable as a common carrier in the transportation of live animals is sought to be sustained by argument as well as by authority; but in our judgment the cases cited do not sustain such conclusion, although some remarks of some of the Judges, in those cases, may justly be regarded as pointing in that direction. Nor is the argument any more satisfactory. The learned Judge who delivered the opinion of the Court says: "For the purposes of this case, it may be assumed that this company, by their charter and act of consolidation, are required to take upon themselves the business of common carriers, and to transport, as such, all such property tendered to them, for that purpose, as was usually transported by railroads, as common carriers, at the date of the charter of the Michigan Southern Railroad Company, in 1846, and any other kind of property which, in the progress of invention and business, might be tendered for such carriage, which should not from its nature impose risks of a different character, or require an essentially different mode of managing their road, or the incurring of extra expenses on account of the different character of such new kinds of property. But the transportation of cattle and live stock, by common carriers, by land, was unknown to the common law when the duties and responsibilities of common carriers were fixed, making them insurers against all losses and injuries not arising from the act of God or of the public enemies. These responsibilities and duties were fixed with reference to kinds of property involving in their transportation much fewer risks and of quite a different kind from those which are incident to the transportation of live stock by railroad." And, after pointing out the manner in which the risks would be increased, and the neces-

sity for the railroad company to incur additional expense to secure the safe transportation of such property, he concludes that the common law rule of liability cannot be applied to the transportation of live animals. The fault of this argument seems to us to consist in assuming that the common law rule was framed with reference to, and was applicable only to, the transportation of such articles as common carriers were in the habit of

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*transporting at the time such rule became a part of the law, whereas we think the true view is that this rule grew out of the nature of the business, and was based upon considerations of public policy by which it was thought necessary that such business should be governed. The supposed necessity for the rule grew out of the fact that the carrier was entrusted with the exclusive custody and control of the goods, it did not matter of what kind or nature, of another, for a special purpose, to wit: to be transported from one place to another. Whether a person was a common carrier or not depended solely upon whether, by his acts or declarations, he held himself out to the world as such, and not upon the kind of property that he carried. One definition, in the elementary books, of a common carrier will show that his character as such did not depend upon the kind of goods which he carried, but solely upon whether he held himself out to the world as a person who was engaged in carrying property of others; not property of a particular kind, but of any kind, from place to place for hire. Take the definition given by Kent: "Common carriers are those persons who undertake to carry goods generally, and for all people indifferently, for hire, and with or without a special agreement as to price." Or that given by Story in his work on Bailments: "One who undertakes, for hire or reward, to transport the goods of such as choose to employ him from place to place." We find here no intimation whatever that the question as to whether a person occupies the position of a common carrier depends upon the kinds of goods which he carries, but solely upon whether he is engaged in the business of carrying goods generally from one place to another for hire. Then, the moment one's character as a common carrier becomes established, the rule applicable to such business must necessarily be applied. It seems to us that the argument used in the Michigan case, carried to its legitimate results, would leave very little scope for the operation of the common law rule. For, in this age, when, by the progress of invention and discovery and the development of the natural resources of the country, many new and different kinds of articles are being constantly added to the large mass requiring transportation, such a limitation of the common law rule as that contended for would open an endless source of litigation by practically abrogating the rule which the wisdom of ages has found to be the most suitable for determining the liability of persons engaged in the transportation of the goods of others from place to place for hire. For, as each

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*new article was introduced, it would become necessary to inquire whether its nature was such as to increase the risks incurred in its transportation. That the common law rule had its origin in considerations of public policy springing from the nature of the business in which the carrier was engaged, unaffected by the nature of the articles handled in the conduct of such business, is apparent from the reasons given in defense of the rule against what has been supposed by some to be its undue harshness.—See Story on Bail., § 490; Smyrl v. Niolon, 2 Bail., 422 [23 Am. Dec. 146]. The case of the Lake Shore and Michigan Southern Railroad Company v. Perkins having been decided in accordance with and in fact based upon McDonough's case, supra, which we have just been considering, no extended examination of it is necessary.

It is to be observed that the decisions in these two cases are in apparent conflict with the decision in another Michigan case—The Great Western Railway Company v. Hawkins, (18 Mich., 427,) and although an effort is made in both cases to reconcile or account for such apparent conflict, yet we must confess that the effort does not strike us as successful in either case. These Michigan decisions may possibly be accounted for by what is said of them by Valentine, J., in The Kansas Pacific Railway Company v. Nichols, 9 Kansas, 235, 12 Amer. Rep., 496: "In Michigan, since April, 1870, railroads have not been public purposes or public uses in the sense that they are such in other States of the Union. In that State they are strictly private purposes or uses.—People v. Salem, 20 Mich., 452, 4 Amer. Rep., 400. The Supreme Court of that State says that 'they (railroad companies) are public agents, in the same sense that the proprietors of many other kinds of private business are, and not in any other or different sense. Our policy in that respect,' says the Court, 'has changed. Railroads are no longer public works, but are private property.' Railroads in Michigan seem from that decision to be such private corporations as are described in the case of Leavenworth & Co. v. Miller, 7 Kansas, 524. If they are such private corporations as are there described, of course they have a right to be common carriers of just such property as they choose—no more and no less. This is not so in Kansas. The railroads of Kansas are organized upon a different basis. In Kansas they are endowed with a quasi public as well as private character. In Kansas they are so far public that the sovereign power of eminent domain may be exercised for their

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benefit, *and they are so far public that other public aid may be extended to them." What

is here said of railroads in Kansas is in many respects true of railroads in South Carolina. We are not inclined, therefore, to follow the decisions in these two cases from Michigan, but, on the contrary, we think the rule is correctly stated in Smith v. New Haven and Northampton Railroad Company, (12 Allen, Mass., 531,) and is well supported by reason as well as by authority. The rule as there stated is this: "The common law liability of a carrier for the delivery of live animals is the same as that for the delivery of merchandise. To this general rule there is an apparent exception, supported by authority which we adopt, that the liability of the carrier does not extend to injuries caused by the peculiar character and propensities of the animals to themselves or each other." But, as the learned Judge proceeds to show, this exception is more apparent than real, for while the common law rule, as ordinarily stated, is that the carrier is liable for all losses except those occasioned by the act of God or of the public enemy, yet the principle of this exception, or, more properly speaking, addition, to the common law rule, as usually stated, has always been recognized as a part of such rule. For example: The carrier was not liable under the common law rule for the natural and ordinary decay of fruits or vegetables, for the evaporation of liquids or for any other damage caused by the inherent infirmity of the article carried. So, too, the carrier would not be liable under that rule for damages occasioned by the inherent character or propensities of the animals.—Story on Bail., §§ 492 and 576; Clark v. Rochester and Syracuse Railroad Company, 14 N. Y., 570, and Evans v. Fitchburg Railroad Company, 111 Mass., 142, 15 Amer. Rep., 19; The Great Western Railway Company v. Blower, 2 Eng. Rep., (Moak's,) 700. As to the fifth request, we find nothing in the pleadings or the evidence which would warrant such a charge. The defendant set up no counter claim for freight, and perhaps if it had the reply might have been that the freight had been paid. The defendant's own evidence showed that it was not entitled to freight for forty-two head of horses at three dollars and a half per head, as claimed in this request, but, at most, to only sixty dollars, the rate for the two cars used. It may be that, under the principles established by the cases of Ewart v. Kerr, (Rice Rep., 203,) and Dyer v. The Grand Trunk Railway Company, (42 Vermont, 441, 1 Amer. Rep., 350,) upon proper allegations, supported by sufficient proof, the

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defendant, *in a case like this, might be entitled to a deduction for freight, but in the case as presented to us we see no warrant for such a charge as that asked for.

We are unable to discover any error in the refusal of the Circuit Judge to charge as requested, and the motion is, therefore, dismissed.

WILLARD, C. J., concurred.

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9 S. C. 70

MARS v. CONNER.

(Columbia. Nov. Term, 1876.)

[*Judicial Sales* ⇐50.]

Where, in an action to set aside a judicial sale of land on the ground of fraud, the validity of the sale is sustained, but the purchasers are required to account for the difference between the price they paid for the land and the enhanced price at which they had sold it, they (the purchasers) are not liable for rent.

[Ed. Note.—For other cases, see Judicial Sales, Cent. Dig. § 96; Dec. Dig. ⇐50.]

[*Accord and Satisfaction* ⇐9.]

A claim by open account for $250: *Held* not to be paid or satisfied by a promissory note for $150, it appearing that the note was not given as satisfaction, but merely as a substitute for the original claim and as a memorandum that the amount had been reduced to $150.

[Ed. Note.—For other cases, see Accord and Satisfaction, Cent. Dig. §§ 88–91; Dec. Dig. ⇐9.]

[*Action* ⇐22.]

A petition entitled petition in a cause pending when it was filed, to which new parties were made and other relief demanded: *Held* to be practically an action for equitable relief.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 124–139, 143, 145; Dec. Dig. ⇐22.]

[*Costs* ⇐13.]

In equity causes, or, more properly speaking, those actions in which the relief sought was, prior to the Code, obtained only in a Court of equity, costs are not allowed, of course, under §§ 330 and 331 of the Code, but may be allowed or not, in the discretion of the Court, as provided in § 332.

[Ed. Note.—Cited in Stegall v. Bolt, 11 S. C. 525; Bratton v. Massey, 18 S. C. 560; Scott v. Alexander, 23 S. C. 126.

For other cases, see Costs, Cent. Dig. § 21; Dec. Dig. ⇐13.]

Before Cooke, J., at Abbeville, October, 1876.

The statement contained in the opinion of this Court is sufficient for a full understanding of all the points with reference to which the case is reported.

Monteith & Bauskett, for appellants.

McGowan, contra.

August 8, 1877. The opinion of the Court was delivered by

McIVER, A. J. For a proper understanding of the question presented by this appeal, it will be necessary to make a brief statement, not only of this, but other cases, with which it is closely connected.

On the 20th of August, 1866, William McCelvey being greatly embarrassed, and believing himself to be utterly insolvent, made

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a *voluntary assignment to the plaintiff, Mars, of his whole estate, in which were in-

cluded two tracts of land, one known as the Wells tract and the other as the Clay tract, for the benefit of his creditors, and within a few days thereafter removed from the State. His right to the Clay tract was then in litigation, under a bill filed by Hugh McCelvey against him, which litigation, however, eventually terminated in his favor in August, 1869. The defendants, Conner and others, having a judgment against William McCelvey for upwards of $9,000, levied their execution upon the assigned property, whereupon the assignee, Mars, on the 28th of September, 1866, filed this bill against Conner et al. to enjoin the sale under their execution, to reduce the amount of their judgment, and to marshal the assets of William McCelvey. On the 29th of September, 1866, the injunction was granted, and on the 7th of November, 1866, the late Judge Wardlaw granted an order in both the above mentioned cases directing the lands to be sold, (the proceeds of sale of the Clay tract to be held subject to the order of the Court until the issue at law which had been ordered in the case of Hugh McCelvey v. William McCelvey should be determined,) the creditors to be called in, and the assignee to account, and, also, granting leave to make Wm. McCelvey, then resident in Texas, a party to the bill filed by Mars v. Conner and others.

A. L. Welch, a party defendant to the bill filed by Hugh McCelvey v. William McCelvey, who had also set up a claim to the Clay tract, having had the sale made under Judge Wardlaw's order set aside, W. D. Mars, on the 13th April, 1867, filed a supplemental bill against Conner and others, making Welch and the two McCelveys—Hugh and William—parties defendants, and upon this bill an order pro confesso was taken against William McCelvey on the 4th June, 1867. Chancellor Lesesne, by an order dated 12th June, 1867, entitled in both of said cases Hugh McCelvey v. William McCelvey and A. L. Welch and W. D. Mars v. A. P. Conner and others, confirmed the report of the Commissioner, marshaling the assets, in which the judgment in favor of Conner and others was reduced to $338, and directed the sale of the lands for cash, the proceeds of the sale of the Clay tract, however, still to await the determination of the issue at law above mentioned. This order, among other things, also directed that the Commissioner should, from the proceeds of sale, (not including the proceeds of the sale of the Clay tract reserved,) and from funds received by him from any

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other *sources, pay the tax costs in the case of Mars v. Conner and others, and such fee as may be allowed complainant's solicitors by order of Court; and "that the tax costs of the case of Hugh McCelvey v. William McCelvey and others be paid from the sales of the latter tract of land above mentioned." A reference was then ordered to ascertain what would be a proper fee for Thomson & Fair, complainant's solicitors, in the case of W. D. Mars v. Conner and others, and the amount was fixed, by order of the Court, dated 15th June, 1867, at four hundred dollars. In pursuance of the order of Chancellor Lesesne, the two tracts of land were sold by William H. Parker, the Commissioner in Equity, on the 7th of October, 1867, and bid off by Thomas Thomson—the Wells tract for $900 and the Clay tract for $920. The price of the Wells tract was paid in cash, but the price of the Clay tract was not then actually received by the Commissioner, though he charged himself, on his books, with the amount. No title was made to Thomson until the 19th of November, 1868, though Thomson and William H. Parker, (who, at some time after the sale, exactly when does not appear, became interested with Thomson in the land,) rented the same to one Carter for the year 1868. On the same day that Parker, as Commissioner in Equity, executed a deed to Thomson for the land, Thomson conveyed to Parker a half interest therein, and immediately thereafter they, Thomson and Parker, conveyed to Reed and Brown, at a considerable advance on the price paid by Thomson at the Commissioner's sale, which conveyance, however, it is proper to add, contained a clause of warranty against the contingent right of dower in the wife of William McCelvey, and also against the claim of Welch, and this, it was said, accounted for the increased price. In June, 1870, the case of Hugh McCelvey v. William McCelvey and A. L. Welch and the case of W. D. Mars v. A. P. Conner and others were both marked "ended" on the docket. William McCelvey returned to this State in August, 1870, and soon after his return commenced two actions, one against W. D. Mars and the other against Thomas Thomson and William H. Parker. The object of the former seemed to be to obtain an accounting from Mars, as assignee, who put in his answer claiming that little or none of the assets of the assigned estate had ever come into his hands, but that under his bill against Conner and others all that had not been sold by the Sheriff had gone into the hands of the Court of Equity, where he had already accounted, and insisted that he

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could not *again be required to account. This defense was sustained by the Referee, to whom this case was referred, and the propriety of his decision seems to have been recognized by William McCelvey, for, so far as the Court is informed, no further proceedings were ever had under this action. The other action, the one against Thomson and Parker, was brought for the purpose of recovering damages against them for alleged fraudulent collusion in the sale and purchase of the lands above mentioned, as it would seem from what is said of this case in the opinion of the Supreme Court hereafter to

be adverted to, though the papers furnished us do not disclose distinctly what was the nature and purpose of this action.

Finally, on the 15th January, 1872, Wm. McCelvey filed what he calls a petition in the cause of W. D. Mars v. A. P. Conner and others, claiming that he was a necessary party to that cause, and that he had never been properly made so; that the cause was improperly marked "ended," and asking that the case should be restored to the docket, that he might have leave to come in and answer; that the cause should be reheard; that the sale of the lands should be set aside, and, if necessary, that the lands be resold and the proceeds applied under the assignment according to law.

It is very obvious that the relief asked for in this petition could not be obtained without making Thomson, Parker, Reed and Brown parties; and although the petition does not in form pray that they should be made parties, yet copies of it seem to have been served upon these persons, who thereupon came in and answered, so that the transactions between these parties culminated in five different cases: First, Hugh McCelvey v. Wm. McCelvey and A. L. Welch, for specific performance; second, W. D. Mars, Assignee, v. A. P. Conner and others, for injunction and to marshal assets; third, Wm. McCelvey v. W. D. Mars, Assignee, for an accounting as assignee; fourth, Wm. McCelvey v. Thomas Thomson and Wm. H. Parker, for damages for the alleged fraud in the sale of the land; fifth, Ex parte Wm. McCelvey in re W. D. Mars v. A. P. Conner and others, being the petition just above mentioned. The matters in controversy in the three last named cases were referred to Silas Johnstone, as Referee, to hear and determine the same, who made his report, which being confirmed by the Circuit Court an appeal was taken to the Supreme Court, where it was determined that the case of Mars v. Conner and others had

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been improperly marked *"ended;" that Wm. McCelvey had been properly made a party to that cause, and that, notwithstanding the Act of 1784, (7 Stat., 210,) he was not entitled "to a rehearing of so much of the merits of the case as terminated in the order made on June 12, 1867, for a sale of the lands, inasmuch as he did not come in within the time allowed by that Act." And after deciding that the sale must stand, but that Thomson and Parker, though expressly relieved from any imputation of moral fraud, are liable for the profit they made on the sale, upon the ground of the fiduciary relation in which they stood to Wm. McCelvey, directed that "the costs under the petition must be paid by Wm. McCelvey, and the costs in Wm. McCelvey v. Thomson and Parker by the respective parties on whose behalf they were incurred," and remanded the case to the Circuit Court for such orders as might be necessary and proper to give effect to the views and principles announced in the opinion.

In conformity with this judgment of the Supreme Court, Judge Carpenter, on the 17th May, 1876, granted an order, which was assented to by the attorneys for Wm. McCelvey, referring it to a Referee to state the accounts of the assigned estate of Wm. McCelvey, including in the assets of such estate the sum of $1,240, (which was the profit made by Thomson on the sale of the land,) and the interest thereon from the 19th November, 1868, ordered to be added by the Supreme Court, and any other assets of the assigned estate; to notify the creditors of Wm. McCelvey, whose claims were embraced in the report of the Commissioner, which was confirmed by Chancellor Lesesne, 12th June, 1867, to present their demands, or so much of them as remain unpaid, on or before a given day; and to report the debts yet remaining unpaid, adding thereto "the tax costs in the case of, first, Wm. McCelvey v. W. D. Mars, and second, Wm. McCelvey in re W. D. Mars, Assignee, v. Thomas Thomson and Wm. H. Parker, (which is undoubtedly the same case as that hereinbefore entitled "Ex parte Wm. McCelvey in re W. D. Mars, Assignee, v. A. P. Conner and others,") and the plaintiff's costs in the case of Wm. McCelvey v. Thomas Thomson and W. H. Parker; the Referee to tax said costs, including proper compensation to the Referee appointed in the three cases upon the motion of plaintiff McCelvey.

The Referee having made his report under this order, sundry exceptions thereto were filed on behalf of Wm. McCelvey, all of which being overruled by the Circuit Judge the same

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exceptions *are presented here by way of appeal. It is not necessary to make any detailed statement of the terms of this report, as the points which we are called upon to review can be made sufficiently to appear from a statement of the exceptions. The first exception complains that the Referee erred in charging Wm. McCelvey with the costs in the case of H. McCelvey v. Wm. McCelvey and A. L. Welch. We agree with the Referee that this matter was concluded by Chancellor Lesesne's order of 12th June, 1867, and that so far from the decision of the Referee being in conflict with that of the Supreme Court, it is strictly in accordance with it. For as we understand the previous decision of this Court, it is that Wm. McCelvey, having been properly made a party to the case, he is bound by all orders made therein, where he failed to avail himself of the privilege afforded by the Act of 1784 by coming in and objecting within the time fixed by that statute. The second exception which objects to the fee allowed Thomson and Fair, besides being disposed of by the same considerations

as have just been adverted to in reference to the first, is evidently taken under a misapprehension of the facts. This fee was not allowed in the case of Hugh McCelvey v. Wm. McCelvey, as seems to be assumed by the terms of the exception, but it was in the case of W. D. Mars, Assignee, v. A. P. Conner and others, in which these gentlemen represented the assigned estate of Wm. McCelvey, and of course were entitled to be paid out of the assets of that estate. We may also add that their services seemed to have proved very valuable to the assigned estate, as they succeeded in reducing a judgment claim against it from upwards of $9,000 to the comparatively insignificant sum of $338, and but for these services there would probably have been no assets of the assigned estate left for the parties to contend about. This, taken in connection with the testimony of Wilson and of Cothran, leaves no room to doubt the propriety of the allowance. The third exception, which complains that the rent of the land for the year 1868, received by Thomson and Parker, was not charged against them as part of the assets of the assigned estate, is based upon a misconception of the judgment of the Supreme Court, as it seems to assume that by that judgment the sale to Thomson and Parker was declared invalid, and therefore that the land still remained the property of Wm. McCelvey, whereas the very reverse is the true construction of that judgment. The Supreme Court expressly declined to set aside the sale, and, on the con-

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trary, confirmed it, using *this language: "The petitioner (McCelvey) cannot have the decree for the sale set aside, because, a party to the bill where it was ordered, he did not move to contest it within the time permitted by the statute;" and again "the sale to Reed and Brown must stand," and directed that Thomson and Parker should be charged with a specific sum of money, $1,240, (the profit made on the sale,) and interest, and the Referee very properly declined to add to the judgment of the Supreme Court any other sum of money, whether in the form of rent or otherwise. As to the fourth exception, which assails the report because the note of Wm. McCelvey to Wm. McGowan, dated subsequently to the deed of assignment, was set down as one of the unpaid debts of Wm. McCelvey, we do not think it well taken. This claim had been previously established under the original order calling in creditors, and is mentioned by the Commissioner in his report dated 31st May, 1867, as a claim by open account for $250, and was subsequently, by agreement between the parties, reduced to $150, for which the note in question was taken, and though dated prior to the making of the report was in fact executed afterwards. Upon this ground McCelvey claimed that the note was a satisfaction of the prior claim, and, being given subsequent to the report, is a new debt, not payable from the assets of the assigned estate, or rather is not to be included in the accounting ordered. On the other hand, it is claimed that this note was not taken as payment, but merely as a substitute for the original claim, and as a memorandum that the amount had been so reduced; and that such was the real intention of the parties, the circumstances attending the transaction leave no room to doubt; and, if so, then, clearly, the note is not to be regarded as payment of the original claim.—Burton v. Pressly, Chev. Eq., 1; Gardner v. Hust, 2 Rich., 601; Charles v. Coker, 2 S. C., 122. And as the Referee was directed to "report the unpaid debts yet remaining against the said McCelvey," and as there is no pretense that this debt has ever been paid in any other way than by giving the note in question, which, as we have seen, did not amount to payment, the claim was very properly allowed.

The fifth and seventh exceptions—the former objecting to the allowance of costs to the defendant in the case of Wm. McCelvey v. W. D. Mars, and the latter to the charging Wm. McCelvey with the fee of the former Referee,—are effectually disposed of by the very terms of Judge Carpenter's order, to

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which the appellant, *through his counsel, assented; for by the express terms of that order these very items which are now excepted to were directed to be charged against the appellant, and it is too late now, even if the objections were originally maintainable, to object to these charges. To this we may add that the fifth exception proceeds upon a mistake as to the facts; for the objection to charging Wm. McCelvey with the costs in McCelvey v. Mars is based upon the assumption that McCelvey "prevailed in that suit," whereas the fact, as we have seen, is otherwise. The Referee (Johnstone) reported that Mars, having already accounted to the Court of Equity, was not liable to a further accounting as asked for in this case, and no exception was taken to that part of his report, which was confirmed. In fact, if there was any error committed in respect to the matter mentioned in the seventh exception, it was in favor of the appellant; for, by the terms of Judge Carpenter's order, the whole amount of the Referee's fee, instead of only two-thirds of it, might have been charged against McCelvey, though it is due to the Referee to add that only two-thirds was charged, by consent of Thomson and Parker. The only difficulty presented by the sixth exception arises mainly from the somewhat indefinite terms in which the exception is taken. The following are its terms: "Because the Referee erred in allowing costs to the persons who volunteered answers in the case of Ex parte McCelvey filed in this cause, the said allowance being unsupported by any statute and illegal." This language would seem to im-

ply that the point of this exception is, not that costs had been allowed under a petition in the cause, as this proceeding was called, in the absence of any statute allowing costs in such a proceeding, but that certain persons had unnecessarily intruded themselves into the cause, volunteering answers, and that such persons should not have been allowed any costs at all. If the exception is to be confined to this point, we would have no hesitation in overruling it; for we are at a loss to understand how it can be said that the defendants alluded to volunteered answers, when it was absolutely necessary that they should have been made parties in order to secure a proper determination of the claims set up by the appellant in his petition, and, being thus necessarily made parties, their answers, which, doubtless, they were advised to put in as essential to maintain their defense against what they regarded as the unjust and unfounded claims of the appellant, cannot, in any proper sense, be regarded as

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"volunteered." *It cannot escape attention that this proceeding, though nominally "ex parte," and styled a petition in the cause, was, in reality, a new action, with new parties, seeking new and different relief from that contemplated in the original cause. That cause was, as we have seen, a bill filed by the assignee, W. D. Mars, against the creditors of his assignor, to which the assignor had also been properly made a party defendant, as the Supreme Court has heretofore decided, for the purpose mainly of marshaling the assets of the assigned estate. To this bill neither Thomson nor Parker, nor Reed nor Brown had been made parties, nor, indeed, were they necessary or even proper parties; and while Thomson might, by his purchase at a sale under an order in that cause, have, for some purposes, become a party to the proceedings, this cannot be said of Parker, who purchased an interest from Thomson, or of Reed and Brown, who purchased from Thomson and Parker.

The petition, on the other hand, was filed for a wholly distinct and different purpose, its main object being to set aside the sale of the land; and to such a proceeding, for such a purpose, not only Thomson and Parker, but Reed and Brown also, were necessary as well as proper parties. They therefore had a right to make their defense to the claims set up against them, either by answer or demurrer, as they might think best. And here it may not be amiss to observe that the defense of Reed and Brown seems to have been entirely successful, while that of Thomson and Parker was equally so, in defeating the main object of the petition, setting aside the sale of the land, although a recovery was had against them, which, for all that the Court can see, might just as well have been had in the action for damages, the fourth in the series of actions above enumerated, which had previously been brought, but which, for some reason of which the Court is not advised, had been passed over, although it was then pending, but in what condition or to what stage it had reached the record does not disclose. If, however, we are to construe the language of this exception so as to mean that there is no statute fixing an allowance for costs, under a petition in a cause, and such, judging from the argument of the counsel for the appellant, seems to have been the real meaning intended, and that, therefore, the allowance was illegal, it will be necessary for us to consider the exception in that aspect. Taking this view of the scope and intention of this exception, a sufficient answer to it would be that this matter had

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already been determined by the *Supreme Court when it adjudged that "the costs under the petition must be paid by William McCelvey." But, in addition to this, we may say, that while it is true that there is no statute allowing costs "of course" in a case like the one now under consideration, it is equally true that the Code of Procedure, after declaring that "costs shall be allowed of course" in a certain class of actions, provides, in Section 332, that "in other actions costs may be allowed, or not, in the discretion of the Court." The Courts of New York have construed the words "other actions," in a corresponding Section of their Code, to embrace "equity causes," or, more properly speaking, those actions in which the relief sought was, prior to the Code, obtained only in a Court of equity.—Hines v. Myers, 4 How., 356; Gallagher v. Egan, 2 Sandf., 742; Stager v. Schultz, 3 Trans. App., 4; Barber v. White, 3 Trans. App., 86; 5 Abb., (N. S.,) 121. See, also, 2 Tilling & Spear Prac., 594. And as we regard this petition in the cause, as it is called, as practically an action of that kind, we think the question whether costs should have been allowed or not was wholly within the discretion of the Court; and as that discretion seems to have been exercised by the order of the Supreme Court fixing the liability for these costs upon William McCelvey, which, under the order of Judge Carpenter, have been taxed against him by the Referee, whose report containing such taxation has been confirmed, we are unable to discover any ground upon which this exception can rest. It is scarcely necessary for us to add that we are not to be considered as either approving or disapproving the correctness of the several items contained in the bill of costs, as presented in the report of the Referee, as this appeal opens up no such inquiry, and if it did we have not been furnished with the necessary data to determine such a question.

The motion is dismissed.

WILLARD, C. J., concurred.

9 S. C. *80

*Ex parte BOND.

(Columbia. Nov. Term, 1877.)

[*Habeas Corpus* ⟸4.]

A prisoner sentenced by a Circuit Judge to confinement in the Penitentiary cannot be discharged upon a writ of habeas corpus, unless the judgment is an absolute nullity either for want of jurisdiction or otherwise. If it be merely erroneous and voidable, the relief is by appeal and not by writ of habeas corpus.

[Ed. Note.—Cited in State v. Garlington, 56 S. C. 414, 34 S. E. 689; State v. Abbott, 87 S. C. 471, 70 S. E. 6, 33 L. R. A. (N. S.) 112, Ann. Cas. 1912B, 1189.

For other cases, see Habeas Corpus, Cent. Dig. § 4; Dec. Dig. ⟸4.]

[*Criminal Law* ⟸991.]

A prisoner convicted of assault with intent to kill cannot lawfully be sentenced to confinement in the Penitentiary at hard labor, but such sentence is not void, but only voidable, and relief can be obtained by appeal only, and not by habeas corpus.

[Ed. Note.—Cited in State v. Welsh, 29 S. C. 8, 6 S. E. 894; State v. Williams, 40 S. C. 381, 19 S. E. 5.

For other cases, see Criminal Law, Cent. Dig. § 2528; Dec. Dig. ⟸991.]

This was a petition to the Supreme Court for a writ of habeas corpus.

The case will sufficiently appear from the opinion of the Court.

Monteith, Green, for petitioner.

The Solicitor, contra.

December 21, 1877. The opinion of the Court was delivered by

HASKELL, A. J. The prisoner was tried at Columbia, Fall Term, 1875, and convicted of assault with intent to kill. The presiding Judge thereupon sentenced him to confinement in the State Penitentiary, at hard labor, for four years, and the petitioner, under a writ of habeas corpus, now seeks a discharge upon the ground that the punishment imposed by the sentence is not authorized by law. In the case of the State v. Hord, (8 S. C., 84,) for assault with intent to kill, it has recently been decided, on appeal, (opinion by Moses, C. J.,) that the offense is not punishable by confinement in the State Penitentiary. Does such error of law, in the judgment by virtue of which this prisoner is detained, render the judgment of the Court void? If it does not, the prisoner cannot be discharged. Says Chief Justice Marshall: "An imprisonment under a judgment cannot be unlawful unless that judgment be an absolute nullity, and it is not a nullity if the Court has general jurisdiction of the subject, although it should be erroneous."—Ex parte Watkins, 3 Pet., 193 [7 L. Ed. 650].

A judgment may be voidable and yet not void. When voidable, the remedy is by appeal,—"the only mode of reviewing a judgment or order in civil or criminal action."—Rev. Stat., 654, § 349.

When void, and it affects the liberty of a person, relief by habeas corpus may be had. Upon that distinction all the cases rest; and although the distinction may sometimes be

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finely drawn and Judges *may differ as to the character of the particular process under which a prisoner is detained, they all concur in the principle above stated. If the Court has general jurisdiction of the subject an erroneous judgment is voidable. If the Court has not such jurisdiction its judgment is void. "Where a Court of record has jurisdiction of the subject matter and the party, its judgment, though erroneous, must stand until rescinded by the proper tribunal; * * * its order must avail until reversed in the mode 'provided by law, which, under our practice, is by appeal.'"—In re Stokes, 5 S. C., 71; Ex parte Watkins, 3 Pet., 206 [7 L. Ed. 650]; Elliott v. Peirsol, 1 Pet., 340 [7 L. Ed. 164].

In Brennan and Galen's case it was submitted that the imprisonment was by virtue of a sentence contrary to law.

Lord Denman, C. J., said: "We think, however, the Court having competent jurisdiction to try and punish the offense, and the sentence being unreversed, we cannot assume that it is invalid or not warranted by law, or require the authority of the Court to pass the sentence to be set out by the gaoler upon the return. We are bound to assume, prima facie, that the unreversed sentence of a Court of competent jurisdiction is correct; otherwise, we should, in effect, be constituting ourselves a Court of appeal, without the power to reverse the judgment."—59 E. C. L., 492.

In Bethell's case "it was held, per curiam, that the commitment was naught, first, because it was not to the Sheriff, who is the legal and immediate officer to every Court of oyer and terminer; second, because the word committitur is necessary to the form of a legal commitment. Then the question was whether he could be discharged," and it was said: "Where a commitment was without a cause, a prisoner may be delivered by habeas corpus; but where there appears to be a good cause, and a defect only in the form of the commitment, as in this case, he ought not to be discharged." And as to the other matter, they said "that though the commitment ought in strictness be to the Sheriff, yet a jailer is a known officer in law, and his custody is the custody of the Sheriff to many purposes; therefore, let him bring his writ of error, for we will not discharge him on the habeas corpus."—1 Salk., 348.

The petitioner claims that his sentence should have been confinement in the County jail, and not in the Penitentiary. The same reasoning applies as in Bethell's case.

The cases Rex v. Ellis (5 Barn. & Cres., 395,) and Rex v. Boarne (7 Ad. & Ellis, 58,)

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were carried up by a writ of error, *and are

not applicable. The other cases relied on were decided and the prisoners discharged either upon the ground that the Court had not originally jurisdiction of the case, or, as in the case Ex parte Lange (18 Wall., 163 [21 L. Ed. 872],) and the Tweed case, (60 N. Y., 559,) where the sentence had been passed and executed, and the Court passed a second sentence under the same verdict, on the ground that "the power of the Court was exhausted" and that its second sentence was null and void. It is unnecessary to consider the case of De Hay, (3 S. C., 564,) as the principle upon which this decision rests is not concluded by that case.

The motion to discharge the prisoner is refused.

WILLARD, C. J., and McIVER, A. J., concurred.

9 S. C. 82

SCOTT v. PRATT.

(Columbia. Nov. Term, 1877.)

[*Appeal and Error* ⇐425; *Justices of the Peace* ⇐160.]

The Circuit Court is without jurisdiction to hear and decide a cause on appeal from the judgment of a Trial Justice where notice of appeal was not served within the time allowed by law.

[Ed. Note.—Cited in Foot & Son v. Williams, 18 S. C. 601; Doty & Co. v. Duvall, 19 S. C. 145; Bigham v. Holliday, 52 S. C. 529, 30 S. E. 485; Manuel v. Loveless, 56 S. C. 428, 35 S. E. 1; Gibbes v. Beckett, 84 S. C. 536, 66 S. E. 1000.

For other cases, see Appeal and Error, Cent. Dig. § 2155; Dec. Dig. ⇐425; Justices of the Peace, Cent. Dig. § 585; Dec. Dig. ⇐160.]

Before Mackey, J., at York, January, 1877.

This was an action by Sylvia Scott, plaintiff, against Amzi Pratt, defendant, before a Trial Justice of York County, on an open account for work and labor.

The summons was served on October 2d, 1875, and on the 9th day of November of the same year a judgment was rendered in favor of the plaintiff for $43.45, and on the same day the Trial Justice gave the defendant due notice thereof.

No notice of appeal was given within the time allowed by law for taking an appeal, and after that time had expired execution upon the judgment was issued and levied.

The defendant then made a verbal complaint to the Circuit Judge, who wrote a letter to the Trial Justice, dated November 20th, 1875, stating that "the appeal to the Court of Common Pleas made by Amzi Pratt must be respected."

On the 22d November, 1875, the defendant gave notice of appeal in due form.

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*At January Term, 1875, a motion was made by the plaintiff's attorney to dismiss the appeal. The motion was denied, and the plaintiff appealed.

Hart, for appellant.

Bell, contra.

January 8, 1878. PER CURIAM.

The judgment of the Circuit Court vacating the judgment of the Trial Justice must be set aside, and the judgment of the Trial Justice reinstated. The appeal to the Circuit Court was taken after the expiration of the time prescribed for such appeals, and, accordingly, the Circuit Court was without jurisdiction in the case.

9 S. C. 83

COOKE v. PENNINGTON.

(Columbia. Nov. Term, 1877.)

[*Equity* ⇐401.]

Where a new trial is ordered in an equity cause, it is not proper for the Circuit Judge in making a second order of reference to direct the Referee to take and report the testimony de novo. The testimony taken prior to the first trial is part of the proceedings to be considered on the second.

[Ed. Note.—Cited in Gee v. Humphries, 49 S. C. 259, 27 S. E. 101.

For other cases, see Equity, Cent. Dig. § 872; Dec. Dig. ⇐401.]

[*Equity* ⇐405.]

Testimony taken on a first reference is taken for the case and not merely for the purposes of a specified trial. It is entitled to stand as part of the case in all subsequent proceedings, whether before the Court or a Referee.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 880; Dec. Dig. ⇐405.]

Before Carpenter, J., at Richland, October Term, 1876.

This case having been remanded to the Circuit Court by a judgment of the Supreme Court, (7 S. C., 385,) it now came on to be heard in the Circuit Court a second time.

The defendant's counsel contended that as the tax deed was now in evidence this Court had nothing to do but to set it up and dismiss the complaint. They also contended that the complaint should be dismissed upon the ground, sustained by the Supreme Court, that the execution of the mortgage had not been proved according to law.

His Honor denied the motion to dismiss, and made an order, on the motion of the plaintiff's attorneys, appointing a Referee and

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*directing him "to take and report the testimony de novo, to be produced by the parties herein upon the issues raised by the pleadings." The defendants gave notice that they appealed from the order.

[For subsequent opinion, see 15 S. C. 185.]

Bacon, for appellants:

1. The Supreme Court having decided that the "tax deed" was in evidence, the Circuit Judge should have so regarded it, and not ordered the testimony in regard thereto to be taken "de novo."

2. The "tax deed" being in evidence, and

its execution admitted, the Circuit Judge was obliged to sustain it by reason of the provisions of the Act of the General Assembly of this State, fifteenth volume, page 773, providing that when "such deed is made by the County Auditor for any real estate sold at delinquent land sale, it shall be prima facie evidence of a good title in the grantee, his heirs and assigns, to the real estate therein described." And the Supreme Court is now asked to so decide and save the defendants any further expense and delay.

3. The defendants having moved the Circuit Court to dismiss the complaint because the execution of the mortgage sought to be foreclosed had not been proved according to law, and the Supreme Court, upon appeal, having decided that ground "well taken," the presiding Judge should have dismissed the complaint.

4. The order of the presiding Judge directing that the testimony be taken "de novo" upon "the issues raised by the pleadings" is directly contrary to the decision of the Supreme Court holding that the "tax deed" was in evidence and its execution admitted, and also to the decision of that Court that the defendant's motion to dismiss the complaint because the execution of the mortgage was not proved according to law and subjects the defendants to unnecessary expense, litigation and delay.

"The questions decided by the Supreme Court on an appeal are conclusively adjudicated so far as the same case is concerned."—Manufacturing Company v. Price, 6 S. C., 278.

Baxter & Seibels, contra.

January 9, 1878. The opinion of the Court was delivered by

WILLARD, C. J. On the former hearing in this case this Court set aside the judgment of the Circuit Court, on the two-fold

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ground *that the bond and mortgage for the foreclosure of which the action was brought had not been proved, and that a tax deed offered by the defendant had been rejected as unproved, notwithstanding its execution was admitted by a stipulation agreed to by counsel for both parties, &c. Subsequently the Circuit Court referred the cause, with directions "to take and report the testimony de novo."

The present appeal is from this order. The order of reference was erroneous to the extent that it ordered the testimony to be taken de novo. This case follows the general practice in equity, and all proceedings taken in it prior to the order of reference should have been allowed due weight upon the further reference. The analogies drawn from the effect of an order for a new trial in cases in the nature of actions at law have no application to the present case.

The testimony which had been taken on the first reference was taken for the case and not merely for the purposes of that specified trial, and such testimony is entitled to stand as part of the case in all subsequent proceedings, whether before the Court or a Referee.

The order of reference, independent of the objectionable words just commented upon, is free from objection and may stand.

The appellant is in error in supposing that the only course left open to the Circuit Court by the judgment of this Court on the former appeal was to dismiss the complaint.

The effect of the judgment on appeal merely reached to the extent of determining the character of certain proofs, demanded by the nature of the issues, and left the case open in the hands of the Circuit Court for further testimony and proceedings.

It is ordered and adjudged that the order of reference appealed from be modified by striking therefrom the words "de novo," and that in all other respects it stand as the order of the Court, and that the costs of this appeal abide the event of the action.

McIVER, A. J., and HASKELL, A. J., concurred.

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9 S. C. *86

*HEATH v. STEELE.

(Columbia. Nov. Term, 1877.)

[*Guardian and Ward* ⇦164.]

Upon settlement between a guardian and the executor of his late ward, the guardian gave to the executor his note for a sum admitted to be due, but which was, in fact, more than he owed, and took from him a receipt as for so much money in full: *Held*, That the acceptance of the note discharged the guardian from all liability for the assets of the ward then in his hands—as, for instance, an unsatisfied judgment against a third person held by him as guardian.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. § 545; Dec. Dig. ⇦164.]

[*Evidence* ⇦408.]

A receipt does not in itself express the terms of any contract, and it may, therefore, be contradicted or modified by parol evidence.

[Ed. Note.—Cited in Moffatt v. Hardin, 22 S. C. 27; Bulwinkle & Co. v. Cramer & Blohme, 27 S. C. 381, 3 S. E. 776, 13 Am. St. Rep. 645; Catoe v. Catoe, 32 S. C. 597, 10 S. E. 1078; Bratton v. Lowry, 39 S. C. 388, 17 S. E. 832.

For other cases, see Evidence, Cent. Dig. §§ 1829, 1830; Dec. Dig. ⇦408.]

Before Mackey, J., at Lancaster, June, 1876.

The case is stated in the following decree of His Honor the Circuit Judge:

Mackey, J. The bill in this cause was filed in 1867 for the purpose, mainly, of marshaling the assets and for the settlement of the estate of M. C. Heath, deceased, which was insolvent. Under the order calling in creditors, Mrs. Mary Jane Secrest, through her trustee, presented a claim which was referred to the Clerk for a special report. The

matter was heard upon his report, filed the 26th day of July, 1875, exceptions of A. W. Heath, the administrator of the estate, and argument of counsel. From the report and the testimony taken by the Referee, it appears that James Daniel Steele died during his minority. He left a will, in which, after providing for payment of certain specific legacies, he bequeathed the entire residue of his estate to his sister, the claimant, Mrs. Mary Jane Secrest.

One John M. Steele was the regularly qualified executor of the will. It is not denied but that Mrs. Secrest, as sole residuary legatee, is entitled to whatever may now remain of the estate of the testator. The above named M. C. Heath was the guardian of the testator at the time of his death. He had invested a considerable portion of his ward's estate in a sealed note by S. B. Massey and James E. Cureton to him as such guardian, made payable for $2,270.83. Upon this note, March 19th, 1860, he obtained a judgment in the law Court against the said S. B. Massey for $1,717.43. On the 16th of October, 1860, John M. Steele, the executor of the ward, had a settlement with the guardian, Heath, in which the cash balance in the hands of the guardian was ascertained to be $2,213.45.

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*In this balance, however, was included the money due on the judgment against S. B. Massey. In the settlement, the guardian delivered to the executor his note, under seal, for said balance. This note of the guardian, under the proceedings above alluded to, was presented and established, subject to sundry credits for payments made by him in his lifetime, as a claim against his estate, the balance due thereon at the date of the report being $1,064.64.

In the settlement mentioned above the executor gave the guardian a receipt in full of the amount due the ward's estate, the sum therein specified being the amount for which the guardian's note was executed.

Since the death of the guardian, and since the filing of the bill in this cause, A. W. Heath, his administrator, has received, on the judgment against Massey, various sums of money, amounting in all to $1,112.22, the last payment having been made to him February 1st, 1872. Out of this money Mrs. Secrest, through her trustee, claims that she should be paid the $1,064.64 established by the executor of the ward against the estate of said M. C. Heath, deceased, in preference to other creditors of his estate. The Referee, in his report, recommends that this claim be allowed. To this report the administrator, A. W. Heath, has filed many exceptions, relying, however, mainly upon the Statute of Limitations as a bar to the claim.

In the judgment of the Court, lapse of time, in analogy to the Statute of Limitations, is not applicable as a bar to this claim. Even leaving out of view the sealed note of the guardian, given for the balance found to be due the ward's estate in the settlement, to which the statute could have no application, notwithstanding the receipt of the executor, the estate of the ward still retained an equitable claim to the money secured by the judgment against Massey, which nothing short of actual payment of the balance due by the guardian could defeat. The judgment, when it went into the hands of the administrator, remained subject to the same trusts which attached to it in the hands of the guardian. Such a trust could not be destroyed by the mere lapse of time. The money secured by the judgment was the ward's money when it was received by the administrator; it, or that portion of it which remains unpaid to the ward's estate, still belongs to the estate. A. W. Heath having received money which belongs to the estate of the ward is bound, in equity, to pay it over to

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the party to whom it was be*queathed by the ward.—Chaplin v. Givens, Rice Eq., 132; Porcher v. Gist, Rich. Eq. Cas., 209; Russell v. Walker, id., 229.

Another ground of defense taken in the exception is that the administrator paid out a portion of this money before this claim was brought to his notice; but, having come into this Court for aid and advice in the settlement of the estate committed to his charge, if he saw proper to pay out the money without awaiting the sanction and direction of the Court, he must abide the consequences of his own rashness.

The exceptions are overruled, and the report of the Referee, with the recommendations therein contained, is confirmed and made the judgment of this Court.

It is therefore ordered that the claimant recover against the said A. W. Heath the sum of $1,064.64, with interest from the date of the report, and the costs thereupon, and that the administrator have credit for the same in his further accounting before this Court.

The plaintiff appealed upon the following amongst other grounds:

1. That the claim of Mrs. Secrest is barred by the settlement made and the receipt passed on the 16th of October, 1860.

2. Because the note given on the 16th October, 1860, has already been established against the estate of M. C. Heath, and, if the decree be allowed to stand, the same amount will have been twice established against it.

Kershaw, Allison & Connors, for appellants:

First. Is this claim barred by the settlement and receipt in full given by John M. Steele, executor, to M. C. Heath, guardian?

(a.) A receipt in full is conclusive evidence of payment, but may be rebutted. The onus is upon the party seeking to avoid it.—Dobbin v. Perry, 1 Rich. Law, 33.

(b.) Where a new note is taken for an ante-

cedent debt, the question is, was it intended as payment?—Townsend & Arnold v. Stephenson & Walker, 4 Rich. Law, 59; Bank v. Bobo, 9 Rich., 31. The circumstances show that it was so intended in this case.

1. Steele had his choice either to take the judgment or throw it upon the hands of the guardian. Heath deliberately chose the latter.

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*2. The same day he received on the note taken in settlement more money than the judgment amounted to. It was a better settlement, therefore, than if he had taken the judgment.

3. The settlement was made in the office of the Commissioner in Equity, and statement thereof and the receipt placed on file in the office. It was really an accounting and settlement before the Commissioner.

4. The parties again elected to stand by the settlement, and reaffirmed it by establishing the note as a claim against the estate of M. C. Heath.

Second. Is this claim barred by the Statute of Limitations? It was barred within four years from the day of settlement, unless there were intervening disabilities. No action was taken for fourteen years after the settlement. In a settlement of an estate by an administrator before the Ordinary, it was held that the parties were barred by the statute after four years.—Payne v. Harris, 3 Strob. Eq., 42. If an executor or other trustee does an act purporting to be a full execution of the trust, the statute will be applied from that time, as in cases of implied trusts.—Moore v. Porcher, Bail. Eq., 195; Long v. Cason, 4 Rich. Eq. 60; Sollee v. Croft, 7 Rich. Eq., 34.

A husband who had administered on his deceased wife's estate made a final return to the Ordinary, in which he declared, in effect, that the estate was wound up, and that he had transferred all the assets to himself as sole owner, and the Ordinary certified to the return as a final settlement: Held, That this transaction in a public office and remaining there as of record gave currency to the Statute of Limitations, and that a bill for an account, filed more than four years afterwards, was barred.—Colburn v. Holland, 14 Rich. Eq., 176.

Third. Can the claimant maintain an exclusive right to the proceeds of this judgment? It was founded on a note payable to M. C. Heath, guardian.

Where a similar note, after the death of the guardian, had come into the hands of his administrator, his title was held good to the proceeds as against the ward and her husband.—McCall and Wife v. Weatherby, 5 Strob. Law, 73.

The case proceeds upon the principle that the legal title is in the guardian and the administrator succeeds to it. It becomes legal assets in his hands and must be so administered.

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*It is true, equity will follow trust funds and subject them to the trust whenever they can be traced and distinguished.—McNeil v. Morrow, Rich. Eq. Ca., 175.

The rule applies when the trust fund has been converted into something specific, but ceases when the subject is turned into money and mixed and confounded in a general mass of the same description.—2 Maule & Selwyn, 575.

In this case the money has been collected by the administrator, with other assets of the estate, and most of it paid out in due course of administration. Suppose the judgment had been collected by the intestate,—could the respondents claim to be paid the amount in preference to all other creditors? Upon what principle does the present case differ?

Fourth. In any event, the decree is erroneous, because the administrator cannot be held liable for more than the balance ascertained to be in his hands by the report confirmed October 12, 1869, plus $533.09, minus the costs ordered to be paid by him June 10, 1869.

The subsequent claim of respondents cannot alter those matters already adjudicated in the cause.

Moore, contra:

1. The contest is simply one amongst creditors of the estate of M. C. Heath, deceased.

2. There can be no question but that the judgment against Massey, when obtained by the guardian, constituted a part of the ward's estate.

3. The note given by the guardian to the executor of the ward in the settlement of October 16th, 1860, did not operate as a payment of the balance due the ward's estate.—Wardlaw v. Grey, 2 Hill Ch., 644.

4. The receipt given by the executor in that settlement did not, therefore, operate as a transfer of the jugdment against Massey to the guardian in his individual character so as to destroy his trust relation to the same. The judgment continued to be a part of the ward's estate, subject to an equity on the part of the guardian to reimbursement out of the same for any money which he might pay either to his ward or otherwise.

5. But when it appears that the guardian is indebted to the ward the securities held by him for the ward will be subjected to the

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pay*ment of the indebtedness, even against creditors of the guardian.—Glass v. Baxter, 4 DeS., 153; Miller v. Alexander, 1 Hill Ch., 25.

It follows, hence, that there was no error in the judgment of the Court against the plaintiff, A. W. Heath, for so much of the money received by him on the judgment

against Massey as remained due on the note of the guardian to the executor of the ward.

January 8, 1878. The opinion of the Court was delivered by

WILLARD, C. J. The nature of the present question and the circumstances under which it arises are sufficiently stated in the opinion of the Circuit Judge.

The decree appealed from establishes certain assets in the hands of the plaintiff administrator as trust funds, withdrawing them from the general funds of the insolvent intestate estate, subject to ratable distribution among creditors, and devotes them to the satisfaction of the trusts thus established. It holds that the funds in controversy represent the estate of a ward of whom the intestate was guardian, and that they retain that character in the hands of the administrator of the intestate guardian.

The precise question is whether a settlement that took place between the guardian in his lifetime and the executor of the ward operated to extinguish the fiduciary relation of guardian and ward as affecting the portion of the estate of the guardian in the hands of the administrator that originally formed part of the ward's estate.

The principal assets formerly belonging to the ward's estate that came into the hands of the administrator was a judgment recovered by the guardian on a note in which his ward's money was invested.

An accounting, purporting in form to be a final accounting, took place between the guardian and the executor of the ward in the office of the Commissioner in Equity, at which time the guardian gave his individual note for the amount of the estate of the ward, including the amount due on the judgment, whereupon the following receipt was signed by the executor of the ward:

South Carolina, Lancaster County.

Received from Moses Chappel Heath, the Chancery guardian of James Daniel Steele, deceased, $2,213.45 in full, the sum or amount due by said M. C. Heath, guardian, as aforesaid, to James Daniel Steele, deceased, agreeable to the returns of said Heath, filed in the

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*Commissioner's office, and settlement by said Commissioner. Received by me, John M. Steele, executor of said James Daniel Steele, deceased. John M. Steele, Executor.

October 16, 1860.

The foregoing receipt was delivered to the guardian and placed on file in the office of the Commissioner in Equity with the guardian's returns. The receipt is not in itself conclusive proof of the fact of payment, but parol evidence may be admitted to contradict or modify it.—Wardlaw v. Gray, 2 Hill. Eq. 644; Tobey v. Barber, 5 Johns. Rep., 68. House v. Low, 2 Johns. Rep., 379; Putnam v. Lewis, 8 Johns. Rep., 389.

In itself a receipt does not express the terms of any contract or uniting of the minds of the parties between whom it has passed, but merely evidences by way of admission the fact stated in it; consequently it is not governed by the rules that prescribe the effect of instruments adopted by parties as the special means of evidencing some compact or understanding had between them, but, like evidence, not enjoying any special privilege, it is capable of being contradicted or modified by other classes of evidences.

The question then is whether there is evidence to show that the guardian and the executor of his ward agreed, upon consideration, that the individual note of the guardian should be taken in full discharge of all claims upon him in behalf of the ward's estate. Such an agreement is competent to discharge the pre-existing obligation by the substitution of a new obligation therefor.—Townsends v. Stevenson, 4 Rich., 59; Burton v. Pressly, Cheves Eq., 1.

But, independent of such an agreement, supported by consideration, the mere fact of taking a note of the debtor, or, perhaps, even of a third person, does not discharge the pre-existing debt, but the new obligation is treated as a collateral security.—Barelli v. Brown, 1 McC., 449, 10 Am. Dec. 683; Wardlaw v. Gray, 2 Hill. Eq., 644; Tobey v. Barber, 5 John. Rep., 68; Bank v. Bobo, 9 Rich., 31; Putnam v. Lewis, 8 Johns. Rep., 389.

On this question the receipt is entitled to weight, though not conclusive. Its language clearly expresses an understanding on the part of the executor of the ward, who signed it in accordance with the idea that the note of the guardian was taken in lieu of all other demands, present or future, against the guardian on account of the estate of his ward that came into his hands.

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*No evidence of a direct character has been introduced to impeach the receipt as to it truthfully representing the intentions of the parties. The note given by the guardian was in excess of what was then due from him to the executor of the ward.

The judgment was still unpaid to a large extent, yet the note given in settlement included the whole amount of the judgment, without regard to what was paid or unpaid.

If the statement of the receipt is accepted, then the intention of this transaction is obvious: for in that case it would amount to a substitution, by the parties, of the absolute personal obligation of the guardian for any demand that the executor of the ward might have for the estate of the ward or its proceeds in the hands of the guardian. If the view of the case presented by the receipt be rejected, then the action of the guardian in assuming an obligation in excess of that imposed upon him by law is unintelligible. The giving of the note by the guardian must then be regarded as supporting the statement that

the parties agreed that such note should be taken in lieu of all other claims against the guardian, and it is also proof of an adequate consideration to support such agreement. The holder of the note, as such, under such circumstances, has no greater claim upon the administrator of the guardian than other creditors of the same class and must come in ratably with them.

No question is made in this case whether the parties are entitled to resort to the bond of the guardian in case of non-payment of the note, and therefore has not been considered.

It is not necessary to examine the question as to the Statute of Limitations in its application to the present case, which would have been appropriate had the parties representing the ward's estate interposed with a direct application to vacate the settlement upon grounds cognizable in equity. The present question does not involve the validity of that settlement, but merely the intention of the parties in making it.

The order appealed from must be set aside, and the case remanded to the Circuit Court for an order allowing the petitioners, the respondents, to come upon the assets of the intestate estate subject to distribution ratably with other creditors of the same class with themselves.

McIVER, A. J., and HASKELL, A. J., concurred.

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9 S. C. *94

*STATE v. SHAW.[1]

(Columbia. Nov. Term, 1877.)

[*Judges* ⇐3.]

Under the Constitution of the State, Circuit Judges must be elected by "joint ballot" of the General Assembly, as directed by § 13, Art. IV, and not viva voce, as directed by § 24, Art. II; otherwise the election will be null and void.

[Ed. Note.—Cited in Fooshe v. Merriwether, 20 S. C. 340; City Council of Charleston v. Weller, 34 S. C. 362, 13 S. E. 628; Townes v. Alexander, 69 S. C. 35, 48 S. E. 214; State ex rel. Birchmore v. State Board of Canvassers, 78 S. C. 468, 470, 59 S. E. 145, 14 L. R. A. (N. S.) 850.

For other cases, see Judges, Cent. Dig. § 8; Dec. Dig. ⇐3.]

This was an application by the Attorney General to the original jurisdiction of the Supreme Court for a judgment of "ouster" against the Hon. A. J. Shaw, one of the Circuit Judges of the State, from office, on the ground that he had been unconstitutionally elected.

The facts were: that at an election held on February 12th, 1875, for Judge of the Third Judicial Circuit to fill the unexpired term of Hon. J. T. Green, deceased, the Hon. A. J. Shaw was voted for, received a majority of the votes given, and was declared elected; that the voting was viva voce as directed by Section 24, Article II, of the Constitution of the State, and not by ballot, as directed by Section 13, Article IV; that he was commissioned by the Governor, qualified, and entered upon the duties of his office.

The Articles of the Constitution mentioned are as follows:

Article II.—Legislative Department.

"Sec. 24. In all elections by the General Assembly, or either House thereof, the members shall vote 'viva voce,' and their votes thus given shall be entered upon the Journal of the House to which they respectively belong."

Article IV.—Judicial Department.

"Sec. 13. The State shall be divided into convenient Circuits, and for each circuit a Judge shall be elected by 'joint ballot' of the General Assembly, who shall hold his office for a term of four years, and during his continuance in office he shall reside in the circuit of which he is a Judge."

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*The following briefs were filed:

Points and authorities of LeRoy F. Youmans, Attorney General:

1. This proceeding was instituted by my predecessor to test the validity of the election of A. J. Shaw as Circuit Judge. He was elected by the joint vote of the General Assembly, the members thereof voting viva voce, and claims that Section 24, Article II, of the Constitution, providing that in all elections by the General Assembly the members shall vote viva voce, is the law of the case. If this view be correct, this proceeding should fail. The State claims that Section 13, Article IV, providing that for each circuit a Judge shall be elected by joint ballot of the General Assembly, is the law of the case. If this view be correct, this proceeding should succeed. Should the general provision in that part of the Constitution relative to the legislative department, Article II, or the special provision in that part of the Constitution relative to the judicial department, Article IV, prevail? The authorities seem clear that the latter and special provision must prevail.—Potter's Dwarris, 117, et seq., 272, 273, et seq., and cases cited; Sedg. on Con. and Stat. Law, 60, 61.

[1] NOTE.—It must not be supposed by persons not intimately acquainted with the judicial and political history of South Carolina at, and for a few years prior to, the commencement of this proceeding that there was any objection whatever to Judge Shaw; on the contrary, he was more esteemed than any of the Circuit Judges then in office, and there is no doubt whatever that the proceeding against him would never have been instituted had not other Circuit Judges of the State been in the same category and they, with some exceptions, the State desired to get rid of, and, as proof of this, we may mention the fact that Judge Shaw was immediately elected to the same office by the unanimous vote of the General Assembly."

2. A fanciful distinction has been suggested between elections by "joint ballot" and "by ballot jointly" of the General Assembly, but the phraseology of South Carolina legislation negatives the idea.—Bell, S. C. Elec. Laws, 510.

3. Voting by ballot being the depositing a little ball or ticket into a ballot box, and voting viva voce being speaking the name by word of mouth, the former being secret, and so intended to be, the latter being open, and so required to be, it follows that if the Constitution requires the former mode an election by the latter mode is illegal and confers no title.—Botts v. Jones, 2 Cong. Elec. Cas., 73; Ottero v. Gallegos, 2 Cong. Elec. Cas., 177; Easton v. Scott, 1 Cong. Elec. Cas., 272; Commonwealth v. Reed, Brightley's Elec. Cas., 126; 2 Ashmead, 261.

4. The journal of the convention showing the attention paid to and the history of this clause, (260, 261, 854, 856,) the ordinance for the ratification of the Constitution by the people, (14 Stat. 31, introduction,) and its ratification by the people all conspire to show that the view taken by the State should prevail.

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*Additional authorities cited by LeRoy F. Youmans, Attorney General:

General Words Qualified by Special Provisions.

The King v. Archbishop of Armagh, 8 Mod. Rep., 8; Thornby v. Fleetwood, 10 Mod. Rep., 115, 408; Roper v. Radcliffe, 10 Mod. Rep., 242; Gregory's case, 6 Coke, 19 b.; Dr. Bonham's case, 8 Coke, 118 b, 119 a.

"All."—Dr. Bonham's case, 8 Coke, 118 b, 119a; 1 Jar. on Wills, 416; State v. Sullivan, 14 Rich., 283.

Contemporaneous Construction.

Broom's Max.; Gorham v. Bishop of Exeter, 5 Welsby, Hurlstone and Gordon, (Exchequer,) 667; Baron Alderson; Barbat v. Allen, 7 Welsby, Hurlstone and Gordon, (Exchequer,) 617, Pollock, Chief Baron; King v. Inhabitants of Eriswell, 3 Term Rep., 721; Hart v. Frame, 6 Cl. and Fin., 199; Lord Denman in O'Connell v. Regina; Broom's Leg. Max., 7th Am. Ed., 134, 140.

Principles of Construction.

Wigram on Wills, 15, 17; Frazer v. Boone, 1 Hill Ch., 360; Horlbeck v. St. Philip's Church, 13 Rich. Eq., 138, 139; State v. Aldermen of Charleston, 1 S. C., 39.

Construction of Constitutions.

Cooley, 58, 59, 66.

Webster's Definitions: Elect—By—Joint—Ballot.

"Ballot."—Williams v. Stein, 38 Ind. 89. Meaning fixed in the Constitution before its occurrence here.—Richardson v. Watson, 4 B. and Adolph, 799.

"Joint Ballot."—Meaning fixed by previous Constitutions and Acts of Assembly, and legislators speak the language of the law.—Roper v. Radcliffe, 10 Mod. Rep., 234.

A committee of revision and style would have brought the two provisions together—the mode of election of Circuit Judges—as an exception to the general mode of elections by the General Assembly.

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*Argument of Simonton & Barker, for Defendant:

I. The Constitution of the State, as the fundamental law of the land, provides that in all elections by the people the electors shall vote by ballot.—Art. VIII, § 1.

That in all elections by the General Assembly, or either house thereof, the members shall vote viva voce, and their votes thus given shall be entered on the Journal of the House to which they respectively belong.—Art. II, § 24.

The reason for this distinction between the mode of voting by the constituent and by his representative is obvious. The people vote by an inherent sovereign right, inseparable from their existence as citizens of a free country. The representative makes use of the right to vote solely from the grant of such right in the Constitution. He exercises but a delegated authority. He votes for and in the stead of his constituents. No one has the right to inquire how a citizen votes. He is a sovereign, and one of the safeguards by which he hedges in his sovereignty in this respect is the right to conceal his vote.

Every citizen has the right to know how his representative votes. One of the checks upon the representative, the safeguard of the citizens whom he represents, is that his vote in his representative character must be open, public, subject to scrutiny.

This is the plain, broad distinction made in the express words of the Constitution. If the position taken by the Attorney General be correct, this distinction is broken down and obliterated.

II. The General Assembly is the creature of the Constitution. It owes all of its powers to the instrument creating it. The Constitution could as well have made one house as two. It could have dispensed with the General Assembly altogether. It could have given it powers purely legislative, with no power in the selection of officers in the other departments. It could have provided for the election of the officers in the executive or judicial departments by the people, by the Legislature or by the Executive. In searching for the powers of the General Assembly, certainly in seeking to discover the mode in which it shall exercise its powers, we must look to the Article of the Constitution which created it. That Article gives to the General Assembly legislative powers in which the Legislature is supreme, and certain other powers, not at all legislative, but representative in their character, such as the election

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*of various officers, in which the General Assembly acts simply in the stead of the people. In the use of its purely legislative powers the scrutiny of the people into the action of the General Assembly is exercised only in certain cases, such as the increase of the public debt, the change of the fundamental law, the consideration of the veto of the Governor, or the demand of two members that the vote be recorded. In these cases only must the representative so act that his action is recorded for the examination and judgment of his constituents. But in the exercise of their representative powers, the Constitution directs that in all instances the votes shall be viva voce and spread at large on the journal.

If the position taken by the Attorney General be correct, the result will be the engrafting into the Constitution of the grant to the General Assembly of a new and contradictory power.

It is not contended that this grant is made directly. If it be given at all, it is given indirectly and only by implication.

After providing for the General Assembly, and after giving it its powers, and prescribing to it the mode in which these powers should be exercised, the Constitution passes on to the other co-ordinate departments. After devoting the third Article to the executive, it provides in the fourth Article for the judicial department. It creates in this Article Supreme, Superior or Circuit Courts and Inferior Courts. In making provisions for the Circuit Courts it uses the expression upon which the whole argument of the Attorney General depends: "The State shall be divided into convenient circuits, and for each circuit a judge shall be elected by joint ballot of the General Assembly."

It is contended that this Section irrevocably fixes the mode in which the General Assembly shall elect, in joint assembly, the Circuit Judges by the secret vote; that it is thus in direct conflict with the whole scheme of the Constitution respecting the mode in which the people shall elect and the mode in which the General Assembly can elect, and is also against the express words in which the power of election is granted to the General Assembly in Section 24, Article II. That, in fact, it is repugnant to this Section, and as it occurs in a subsequent Article of the Constitution, it repeals the prior Section pro tanto.

We submit that the proper course to be pursued in construing any instrument is to give each provision its full force; to inquire if all the parts cannot stand together;

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to reconcile clauses which are *apparently contradictory, and only as a last resort to allow one to destroy or impair the other. That the fundamental canon of construction is that all parts of the instrument be construed together, so that every part will have effect. Repugnancy must be avoided if possible, and it is only when the parts are irreconcilable with each other that the first parts of a deed and the last parts of a will control.—See Cooley on Con. Lim., 58.

If we say, as the Attorney General says, that this Section of the fourth Article repeals the Section of the second Article pro tanto, we abandon all hope of reconciling these Sections and admit and declare a repugnancy. We submit that this is not good construction.

If, on the other hand, we seek to reconcile the two Sections, we can do so by holding that the words "joint ballot" are generic; that they are used not in their most narrow and technical signification, but in their popular sense, in every day use; that they signify the act and not a particular mode of voting.

Let us examine the proceedings of the Convention which framed the Constitution and see how these words were used by the persons who drew the instrument. When this clause of the Constitution was under discussion the question was who should select the Judges, the people directly, or the General Assembly for the people. After an animated, and, we may say, an exhaustive discussion, it was finally determined that the General Assembly should select these officers.

The argument was not directed to the manner of voting but solely to the question of how the voting should be done,—should the principal or the agent select. It was decided that the agent should do so, and the clause was passed in these words: "The State shall be divided into convenient circuits, and for each circuit there shall be elected a Judge by the joint vote of the General Assembly."

We see nothing more of this Section, or of the fourth Article of the Constitution, until it was finally ratified, and then, for the first time, we see the words joint ballot substituted for joint vote. No other change is made; nor is the change made by a vote of the Convention. If the Convention supposed that they were making a radical change in their Constitution—that they were repealing a Section of it which they had already adopted, they would, ex necessitate, have done so by a vote. The Section of the second Article, and the provision of the fourth article, both of which had been passed by the Convention, could not have been changed but by a vote.

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and *the latter could not have been altered except by the reconsideration of a vote. No vote as to such change was taken, and the conclusion is inevitable that none was intended. The Convention evidently supposed that they were ratifying the same provision which they had adopted after a long discussion; that the words of the amendment and the words of the engrossed Constitution were synonyms; that as they had already declared

an invariable rule for the General Assembly, as to its manner of voting, this Section of the fourth Article simply gave to the General Assembly the power of selection of Circuit Judges in the mode prescribed.

It may be said, however, that the validity of the Constitution depended upon its ratification by the people, and that when it was so ratified it had in it these words: "joint ballot," without any explanation of the sense in which they were used: that thus the words should be used technically. Without dwelling upon the position that when the people ratified the Constitution they must have done so subject to a legal construction of their intent, we submit that the words of the Constitution must be construed, not technically or strictly, but according to their plain, every-day, familiar, common sense meaning. There is this difference between the manner of construing deeds and statutes and the manner of construing Constitutions: The former in their use of technical words are construed technically. In the latter, the words are construed according to their popular use and signification. Constitutions are submitted to the masses, are construed by the masses, owe their existence to the approval of the masses, and the masses know nothing of technicalities.—Dwarris on Statutes.

Now, what is the common use and understanding of the term "ballot," joint ballot, when the election of officers is spoken of? It is understood to mean the act of voting, not the manner of voting.

In all party conventions the mode of voting is viva voce. Indeed, in these United States, the rule of all representative bodies is that the manner of voting should be viva voce; voting by ballot, that is by a little ball or slip of paper, is a relic of the past. Yet, in speaking of the result of the voting in the party conventions, the journals of the body, the members who compose it, the newspapers, everybody, speak of the result of the first ballot, second ballot, third ballot, etc., and of the success of the candidate on the last ballot.

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*In the journals both of the House and of the Senate for 29th July, 1868, when the Justices of this Court were elected viva voce, the result of the first ballot, of the second ballot and of the third ballot for Chief Justice are given, and each voting is so designated. So, also, with regard to the Associate Justices.—House Journal, special session, 1868, p. 132, etc.; Senate Journal, special session 1868, p. 93, etc.

If we examine the contemporaneous and practical construction of this Section of the Constitution, we will come to the same construction of these words of the Constitution. Mr. Cooley, in his work on Constitutional Limitations, speaking of contemporaneous and practical construction of Constitutions, says: "An important question which now suggests itself is this: How far the contemporaneous construction or the subsequent practical construction of any particular provision of the Constitution is to have weight with the Courts when the time arrives at which a judicial decision becomes necessary? Contemporaneous construction may consist simply in the understanding with which the people received it at the time or in the acts done in putting it in operation, or which necessarily assume that it is to be construed in a particular way. In the first case it can have very little force, because the evidences of the public understanding when nothing has been done under the provision in question must always necessarily be vague and undecisive. But when there has been a practical construction which has been acquiesced in for a considerable period, considerations in favor of adhering to this construction sometimes present themselves to the Courts with a plausibility and force which it is not easy to resist. Indeed, when a particular construction has been generally accepted as correct, and especially when this has occurred contemporaneously with the adoption of the Constitution, and by those who had opportunity to understand the intention of the instrument, it is not to be denied that a strong presumption exists that the construction rightly interprets the intention. Especially when this has been given by officers in the discharge of their duty, and rights have accrued in reliance upon it, which would be divested by a decision that the construction was erroneous, the argument ab inconvenienti is sometimes allowed to have great weight."—Cooley on Con. Lim., 67.

In Stuart v. Laird, (1 Cranch, 299,) the question was made before the Supreme Court of the United States as to the right of Justices of the Supreme Court to hold the Cir-

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cuit Courts of the United *States. The decision was in 1803, and in these words: "Another reason for reversal is that the Judges of the Supreme Court have no right to sit as Circuit Judges, not being appointed as such, or, in other words, that they ought to have distinct commissions for that purpose. To this objection, which is of recent date, it is sufficient to observe that practice and acquiescence under it for a period of several years, commencing with the organization of the judicial system, afford an irresistible answer and have indeed fixed the construction. It is a contemporary interpretation of the most forcible nature. This practical exposition is too strong and obstinate to be shaken or controlled. Of course the question is at rest and ought not now to be disturbed."

Now, the first General Assembly formed under the present Constitution consisted mainly of persons who were members of the Convention which adopted it. This General Assembly elected eight Circuit Judges,

and each one was elected in joint assembly viva voce. This continued to be the uniform practical construction of the Constitution until this year. Indeed, so deeply is it fixed in the minds of the Legislature that the words "joint ballot" mean nothing but the act of voting, that the present General Assembly, in filling the vacancy caused by the resignation of the late Attorney General, proceeded to do so by a viva voce vote, notwithstanding that the Act authorizing it declared that such vacancy should be filled by an election by joint ballot of the General Assembly, (A. D. 1875, 15 Stat., 935,) and this without question or demur on the part of any member of either house.

If we examine the Constitution, we will discover that the only offices which the General Assembly is authorized by that instrument to fill are those of the Justices of the Supreme Court and of the Judges of the Circuit Courts; of course each branch of the General Assembly elects its own officers, but the General Assembly, as a body, elects these judicial officers only. Now, can it be supposed that the general rule that all elections by the General Assembly shall be viva voce should be laid down so broadly as it is in Section 24, Article II, and that the provisions of Section 13, Article IV, are an exception to the rule, when, by the general rule, only three offices are filled, and, by the exception, at least eight are filled? In such a construction, which is the rule and which the exception?

What can be the reason and motive for such an exception?

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*The people have the right to elect all officers. They delegate to certain of their agents the duty of selecting judicial officers. They have the right to know how their agents execute this delegated authority. They require that in the selection of the Justices of the Supreme Court the act of each delegate should be published and recorded. The interests involved are too grave to dispense with this wise and needful precaution. Is there less interest or importance in the selection of Circuit Judges? The Judges of these Circuit Courts are thrown directly in contact with the people. They have in their hands the dearest interests of the citizen—his life, liberty and property. It is only in exceptional cases that the litigant can come to the Supreme Court. He must go to the Circuit Court in nearly every instance, and in very many cases is dependent upon the discretion of the Judge. The decision of that Court is final, in such cases.

If, then, it be deemed necessary that the people should supervise and scrutinize the votes of their representatives, with respect to the Supreme Court, in order that the best men for this august tribunal should be selected, for a yet stronger reason they should have the same scrutiny and supervision over the selection of the Circuit Judges, in whose purity, wisdom, discretion and ability they have so near and such important interests.

Argument of Samuel Dibble, of counsel for Respondent:

Proposition: The constitutional mode of electing a Circuit Judge is by voting viva voce.

1. There are two ordinary modes of election, viz., voting viva voce, which is essentially open and public, and voting by ballot, which is essentially secret. The theory of our State Constitution is that in all elections by the people the secrecy of the vote shall be impenetrable, so as to insure the free action of the voter, but that in all elections by the Legislature the action of each member should be open to the scrutiny of his constituents, so as to preserve the full accountability of the legislator to the people, of the agent to the principal, of the representative to the sovereign. Hence it is provided in Article VIII, Section 1, that "in all elections by the people the electors shall vote by ballot;" while in Article II, Section 24, it is ordained that "in all elections by the General Assembly or either house thereof

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the members shall vote viva voce, and *their votes thus given shall be entered upon the journal of the house to which they respectively belong." The same principles prevail in the fundamental laws of other States. Take for example the Constitution of Indiana. Article II, Section 13, of her Constitution reads: "All elections by the people shall be by ballot, and all elections by the General Assembly or either branch thereof shall be viva voce." In relation to this Section the Appellate Court of Indiana well remarks: "Here are two modes of election provided for and enjoined—the one applicable to the General Assembly, the other to all elections by the people. There is no trouble in determining that the viva voce method was intended to secure publicity; and the reason for such publicity is equally manifest. Elections by the General Assembly must be viva voce. And why? Because the members of that body are agents or representatives of their several constituencies, to whom they are responsible for their votes, and to that end they must vote openly and audibly, that it may be known how they are exercising their delegated authority. No such reason, if indeed there be any, exists as to the voter at a popular election. He represents nobody, and is responsible to nobody for the vote he may cast. He should vote honestly and intelligently, and under our system he is presumed to do so; but he has the absolute right to exercise the franchise as he pleases, uncontrolled and unquestioned by any person or power."—Williams v. Stein, 38 Ind., 89.

It may be useful to take a cursory review of the constitutional history of South Carolina in this connection. Under the Consti-

tutions of 1778, 1790 and 1861, elections were held by ballot, whether the people voted or the General Assembly; and nearly all public officers were elected in this manner by the Legislature instead of by the people. But the Convention of 1865 made several radical changes in our political system. The election of Governor and of various State and local officers was given to the people, and it was ordained also that the General Assembly in all elections should vote openly and that each member's vote should be recorded. Hon. B. F. Perry, Provisional Governor, in his first message to the Convention, after advising that various "elections and appointments should be taken from the Legislature," proceeds as follows: "In all elections made by the Legislature, the voting should be viva voce, so that each member's constituents might know how he voted. The ballot is secret and conceals the member's vote from

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his constitu*ency. The people have a right to know how their representatives voted in elections as well as in legislation. In all elections by the people the ballot is certainly the proper mode, for it enables every man to vote independently, according to his own convictions. No one has any right to know or question his vote. He votes as a sovereign. But the representative votes for others, and they have a right to know how he votes."—Jour. Conv., S. C., 1865, p. 16. On the day when this message was read, (which was the second day of the Convention,) Mr. Orr, of Anderson, introduced a resolution, which was referred to an appropriate committee: "That all elections by the Legislature shall be made viva voce, and the name of the member and of the person voted for recorded." On the following day the Governor's message was considered and the subject of "voting viva voce in elections by the Legislature" was referred to the Committee on the Legislative Department of the Constitution. Three days afterwards a report was made on Mr. Orr's resolution by the Committee on Amendments to the Constitution, and it was subsequently acted upon by the Convention in connection with the report of the Committee on the Legislative Department, the result being the adoption of the suggestions of the Provisional Governor, in the terms of our present Constitution, which are taken verbatim in this particular from the Constitution of 1865. On the last day of the session of the Convention, a congratulatory message was received from Governor Perry, in which he alludes, to the fact that the Convention had "declared the responsibility of the representative to his constituency by viva voce voting in the Legislature."—Jour. Conv., 1865, p. 130.

But although, under the Constitution of 1865, the share of the masses in the administration of the State was greatly enlarged, yet a factor was introduced into our political system, three years later, which required that the scheme of the State Government should be still further popularized, to meet the demands of the advocates of universal suffrage; and accordingly we find the Constitution of 1865 was not satisfactory to the majority of the voters of 1868. One needs only to read the debates of the Convention of 1868 and the Constitution then adopted to become convinced that Mr. A. G. Mackey, the President of the Convention, correctly expresses, not simply his own views, but those of the delegates and their constituents, when, in the preface to the journal of that Convention, he characterizes the Constitution

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of 1865 as "in some respects an *improvement on that of 1790," yet "not such an instrument as the progressive spirit of the age demanded." And, notwithstanding this dissatisfaction with the Constitution of 1865 in general, we find that the Section of that Constitution prescribing that all elections by the Legislature shall be viva voce was reported verbatim to the Convention of 1868 as a part of the Article on the legislative department, and that it passed the Convention without question or debate. In fact, there was no room for any extension of its terms. "In all elections by the General Assembly, or either house thereof," is so comprehensive as in its very words to admit of no exception.

We have dwelt at some length on the constitutional history of South Carolina since the war, because the state of the public mind at the time of the adoption of the Constitution of 1868 renders us legitimate assistance in the construction and interpretation of its provisions. As is well remarked by Judge Story in Prigg v. Pennsylvania, 16 Pet., 610: "Perhaps the safest rule of interpretation, after all, will be found to be to look to the nature and objects of the particular powers, duties and rights, with all the lights and aids of contemporary history, and to give to the words of each just such operation and force, consistent with their legitimate meaning, as may fairly secure and attain the ends proposed." Mr. Smith, in his Commentaries on Statutory and Constitutional Construction, § 491, says: "The reason of the statute—that is, the motives which led to the making of it, the object in contemplation at the time the Act was passed,—is another criterion by which to ascertain the true meaning of the Act." Again, he says, in the same section of his work: "When we once know the reason which alone determined the will of the law-makers, we ought to interpret and apply the words used in a manner suitable and consonant to that reason and as will be best calculated to effectuate the intent." See the same in Vattel, § 287.

Puffendorf remarks: "That which helps us most in the discovery of the true meaning of the law is the reason of it or the cause

which moved the legislator to enact it." Cited in Potter's Dwarris on Stat., 133. Judge Potter, in his edition of Dwarris on Statutes and Constitutions, also quotes Mr. Rutherford's rule as to circumstances which may help to ascertain the meaning of ambiguous words and expressions. Mr. Rutherford divides these into three sorts, according to their connection with a law in origin, in place or in time.

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*In our own Courts we find the same doctrine in the case of State v. Stephenson, (2 Bail., 334,) where Judge Johnson states the rule to be that "whatever may give certainty to a doubtful construction may be resorted to, no matter from what source it is derived, whether from a comparison of the various parts of the same Act or of different Acts on the same subject, the opinions of learned men or contemporary history." In the celebrated case of The State v. Carew, in the Court of Errors, (13 Rich., 251, 253,) Chief Justice Dunkin ably supports the construction of the clause of the Federal Constitution protecting the obligation of contracts by the historical circumstances which gave rise to its adoption, and by the motives of the framers, as declared in the debates, and in the Federalist and other contemporary writings.

II. Having seen, therefore, that the object of viva voce voting in all elections by the Legislature, as prescribed in the Constitutions of 1865 and 1868, was to establish the full and complete responsibility of every member to his constituents, let us now take into consideration Article IV, Section 13, of the Constitution of 1868, which contains the following words, viz.: "The State shall be divided into convenient circuits, and for each circuit a Judge shall be elected by joint ballot of the General Assembly."

The conflict of opinion concerning the proper mode of electing Circuit Judges arises in the construction of the phrase "joint ballot" in the Section just above quoted.

1. This expression, "joint ballot," is to be taken in its popular sense, according to its common use. "The same word," says Mr. Story, "often possesses a technical and also a common sense meaning. In such a case the latter is to be preferred, unless some attendant circumstance points clearly to the former."—Story on Const., § 453.

"Every word employed in the Constitution is to be expounded in its plain, obvious and common sense meaning, unless the context furnishes some ground to control, qualify and enlarge it. Constitutions are not designed for metaphysical or logical subleties, for niceties of expression, for critical propriety, for elaborate shades of meaning, or for the exercise of philosophical acuteness or judicial research. They are instruments of a practical nature, founded on the common business of life, adapted to common wants, designed for common use, and fitted for common understandings. The people make them; the people adopt them; the people must be sup-

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*posed to read them with the help of common sense, and cannot be presumed to admit in them any recondite meaning or any extraordinary gloss."—Story on Const., § 451.

"The proper signification of words is the signification which common usage has affixed to them." "The use of vulgar languages being, as every one knows, very arbitrary, etymological and grammatical investigations pursued with a view to discover the true import of a word in common usage would furnish but a vain theory, equally useless and destitute of proof."—Vattel's Law of Nations, Book II, Chapter XVII, §§ 271, 272.

Puffendorf speaks to the same effect: "As for words, the rule is, unless there be reasonable objection against it, they are to be understood in the proper and most known signification—not so much according to grammar as to the general use of them."—Puffendorf's Rules, cited from Potter's Dwarris, 132.

Grotius has the following rule: "In cases that are not odius (i. e., not against equity and right,) words are to be understood according to the full propriety of popular use; and if in popular use there be several significations of the same word, the largest is to be taken."—Grotius's Rules, cited from Potter's Dwarris, 133. Under this rule, a generic meaning should be attached to the phrase "joint ballot," rather than a specific meaning.

Even in regard to statutes, which are construed more rigidly than constitutions, the American rule is that "the popular or received import of words furnishes the general rule for the interpretation of statutes"—Potter's Dwarris, 143; Maillard v. Lawrence, 16 How., 261. Dwarris states the English rule as to statutes, "that they are to be taken in their ordinary and familiar signification and import, and regard is to be had to their general and proper use; for jus et norma loquendi is governed by usage; and the meaning of words, spoken or written, ought to be allowed, as it has constantly been taken, 'loquendum est ut vulgus.' Even in the times of Queen Elizabeth, when Judges were accustomed to criticise words more narrowly than in the days of more liberal jurisprudence, it was held of a penal statute, in Wigge's case, (4 Rep., 46,) that the word 'attainted' should be construed to mean 'convicted,' the Judges saying that 'many times in common speech a person convicted is called a person attainted.'" And we find a striking illustration of this principle, in our own State, in the case of Neeley v. McFadden, (2 S. C. R. 175, 177,) in which case it was held competent to prove

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*that the words "lawful money" in a contract meant "Confederate money" by the common understanding and usage of the community

at the time of the contract. Another example is to be found in the discussion as to the meaning of the word "money" in State, ex rel. Gary, v. Parker, (4 S. C. R., 230, note,) where it is held that "it must be taken in the ordinary sense understood by the community in their mutual dealings."

Let us now consider how far a technical definition is to prevail in interpretation of technical words.

Puffendorf confines technical interpretation to "terms of art, which are above the reach of the common people."—Puffendorf's Rules, cited in Potter's Dwarris, 132.

Vattel's rule is stated correctly but incompletely by Judge Potter, as follows: "Technical terms, or terms proper to the arts and sciences, ought commonly to be interpreted according to the definition given of them by masters of the art or persons versed in the knowledge of the art or science to which the term belongs."—Potter's Dwarris, 127. But Mr. Vattel proceeds to qualify this rule. He remarks of it: "I say commonly, for this rule is not so absolute but that we may, and even ought to, deviate from it, when we have good reasons for such deviation," and among the exceptions is any instance where it is proved that it was employed "in a vulgar acceptation." "If, however, the technical or other terms relate to things which admit of different degrees, we ought not scrupulously to adhere to definitions, but rather to take the terms in a sense agreeable to the context."—Vattel's Law of Nations, Book II, Chapter XVII, §§ 276, 277.

The Supreme Court of the United States, in the construction of the Constitution, has frequently refused to employ technical interpretation. In the case of Gibbons v. Ogden, (9 Wheat., 188,) the word "commerce" was construed to comprehend "navigation" also, Chief Justice Marshall remarking: "The framers of the Constitution and the people who adopted it must be understood to have employed words in their natural sense and to have understood what they meant."

Mr. Cooley, in his Constitutional Limitations, p. 59, sums up this doctrine in these words: "Narrow and technical reasoning is misplaced when it is brought to bear upon an instrument framed by the people themselves for themselves, and designed as a

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chart upon *which every man, learned and unlearned, may be able to trace the leading principles of government."

2. It being evident, therefore, that the popular meaning of the words "joint ballot" ought to prevail over any technical definition, we interpret them, in Article IV, Section 13, to mean that the General Assembly should vote as a joint body and not in separate houses. For, in common usage, we find the word "ballot" applied as a generic term, denoting the "act of voting" as frequently as it is employed as a specific term, confined to one particular mode of voting; and in one lexicographer at least this use of the word "ballot" in a generic sense is recognized. Bouvier, in his Law Dictionary, after giving the specific meaning of "a little ball or a paper, &c.," adds, as a definition, "the act of giving votes." Common usage among parliamentarians and legislative bodies sanctions this definition. For instance, nothing is more common than to read or hear, among persons of education, as well as the unlearned, and from the lips and pens of politicians, statesmen, journalists, and, if your Honors please, from parliamentarians also, that in a convention or a caucus such a candidate was nominated on the first ballot, or such ballot as the case may have been, without intending thereby to indicate at all the mode of voting. We have heard again and again that at the National Republican Convention of 1876 Rutherford B. Hayes, of Ohio, was nominated as the Republican candidate for President on the eighth ballot, and yet the vote was taken viva voce. It is common to remark, after a State election, that the new Legislature of the State will be composed of so many Democrats and so many Republicans, giving the Democrats (or vice versa) a majority on joint ballot, thus securing the election of a United States Senator, and yet every well-informed person knows that a United States Senator must be elected viva voce, according to the Act of Congress.

Again, we observe a similar use of the word "ballot" to denote "the act of giving votes" in the Journal of the Convention of 1868, which framed the Constitution. In the record of the second day's proceedings, after a discussion of the merits of the respective modes of voting—"by ballot" and "viva voce" —we find the following:

"On motion of Mr. H. E. Hayne, the motion to suspend the rules and vote by ballot was laid on the table."

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* "The Convention proceeded to vote viva voce for Assistant Sergeant-at-Arms, which resulted in the election of Mr. Peter L. Miller."

"In the same manner, after two ballots, Mr. Samuel Dickinson, of Charleston, was elected Doorkeeper, and Mr. John Fitzsimmons, of Columbia, Assistant Doorkeeper."—Jour. Conv. 1868, pp. 24, 25.

In the Journals of the Senate and House of Representatives, we find the same use of the word ballot to denote "the act of giving votes," in connection with viva voce voting. We quote some instances, viz.:

1. When Mr. Sawyer was elected United States Senator in July, 1868, we find the President of the Senate announcing "that the Joint Assembly would proceed to vote viva

voce for a Senator in the Congress of the United States from South Carolina for the term," &c.

"First Ballot."

[Here follow the names of candidates and their supporters.]

"No candidate having received a majority of the votes given, there was no election, and the Assembly proceeded to a second ballot."

[Here follow the votes, with names, &c., as before.]

"No candidate having received a majority of votes given, the Joint Assembly proceeded to a third ballot."

And so the House Journal continues, with the use of the word "ballot" in the sense of Bouvier's definition—"the act of giving votes" —up to the "eighth ballot," when Mr. Sawyer was elected.—House Journal, special session 1868, pp. 84, 85, 86, 87, 89, 91, 92, 93.

2. On the same election the Senate held five ballots on the first day before going into Joint Assembly. The voting was viva voce and names of voters were recorded. The words used in the Journal to designate the respective votings were: "First ballot," "second ballot," "third ballot," "fourth ballot," "fifth ballot."—Senate Journal, special session 1868, pp. 34, 35.

"The President announced, upon the result of the fifth ballot, that Mr. Frederick A. Sawyer had received a majority of the whole number of votes given in the Senate."—Senate Journal, special session 1868, p. 36.

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*Concerning the proceedings in Joint Assembly, there appear the words "first ballot," "second ballot," and so on, up to "eighth ballot," as in the Journal of the House.—Senate Journal, special session 1868, pp. 39, 40, 41, 42, 43, 45, 46, 47.

3. We find the same use of the word "ballot" concerning the election of Chief Justice and Associate Justices of the Supreme Court.—House Journal, special session 1868, pp. 132, 133, 135, 136, 140, 141, 143, 144; Senate Journal, special session 1868, pp. 93, 94, 95, 97, 99, 101, 103.

4. In the viva voce election of a Circuit Judge for the Sixth Circuit, vice Hon. George W. Williams, who declined the office, the same use of the phrases "first ballot," "second ballot," appears in House Journal, special session 1868, pp. 471, 472, and in Senate Journal, special session 1868, pp. 388, 390.

5. In the election of Trustees of the University, the word "ballot" again occurs to denote "the act of giving votes," and is applied to viva voce voting.—House Journal, 1868–69, pp. 492, 493; Senate Journal, 1868–69, pp. 432, 433.

6. On March 13, 1869, when the Senate and House were in Joint Assembly for the election of three Commissioners to revise and consolidate the statute laws,

"Mr. Donaldson moved that the Joint Assembly proceed to vote viva voce for three Commissioners, simultaneously, on the first ballot."

"The President decided the motion out of order, the custom of the Joint Assembly being to elect separately.

"The Joint Assembly then proceeded to a

"First Ballot."

[Here follows the record of the votes, given viva voce.]

"The Joint Assembly then proceeded to a second ballot."

[Here follows the record of votes, given viva voce, as before.]

"The Joint Assembly then proceeded to a third ballot."—House Journal, 1868–69, pp. 543, 544; Senate Journal, 1868–69, pp. 465, 466, 467.

7. Of the election of United States Senator in 1870 we have the following record: [House Journal, pp. 57, 58, 62.]

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* "The House then proceeded to vote viva voce, with the following result on the

"First Ballot."

[Here follow the names and votes of members, &c.]

"The House then proceeded to vote viva voce, with the following result on the

"Second Ballot."

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"The Joint Assembly then proceeded to vote viva voce, with the following result on the first ballot."

In the Senate Journal, December 6, 1870, the votings for United States Senator are similarly designated as "first ballot," "second ballot," and so on, up to "ninth ballot." —Senate Journal, 1870–71, pp. 78–81.

8. In regard to the election of Chaplain of the Senate, November 26, 1872, there were two ballots, the votes being each time given viva voce. The Journal relates (p. 10): "The Senate proceeded to a second ballot for a Chaplain of the Senate."

9. The phrases "first ballot," "second ballot," are found in Senate Journal, 1872–73, pp. 94, 95, concerning the election of Hon. J. J. Patterson to the Senate of the United States; also, the following:

"Mr. Nash desired the decision of the President as to the right and legality of the Senate proceeding to a second ballot on this day under the Act of Congress as read to the Senate.

"The President ruled that the Senate may proceed and continue to ballot, in the event of no person receiving a majority, until midnight, unless interrupted by adjournment.

"The Senate proceeded, viva voce, to a second ballot."

10. Even in the present session of the General Assembly, with the fact of the present discussion as to the meaning of the phrase "joint ballot," we find in the Calendar of

the House of Representatives for December 5, 1877, the following:

"Special Order for 1 O'Clock P. M.

"Joint ballot for Judge of Seventh Circuit.

"Joint ballot for Register of Mesne Conveyance for Charleston County.

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* "Joint ballot for Attorney General."

Thus showing that the language of the people, adopted by them in common use, refuses to be bound by the shackles of a narrow and rigid interpretation.

III. But we have dwelt, perhaps, too much at length upon the definitions of the word "ballot" and of the phrase "joint ballot." "Qui hæret in litera hæret in cortice." Chief Justice Marshall, in Cherokee Nation v. Georgia, (5 Peters, 19,) says: "The most important rule in cases of this nature is that a constitution of government does not, and cannot from its nature, depend in any great degree upon mere verbal criticism or upon the import of single words. Such criticism may not be wholly without use; it may sometimes illustrate or unfold the appropriate sense, but unless it stands well with the context and subject matter it must yield to the latter. While, then, we may well resort to the meaning of single words to assist our inquiries, we should never forget that it is an instrument of government that we are to construe; and, as has been already stated, that must be its truest exposition which best harmonizes with its design, its objects and its general structure."

Mr. Story, in his work on the Constitution, § 454, says: "It does not follow, either logically or grammatically, that because a word is found in one connection in the Constitution with a definite sense, therefore the same sense is to be adopted in every other connection in which it occurs. This would be to suppose that the framers weighed only the force of single words, as philologists or critics, and not whole clauses and objects, as statesmen and practical reasoners. Men of ingenious and subtle minds, who seek for symmetry and harmony in language, having found in the Constitution a word used in some sense which falls in with their favorite theory of interpreting it, have made that the standard to measure its use in every other part of the instrument. They have thus stretched it, as it were, on the bed of Procrustes," &c.

Says Vattel: "The consideration of the reason of a law or promise not only serves to explain the obscure and ambiguous expressions which occur in the piece, but also to extend or restrict its several provisions independently of the expressions, and in conformity to the intention and views of the Legislature or the contracting parties, rather than to their words."—Law of Nations, Book II, Chapter XVII, § 290.

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*As to statutes, Potter's American Rules on this subject are as follows:

"Statutes must be interpreted according to the intent and meaning, and not always according to the letter."

"A thing within the intention is within the statute though not within the letter; and a thing within the letter is not within the statute unless within the intention."—Potter's Dwarris, 144, and cases there cited.

"The intent of the Legislature is not to be collected from any particular expression, but from a general view of the whole of an Act of Parliament."—Potter's Dwarris, 193.

"In construing Acts of Parliament," says Lord Tenterden, 7 B. & C., 643, "Judges are to look at the language of the whole Act; and if they find in any particular clause an expression not so large and extensive in its import as those used in other parts of the Act, and upon a view of the whole Act they can collect from the more large and extensive expressions used in other parts the real intention of the Legislature, it is their duty to give effect to the larger expressions."—Ibid. 194.

"Sometimes, when the words of a statute are obscure, the intention of the Legislature is to be collected from the cause and necessity of the statute, and sometimes from other circumstances; and whenever it can be discovered it ought to be followed with reason and discretion in the interpretation, although such interpretation seem contrary to the strict letter of the statute."—People v. Utica Insurance Company, 15 Johns., 358.

Applying these rules to the Constitution as a whole, we find the "more large and extensive expression" to be in Article II, Section 24: "In all elections by the General Assembly, or either house thereof, the members shall vote viva voce; and their votes, thus given, shall be entered upon the journal," &c. Here is the intent, collected from a "general view" of the whole Constitution. We have already seen that the "design" and "object" of this Section is to insure full responsibility of the representative to the people. When we construe the expression "joint ballot" in Article IV, Section 13, in the light of the context, can we, in the face of all these rules, narrow its meaning down to a secret vote?

What is the "design," what are the "objects," of this Section? Let us repeat it:

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* "Section 13. The State shall be divided into convenient circuits, and for each circuit a Judge shall be elected by joint ballot of the General Assembly, who shall hold his office for a term of four years, and during his continuance in office he shall reside in the circuit of which he is Judge."

The "design" is, first, to provide for a subdivision of the State into judicial territories; secondly, that each territory should have a

Judge who should be resident therein; thirdly, that each Judge should be elected by the General Assembly, voting as a joint body, and not in separate houses; and, fourthly, that the term of office should be four years.

It was not necessary that the mode of his election should be designated, for the mode of "All elections by the General Assembly" had been already prescribed in Article II, Section 24. And it may not be amiss to remark that in no instance of any judicial or executive officer does the Constitution prescribe the mode of his election, except under the general provisions of Article VIII, Section 1, as to popular elections, and of Article II, Section 24, as to legislative elections, both of which are expressed in terms denoting universal application.

IV. But let us leave the instrument itself, and again recur to the light of its history. We have already examined into the temper and tendencies of the framers and their constituents: let us now notice the proceedings of the Convention of 1868 in reference to Article IV, Section 13: "When the inquiry is directed to the mischief designed to be remedied, or the purpose sought to be accomplished by a particular provision, it may be proper to examine the proceedings of the Convention which framed the instrument."—Cooley Const. Lim., 66, and cases cited.

The article on the judicial department of the Constitution came before the Convention on its second reading, on February 26, 1868, and the debates are fully reported in the Journal, pp. 595 et passim. The professional stenographer who kept the record was officially employed by the Convention. It appears that the question principally discussed concerning the Judges of the Circuit Courts was who should elect them.

The Section now under consideration was reported by the Committee, with the words "for each circuit a Judge shall be elected by the qualified electors thereof."—Jour. Conv. 1868, p. 617.

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*Mr. C. M. Wilder moved to strike out the words "qualified electors" and to insert the words "by joint vote of the General Assembly."

The debate was quite animated, Messrs. J. J. Wright, C. C. Bowen and D. H. Chamberlain leading the debate in favor of the election of Circuit Judges by the people, and Messrs. C. P. Leslie, E. W. M. Mackey, W. B. Nash and others advocating their election by the General Assembly. Mr. Mackey in his argument on the subject alludes to that principle of the Constitution which insured legislative responsibility to the people in the following terms: "The members of the Legislature are sufficiently responsible to the people for their action, and if they elect an incompetent or corrupt Judge the people will take care that those men shall never again take their seats in the General Assembly."

After the debate, the result was the adoption of Mr. Wilder's amendment by a vote of 65 to 24.—Jour. Conv. 1868, pp. 617–621.

According to this action of the Convention, the Section should have been engrossed for a third reading with the words "and for each circuit a Judge shall be elected by joint vote of the General Assembly."

It was never afterwards altered or amended in the Convention, but we next find the Section before the Convention when the Constitution, as a whole, came up for a third reading; and then, for the first time, we discover the words "joint ballot," instead of "joint vote." Article IV was read by Sections and passed for ratification without any comment or debate, save that notice was given of an additional Section concerning slave debts.—Jour. Conv. 1868, pp. 854–858.

Now, we submit that the intention of the framers of the Constitution was to preserve the responsibility of the General Assembly to the people in this election as in all others; that no intimation was given, in debate or otherwise, of any disposition to make the mode of election of Circuit Judges an exception to the universal rule adopted in Article II, Section 24; that the Convention, being presumed to act intelligently, and to recognize the principle laid down by Chief Justice Marshall in Craig v. Missouri (4 Pet., 437,) that a "constitution deals with things, not names," adopted the expression "joint ballot of the General Assembly" as meaning the same as "joint vote of the General Assembly:" and, further, we submit, and we think we have already clearly demonstrated, that

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*the two expressions may be taken as synonymous with full regard to all the rules of constitutional interpretation.

V. And now we come to consider the contemporaneous and practical construction of the Constitution in this particular. The people ratified and adopted the Constitution on the 14th, 15th and 16th days of April, 1868, and at the same election, upon the same ticket, voted for members of the General Assembly.—Ordinances Conv. 1868, Gen. Stat., 55. The General Assembly thus elected was composed largely of members and attachees of the Convention. By a comparison of the rolls of the Convention and of the General Assembly, it will be seen that sixty members of the Convention were elected members of the Legislature—seventeen as Senators and forty-three as Representatives. One of the duties of that General Assembly was to elect Circuit Judges. How did they elect them? They elected them in joint assembly, the members voting viva voce, and the names of members and their votes being recorded in the journals. And thus has election after election of Circuit Judges proceeded, without a question or a doubt as to the propriety or legality of the mode, up to 1877. Judges elected viva voce took the oath of office and went upon the bench to construe and admin-

ister the Constitution and the laws. Astute constitutional lawyers, hostile to the new system and ready at all times to expose and take advantage of any mistakes in its practical workings, appeared before those Judges and argued important causes, involving life, liberty and property, without expressing a single doubt as to the constitutionality of their election in this particular, until the case of Whipper v. Reed, lately before this Court. And the same Legislature, which adopted during the present year a different mode of election, did so with hesitation, and evinced their doubts on the subject by passing the resolution in compliance with which this cause is now brought before your Honors for adjudication.

Strong as all this appears of itself, let us read it with the assistance of authority.

The Court of Errors, in the State v. Carew, (13 Rich., 521–523,) and again in Barry v. Iseman, (14 Rich., 138,) expounds the Constitution of the United States by the testimony of its framers: and in the latter case, Judge Munro, who delivered the opinion of the Court, supports the exposition of the clause under consideration by reference to an ordinance passed in 1787 by the old Congress,

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*"most of the members of which were also members of the Convention that framed the Constitution."

Chief Justice Marshall, in Cohens v. Virginia, (6 Wheat., 418,) says: "Great weight has always been attached, and rightly attached, to contemporaneous exposition;" and, after citing the Federalist as a commentary on the Constitution and the Judiciary Act, he remarks, in favor of the constitutionality of the latter: "We know that in the Congress which passed the Act were many eminent members of the Convention which framed the Constitution."

Judge Story, in Martin v. Hunter's Lessee, (1 Wheat., 351, 352,) announces the same doctrine in terms equally emphatic.

In Union Insurance Company v. Hoge, (21 How., 66,) Judge Nelson, on the question whether the company had complied with the insurance law of New York, decides in accordance with "the practical construction of the Act of 1849 by the public officers of the State."

In Surgett v. Lapice, (8 H.,) Judge Catron construes the Act of Congress of 1832 concerning public lands and remarks: "The foregoing construction being the one adopted by the Department of Public Lands soon after the Act of 1832 went into operation, we should feel ourselves constrained, unless the error was plainly manifest, from disturbing the practice prescribed by the Commissioner of the General Land Office," &c.

In Cooley v. Board of Wardens of Port of Philadelphia, (12 H., 315,) Judge Curtis says, concerning the constitutionality of the Pennsylvania pilotage laws: "This contemporary construction of the Constitution, since acted on with such uniformity in a matter of great public interest and importance, is entitled to great weight."

Judge Thompson, in the Bank of the United States v. Halstead, (10 Wheat., 62, 63,) says: If any doubt existed whether the Act of 1792 vests such power in the Courts, or with respect to its constitutionality, the practical construction heretofore given to it ought to have great weight in determining both questions. It is understood that it has been the general, if not universal, practice," &c.

In Edward's Lessee v. Darby, (12 Wheat., 210,) Judge Trimble states: "In the construction of a doubtful or ambiguous law, the contemporaneous construction of those

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who were called upon to act *under the law and were appointed to carry its provisions into effect is entitled to very great respect."

Judge Johnson, in the great case of Ogden v. Saunders, (12 Wheat., 290,) reasons as follows: "The contemporaries of the Constitution have claims to our deference on the question of right, because they had the best opportunities of informing themselves of the understanding of the framers of the Constitution and of the sense put upon it by the people when it was adopted by them."

But the leading case on the subject of contemporary construction, cited as such by eminent writers on constitutional law in this country, and frequently affirmed in the Courts, is Stewart v. Laird, 1 Cranch, 309, which was decided by the Supreme Court of the United States in February, 1803, a few years after the adoption of the Federal Constitution. The question was concerning the right of the Judges of the Supreme Court to hold Circuit Courts, and it was contended that the Supreme Court Judges, having been appointed and commissioned for that Court only, could not sit on the bench of an inferior Court. The language of Judge Patterson, in delivering the opinion of the Court, is: "To this objection, which is of recent date, it is sufficient to observe that practice and acquiescence under it for a period of several years, commencing with the organization of the judicial system, affords an irresistible answer and has indeed fixed the construction. It is a contemporary exposition of the most forcible nature. This practical exposition is too strong and obstinate to be controlled." We cannot imagine a case that could be more like the present than this. To the objection that Judges had no right to sit in certain Courts, the answer that Judges have been sitting there without question for several years is "irresistible." To the same objection now the answer is given in the same terms.

VI. We submit, therefore, that we have established:

First. That the phrase "joint ballot" is capable of two interpretations, viz.:

1. A strict and technical one, applying it to the mode of voting, to denote a secret vote.

2. A general and popular one, which embraces all elections held by two bodies voting jointly, without regard to the mode of voting.

Second. That this phrase in Article IV, Section 13, is to be construed according to its popular use, because—

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*1. Other things being equal, the popular meaning prevails over the technical meaning.

2. The people adopted and ratified the Constitution.

3. It is the larger sense of the phrase.

4. It is the only construction consistent with the "design, objects and general structure" of the Constitution.

5. It is supported by contemporaneous exposition, and the practice of the first General Assembly, which was largely composed of the framers of the Constitution of 1868.

6. It has been adhered to by the Legislature and State officers, and the Judges have acted under it, without question or challenge up to April, 1877.

Third. That, whatever the literal meaning of this phrase, the Constitution, as a whole, demands that the General Assembly shall always elect viva voce, and the general tenor must prevail.

VII. And now, in conclusion, let us cite a regulation from an ancient and venerable authority: "It is a rule," says Lord Bacon, in his Maxims, (Reg., 10,) "that the King's grants shall not be taken or construed to a special intent." Our sovereign is the people; their grant is our fundamental law. By the Constitution they have confided in the Legislature important trusts, but they have coupled those trusts with a full and complete accountability of their agents to themselves. They have retained the right to know all the official acts of their representatives; and they have, for greater certainty, declared in the preamble to their grant that "the enumeration of rights in this Constitution shall not be construed to impair or deny others retained by the people, and all powers not herein delegated remain with the people."—Article I, Section 41. Has the Legislature any right to exceed the powers thus bestowed upon them? And when they are instructed to exercise their delegated powers in a particular way, can they exercise them in another way, less favorable to the grantor, without being guilty of usurpation?

Let us, therefore, maintain the integrity of the fundamental law, construed according to the maxims of popular government venerated and upheld by our fathers in the best days of the republic. And, in reading its language, let us remember that "the language of the country," as one of our Judges has said, "is the coinage of the whole people." The words of the Constitution were coined in the people's mint and their authority has given them currency. The only proper device to be stamped upon them is the image of

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*their sovereign. We cannot substitute for that image the profile of a Webster or of a Walker or of any other etymologist. Neither can we impress upon them any stamp of temporary expediency without rendering them counterfeit. The "image and superscription" are Cæsar's; let us, therefore, "render unto Cæsar the things that are Cæsar's."

Points and Authorities by Robert Aldrich, of counsel for State:

Article II, Section 24, Constitution of South Carolina: "That in all elections by the General Assembly, or either house thereof, the members shall vote viva voce, and their votes thus given shall be entered upon the journal of the house to which they respectively belong."

This Article relates to the legislative department, and this provision is the rule by which the General Assembly are to be governed in the matter of elections generally.

Article IV, Section 2: "They (Justices of the Supreme Court) shall be elected by a joint vote of the General Assembly."

A joint vote by ballot would be a joint vote; and if this Article stood alone its requirements would be fulfilled either by a joint vote by ballot or a joint vote viva voce. Why, then, may not the Legislature elect Justices of the Supreme Court by ballot? It is because the special provision in this Article must be construed in pari materia with the general provision contained in Article II, Section 24; and harmony being the prime object in statutory construction, this is obtained by giving such a construction to the words joint vote as will bring them under the general rule laid down in Article II, which requires all the elections by General Assembly to be viva voce.

Article IV, Section 13: "And for each Circuit a Judge shall be elected by joint ballot of the General Assembly."

If this Section of this Article stood alone, no question could arise as to the construction to be given to it, and the mode of voting would be by ballot. How is it varied by construing it in pari materia with the provision contained in Section 24 of Article II? They are in direct conflict. One commands viva voce; the other commands ballot.

A rule is, in case of a conflict, a special provision will control a general. The special provision is ballot; the general is viva voce. By this rule the ballot would prevail.

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*Another rule is, that when a conflict arises in the terms of a constitution or statute, the latter will control the former. Viva voce is the former; ballot is the latter. So by this rule the ballot would prevail.

Another highly favored rule of construction is, that such a construction should always be given as will preserve all the parts of the instrument, giving force and effect to all,

destroying none. To hold that the Judges of the Circuits shall be elected by a viva voce vote, in deference to the provisions of Section 24, Article II, is to destroy the provision of Article IV, Section 13. To hold that all elections by the General Assembly shall be viva voce, except elections for Circuit Judges, is to give effect to all parts of the instrument —preserving all, destroying none.

The reason is asked for this difference in the mode of voting. It is sufficient that it is commanded by the fundamental law to be obeyed. There is a great underlying reason, however, for the requirement—protection to the voter; protection to those represented by the voter. Protection is the first aim of government; the second is purity in the public service. It is not strange that in a constitution of government, protection and purity should be guarded.

If, then, by all the considerations we are at liberty to indulge, we conclude that Circuit Judges are required to be elected by joint ballot, is an election by joint vote viva voce a valid election? Try it by the Constitution.

Article VII, Section 1: "In all elections the electors shall vote by ballot." What would the viva voce vote of an elector at the polls for Governor be worth, though it were entered on the poll lists by the managers? If worthless in South Carolina, why is it? [It would be good in Kentucky.] Because the Constitution of South Carolina requires it to be by ballot.

What would the title of a Governor thus elected be worth? If nothing, why? Because he would have been elected in a manner different from that required by the Constitution. Construe this provision in pari materia with the former.

Questions have arisen as to what really was intended to be put in the Constitution by its framers. The Constitution is that which was ratified by the people. The Constitution which all are sworn to support, protect and defend is that which was ratified on the 14th, 15th and 16th days of April, A. D. 1868.

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*To arrive at a just construction of the Constitution, let us ascertain the meaning, critically, of "vote" and "ballot." They are sometimes used in the same sense, but they are different.

Walker defines "ballot," "a little ball or ticket used in giving votes; the act of voting by ballot." "Vote," he says, is suffrage voice given and numbered. Webster: "Ballot is a ball used in voting, or a piece of paper or other thing used for the same purpose; the whole amount of votes cast."

Vote is to express or signify the mind, will or preference, either viva voce or by ballot, or other authorized means, as in electing men to office.

Locke on the Human Understanding, Book IV, Chapter XX: "How many men have no other ground for their tenets than the supposed honesty or learning or number of those of the same profession? as if honest or bookish men could not err, or truth were to be established by the vote of the multitude!"

Wharton's Law Dictionary: "Ballot" is to vote for or choose a person into an office by means of little balls of several colors, which are put into a box privately, according to the inclinations of the chooser or voter, or by writing the names of the candidates upon small pieces of paper, and rolling them up so that they cannot be read, which are put into a box, and, when the time limited for an election is over, an indifferent person takes them out one by one, and, upon reading the name or names, somebody takes down the number of votes, the greater of which is declared duly elected.

Cush. Leg. Assemb., Section 103: "A ballot" may be defined to be a piece of paper, or other suitable material, with the name written or printed upon it of the person to be voted for; and when the suffrages are given in this form, each of the electors, in person, deposits such a vote in a box or other receptacle provided for the purpose and kept in the custody of the proper officers.

Bouvier's Law Dictionary: "Ballot," a diminutive ball, i. e., a little ball used in giving votes; the act itself of giving votes; a little ball or ticket used in voting privately, and for that purpose put into a box (commonly called a ballot-box) or some other contrivance.

These authorities fully establish and define the technical meaning of the word "ballot." The next question which arises is: whether this technical signification is to be adopted in the construction of our Constitution, or

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some loose and popular understanding *of the term "ballot," such as being a synonym for the word "vote." Now, it is a well-established principle in the construction of statutes that wherever a word has received a technical and distinctive signification by usage that signification must prevail in the interpretation, in opposition to any loose or general definition of the same. We come, then, to consider this term "ballot" in connection with its parliamentary history and the practical acceptation of the term by legislative bodies in this State from the Revolutionary period to the present day; for by such history and usage we will be enabled to ascertain the true meaning of the terms.

By the State Constitution, (19th March, 1778,) Section 18:

The Senate and House of Representatives shall each choose their respective officers by ballot, without control.

Sec. 22. Delegates to Congress to be elected jointly by ballot in the House of Representatives.

Sec. 24. Ordinaries for the several Districts shall be chosen by the Senate and House of Representatives jointly by ballot.

Sec. 27. Judicial officers shall be chosen by ballot jointly by the Senate and House of Representatives.

Sec. 29. The two Commissioners of the Treasury, the Secretary of State, &c., shall be chosen, in like manner, jointly by ballot.

Sec. 30. All officers of the army and navy of the State above the rank of Captain shall be chosen by the Senate and House of Representatives jointly by ballot.

Constitution of 1790.

Article I, Section 12: Each house shall choose, by ballot, its own officers, &c.

Article II, Section 1: The Senate and House of Representatives shall jointly, in the House of Representatives, choose, by ballot a Governor.

Article VI, Section 1: The Judges of the Supreme Court, &c., shall be elected by the joint ballot of both houses, in the House of Representatives.

5 Stat., 202, Act of 1792, Sub. 1: Electors of President and Vice President shall be appointed by ballot * * * in the House of Representatives * * * by the Legislature of the State.

5 Stat., 361, Act of 1792, Section 9: Comptroller General shall be elected by joint ballot of both branches of the Legislature of this State.

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*5 Stat., 674, Act of 1812, Section 1: Attorney General and others elected by joint ballot of both houses of the Legislature.

5 Stat., 674, Acts of 1812, Section 2: That in all joint ballots for the officers before mentioned a majority of all the votes given on such joint ballot shall be necessary to constitute an election.

Act of 1784, Section 2: Court of Chancery to consist of three Judges, to be chosen by joint ballot of the Senate and House of Representatives.

8 Stat., 25, Act of 1812. Bank of the State. Section 7: Legislature shall proceed to elect, by joint ballot, a President and twelve Directors.

12 Stat., 647, Act of 1859. Separate Court of Appeals:

Section 1. Chief Justice and two Judges, to be styled Judges of the Court of Appeals, to be chosen by joint ballot of the Legislature among the Chancellors and Judges now in commission.

It will thus appear, that from the period of the State's first existence as a sovereignty to the termination of the late civil war all elections in the General Assembly were determined by ballot; and the universal practice of balloting in the legislative bodies on such occasions, we assert as a matter of fact, was in accordance with the legal and technical definitions already furnished. It will, moreover, appear from the above quotations that the terms "jointly by ballot," "by ballot jointly" and "joint ballot" are, in parliamentary language, interchangeable terms, applied without distinction to the composition of the electoral body and the particular mode of effecting a result "necessary to constitute an election."

Such, then, being the time-honored parliamentary signification of the term "joint ballot" and its cognate expressions, it behooves both the judiciary and the Legislature to receive it according to its accepted and technical meaning, as, indeed, it was received in the late election of Judge Kershaw; for "words and phrases the meaning of which in a statute (a fortiori in a Constitution) has been ascertained are, when used in a subsequent statute, to be understood in the same sense."—Potter's Dwarris, 274.

Leave out Section 21 of Article II of our present Constitution, and the modes of electing, respectively, the Justices of the Supreme Court and the Circuit Judges, the former by "joint vote" and the latter by "joint ballot" of the General Assembly, would be too apparent to admit of discussion. Does, then, this general provision that all elections by the General Assembly shall be "viva voce"

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so *overshadow the special and express provision with regard to the mode of electing Circuit Judges that we must go counter to the recognized meaning of language and do violence to the Constitution itself? Certainly not. It has been laid down as an established rule in constitutional interpretation that when a special provision conflicts with a general, the former must be treated as an exception to the latter, as much so as if the words in the general provision had been followed with "save as hereinafter provided," so that we must read the 21st Section of Article II as if the words "viva voce" were followed by "save as hereinafter provided in Article IV, Section 13, of this Constitution."—Potter's Dwarris, 117, 272, 273.

Thus, then, is harmony restored to the Constitution, yet no violence done to its letter or to its spirit. Without undue straining of terms from their received signification, without any labored exhibition of grammatical ingenuity, without the aid of metaphysical refinement, we have by this "saving" rule the plain meaning of the words and intent of the Constitution maintained.

We have thus far endeavored to show that the election of Circuit Judges by a viva voce vote of both houses is contrary to express constitutional requirement. In support of that view we have established the parliamentary signification of the words "ballot," "jointly by ballot," "by ballot jointly" and "joint ballot." We have shown the unvarying custom of election by ballot from the Revolution to the times of reconstruction, and the necessity of giving effect to the mode by ballot in the election of the Circuit Judges, in order to harmonize the Constitution without doing violence to its express provisions.

Can a vote viva voce and a vote by ballot be by any construction, however forced, made to mean the same thing or things equivalent?

Viva voce, involves verbal utterance.

Ballot, involves silence.

Viva voce, involves sound.

Ballot, involves quiet.

Viva voce, involves publicity.

Ballot, implies secrecy.

Can two things be more opposite in their meaning? When the fundamental law uses words of a diametrically opposite sense as to the mode of performing the same act on

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different occasions, can it *be said that it means the same mode on both occasions? Can it be said that the instrument is indifferent as to the mode?

If the two modes are different in the law, is making them the same lawful?

The underlying reasons for requiring Circuit Judges to be elected differently from other officers and differently from the Supreme Court Judges:

The Justices of the Supreme Court are supposed to be chosen from a class beyond the reach of personal influence.

They are a few and hold for a longer term.

They come less in contact with the bar, and not at all with the people.

They are a Court for the correction of errors of law and to hear and determine appeals, and have little or no discretionary power.

The Circuit Judges are elected for a shorter term and are more numerous. They come in daily contact with the bar, the people and their representatives. They have vast discretionary powers, to be employed justly, but which may be employed to reward friends and to punish opponents.

For these reasons the Constitution requires a different mode of election, (by ballot,) so that the elector may exercise his unbiased, unfettered choice for the one his conscience and his judgment tell him will make the best Judge, regardless of the consequences which might attach to his voting against the successful candidate.

If, then, these plain requirements are disregarded, and a different mode is adopted, —one that deprives the elector of his freedom, one that enabled party leaders on one memorable occasion to force weak and timid legislators to vote for men they knew to be unworthy,—is it a legal election? If the Constitution is violated, is the act lawful?

Chief Justice Davis, in People v. Pease, (27 N. Y., 81,) speaking of the ballot, which he styles "an important and valuable safeguard of the independence of the humble citizen," says:

"The spirit of the system requires that the elector should be secured then, and at all times thereafter, against reproach or animadversion or any other prejudice on account of having voted according to his own unbiased judgment; and that security is made to consist in shutting up within the privacy of his own mind all knowledge of the manner in which he has bestowed his suffrage."

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*Mr. Cooley expresses himself in similar terms.—Cooley's Con. Lim., p. 604.

Some say, what practical difference does it make? The same may be asked about any other provision of the Constitution where men differ in opinion upon questions of policy. The answer is, the Constitution requires it, and that is enough.

The Constitution is divided into separate Articles, each Article relating to a different subject. The second Article relates to the legislative department, and the 24th Section provides: "That in all elections by the General Assembly, or either house thereof, the members shall vote viva voce, and their votes thus given shall be entered upon the journal of the house to which they respectively belong." From this it is clear that all elections by the General Assembly, as a general rule, are to be viva voce: and if nothing more had been said, the viva voce of the Circuit Judges would unquestionably be constitutional. But, as a Constitution or an Act is to be construed together, we must take all the parts of either to arrive at a correct conclusion. Coming, then, to the fourth Article, Section 2, which relates to the judicial department, separate and distinct from the legislative, and subsequent from it, we find the following provision as to the election of Justices of the Supreme Court: "They shall be elected by a joint vote of the General Assembly." And, further on, in the same Article, Section 13, providing for the election of Circuit Judges, we find the following provision: "And for each circuit a Judge shall be elected by joint ballot of the General Assembly." Pursuing our inquiry in Article VII, Section 1, which relates to the right of suffrage, we find, further, that "in all elections the electors shall vote by ballot." These are all the provisions in the Constitution which relate to the mode of voting. In the legislative department the members shall vote viva voce in all elections; in the judicial department the Justices of the Supreme Court shall be elected by a joint vote, and the Circuit Judges by a joint ballot of the General Assembly.

In elections by the people the vote shall be by ballot. Thus, it will be perceived, there are four modes of election prescribed by the Constitution—viva voce, joint vote, joint ballot and ballot. The first is a general provision; the other three relate to particular elections. If the second Article is to control the construction, the provisions of the fourth Article are surplusage and should not have been put in. To arrive at a just construc-

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tion of the Constitution, it is neces*sary to ascertain the correct meaning of the expressions vote and ballot. They are sometimes used in the same sense, but, critically speaking, the words do not mean the same thing. Walker defines ballot "a little ball or ticket used in giving votes; the act of voting by ballot." Vote, he says, is "suffrage voice given and numbered." And so Webster: ballot is "a ball used in voting, or a piece of paper or other thing used for the same purpose; the whole amount of votes cast." Vote, is "to express or signify the mind, will or preference, either viva voce or by ballot, or other authorized means, as in electing men to office." And Richardson, in one of his illustrations, quotes from "Locke on the Human Understanding," b. 4, Chapter XX: "How many men have no other ground for their tenets than the supposed honesty or learning or number of those of the same profession? as if honest or bookish men could not err, or truth were to be established by the vote of the multitude."

From all this, it seems that vote is a noun of multitude, and the vote is ascertained by counting the ballots or the viva voce responses. The words are not synonymous. Ballot means the expression of the will of the voter by a ball or a piece of paper. Vote means the aggregate expression of all the voters, whether indicated by a ball, a piece of paper, or viva voce; and that they are not used in the fourth Article of the Constitution as correlative terms is apparent from the use of them in this Article in juxtaposition. Thus, in the second Section, it is declared the Justices of the Supreme Court shall be elected by a joint vote, which may be either by ballot or viva voce; and immediately after, in the thirteenth Section, on the same page, it is provided the Circuit Judges shall be elected by a joint ballot, which can only be by writing or printing the name of the person voted for on a piece of paper. Now, can it be contended that the framers of the Constitution used these expressions to mean the same mode of voting, or did they have a design in providing different modes? It was not an accident, nor was it careless expression; for in Article VII, Section 1, it is provided that "in all elections by the people the electors shall vote by ballot." This proves conclusively that the different expressions of the mode of voting were used by the Convention designedly; they intended to distinguish between the vote by ballot and the vote viva voce. Will any one contend for a viva voce vote when the Constitution commands the vote to be by ballot? And there was a sufficient reason for prescribing a different mode. The

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Justices of the Supreme *Court were to be elected for the whole State and for a longer term, while the Judges of the Circuit Court were to be elected for a circuit and shorter term. It was also ordained that they should interchange circuits as provided by law, yet it might happen that the Legislature would not make that provision, as they did not until the last session. So, in order to prevent any prejudice that might influence the mind of a Circuit Judge by knowing that a man of influence, a suitor in his Court, had supported or opposed his election, the Constitution designedly provided that the election of these Judges shall be by ballot. Can anything be more clear? A ballot cannot be a viva voce vote, because the former implies secrecy, while the later commands verbal utterance. Therefore it must have been used advisedly, and, as just stated, a sufficient reason did exist.

It may be laid down as a general proposition in the construction of constitutions and statutes, that when the first and the succeeding clauses are inconsistent the latter controls the former. If this be true, (and it will hardly be disputed,) the argument is concluded; for although the expressions viva voce and joint vote may be considered synonymous, there can be no doubt as to the meaning of ballot. When an elector is directed to vote by ballot, there is no escaping the duty to be performed; he must express his preference either by a ball or on a piece of paper deposited in a box or other receptacle, and the majority of the ballots thus deposited is the vote that determines the election. And so, when the election is viva voce, the majority of audible expressions is the vote that determines the election. And again, when the election is by joint vote, the choice of the electors may be expresed by the audible announcement of their choice or the silent evidence of their will as indicated by the ball or the piece of paper. In other words, the vote is the aggregation of the verbal announcements made or the written ballots deposited. For although, in common parlance, vote and ballot may be used as convertible terms, yet when they are used in a Constitution or in the same Act, directing how the Justices of the Supreme Court and the Judges of the Circuit Court shall be elected, we are forced to ascertain the critical meaning of the words used, to determine what was the intention of the framers of the Constitution. If, then, the expressions joint vote and joint ballot mean different modes of election, we cannot escape the conclusion that the election of the Circuit Judg-

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es, except of the Fifth Circuit, is *unconstitutional and void, the others having been elected viva voce and not by joint ballot as required by the Constitution.

It has been suggested that the use of the word "ballot" instead of "vote," as to the election of Circuit Judges, is a clerical error, and that the inexperience and ignorance of the members of the Convention did

not enable them to detect it; also, that this is probable, as there is no mention of an amendment in the journal—the original draft being vote. It appears to us that the suggestion is without force. Dr Mackey, the President of the Convention, a forcible and perspicuous writer, was accustomed to preside over deliberative assemblies, and his works show that he understands the use of words. Mr. Chamberlain, a lawyer of ability and a man of high literary culture; Mr. Corbin and Mr. Leslie, both lawyers and certainly astute men; Judge Wright, an Associate Justice of the Supreme Court, and many others, of more or less culture and attainment, were members of the Convention. It is hardly to be supposed that so important a change in the organic law would have escaped their notice, or of the Committee whose duty it was to revise and engross the Constitution before it was adopted. But even if such an error had been made by the Engrossing Clerk and overlooked by the Engrossing Committee, as well as the professional and educated men of the Convention, it cannot be corrected either by the Supreme Court or the Legislature, for the Convention passed an ordinance "to provide for the ratification of the Constitution," which was submitted, as it now reads, to the registered voters of the State on the 14th, 15th and 16th days of April, 1868, and by them ratified; so that if there was a clerical error, it was embodied in the Constitution adopted by the Convention, ratified by the people, and the only way to correct it is in the mode and manner prescribed by the Constitution itself in Article XV. It would be a gross usurpation, either by the Courts or the Legislature, to override and change this Article of the fundamental law.

January 22, 1878. The Judges delivered their opinions, seriatim, as follows:

HASKELL, A. J. The question in this case is of the most serious character. It involves the construction of an important clause in the Constitution of the State, and upon such construction depends the title to one of the highest and most honorable of-

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fices in the *gift of the State. The Court, impressed by the gravity as well as the magnitude of the matter which it has had under consideration, while there is division of opinion, has, nevertheless, arrived at a conclusion concurred in by a majority of its members. The opinion of each Justice will be rendered separately, and I proceed to state some of the reasons by which my mind has reached that conclusion upon which the judgment of the Court is based.

The action is brought in the name of the State by the Attorney General, and is against A. J. Shaw as occupant of the office of Judge of the Third Judicial Circuit of the State, claiming to have been elected thereto on the 12th day of February, 1875. The second and third allegations of the complaint, and upon which the questions hinge, are as follows:

"2. That the Constitution of the State of South Carolina, Article IV, Section 13, provides that for each judicial circuit a Judge shall be elected by joint ballot of the General Assembly.

"3. That said A. J. Shaw was not elected Judge of the Third Judicial Circuit by joint ballot of the General Assembly, as the Constitution of the State requires, but was elected by the viva voce vote of the Senators and members of the House of Representatives met in joint assembly."

In the answer of the defendant it is alleged:

"That, in accordance with the provisions of the Constitution of this State, (Section 24, Article II, and Section 11, Article IV,) he was elected to the office of Judge of the Third Judicial Circuit on the 12th day of February, A. D. 1875, by the joint vote of the General Assembly of South Carolina, the members thereof voting viva voce, and their votes thus given being entered upon the journal of the house to which they respectively belonged, and that by virtue of said election he now holds and lawfully is in the exercise of the said office, and has not intruded into the same."

Section 11, Article IV, provides how vacancies shall be filled, and on this point there is no dispute.

Section 24, Article II, cited in the answer, is as follows: "In all elections by the General Assembly, or either house thereof, the members shall vote viva voce, and their votes thus given shall be entered upon the journal of the house to which they respectively belong."

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*And upon this the defendant rests his title to the office. The facts are admitted, and the question becomes one of law solely, and, briefly stated, is thus:

It is claimed by the State, first, that where the manner or mode of voting at an election is prescribed by the Constitution, it must be observed, and that an election by any other mode of voting than the one prescribed is null and void; second, that the Constitution, in Section 13, Article IV, does prescribe the manner of voting at the election of Circuit Judges [vide above]; third, that the said mode or manner of voting as prescribed by the Constitution was not observed at the election by which defendant claims the office; fourth, and that, therefore, the election is a nullity, and the defendant has no right to the office.

On the other hand, it is contended that the second proposition above set forth is, in law, not true; but that the mode of voting at the election of Circuit Judges is prescribed and fixed by Section 24, Article II, as well as by Section 13, Article IV, of the Constitution, and that the former Section prevails as to the manner of voting, and that the latter Sec-

tion applies only to the manner in which the two houses shall assemble for the purpose of voting; second, that the election of defendant was had in conformity to the requirements of both Sections of the Constitution, and that, therefore, the election is good in law, and the defendant lawfully holds his office.

The general proposition, that where the manner of voting is fixed by the Constitution it must be observed and obeyed, is not controverted. It is reduced, then, to the naked inquiry, is the manner of voting at election of Circuit Judges fixed by the Constitution? and, if so, what is that prescribed manner, and has it been complied with in this case? Both sides agree that the mode of assembly of the two houses for the purpose of voting is prescribed by Section 13, Article IV, and that the mode is joint assembly. But, in behalf of the State, it is argued that after the two houses have met the vote must be "by ballot;" whereas the defendant claims that the vote must be "viva voce," in obedience to Section 24, Article II, of the Constitution. Which is the law?

The case was argued on both sides with ability, and did the time permit I would avail myself much more, than under the circumstances is possible, of many of the suggestions and cited authorities, by which I would be aided in elaborating an opinion upon so grave

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*a subject. But it is obvious that if the Court has arrived at an unchangeable conclusion it is its duty to render a decision promptly. While it is important that the reasons should be clearly set forth, it is sometimes more important that the conclusion be announced and uncertainty be removed.

Let us now put together the two Sections in which the law of this case lies.

Section 24, Article II, Legislative Department: "In all elections by the General Assembly, or either house thereof, the members shall vote viva voce, and their votes thus given shall be entered upon the journal of the house to which they respectively belong."

Section 13, Article IV, Judicial Department: "And for each circuit a Judge shall be elected by joint ballot of the General Assembly."

Were the last Section considered alone, there could be no doubt about its meaning. "Elected by the two houses of the General Assembly met in joint assembly—voting by ballot." The word "joint," of necessity, qualifies the "General Assembly," for were it made to qualify the word "ballot," it would lead to the absurdity of saying "vote by a joint ball or ticket," which is impossible. We are forced to adopt the plain meaning established by the common use of the words, by parliamentary usage and by legislative enactments, all concurring. Indeed, the phrases quoted by counsel, "by joint ballot," "by ballot jointly," "jointly by ballot," and "joint ballot," in connection with elections by the two houses of the General Assembly, have interchangeably been so used, and with undisputed and undoubted signification, from the time of the adoption of the Constitution of 1788 to the time of the adoption of the Constitution of 1868.

But it is said that while "ballot" and "vote" are not synonymous, yet that by usage it has become common to use the word "ballot" in the sense of "vote," or the "act of voting," without any reference to the manner of voting; or, in other words, that "to ballot" may mean "to vote viva voce" or "to vote by ballot,"—that the true meaning is to be derived not so much from the word itself as from the context and the object in view. If this be so, could not Section 1, Article VIII, on the right of suffrage, which reads: "In all elections by the people the electors shall vote by ballot" be construed to mean "vote viva voce?"

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*It is argued, however, that the meaning of Section 13, Article IV, is limited by Section 24 of Article II, which it is claimed is an universal rule and controls all elections by the General Assembly and annuls any subsequent provisions which may not be in accord with it. The proposition, then, is that the word "ballot" in Section 13, Article IV, is either a nullity, because in conflict with the rule set up as universal, or must be made to harmonize therewith by construing the word, if it be possible, to mean "vote." I see no difficulty in the coexistence and operation of the two provisions, even although the first be an universal rule and the second an exception thereto.

The first occurs in the Article on the legislative department, and defines and limits the power of the General Assembly with regard to elections in that body.

In Article III, the executive department, it will be found in Section 4 that when the election of Governor devolves upon the Legislature by reason of "two or more" of the candidates being "equal and highest in votes," it is provided that "the General Assembly shall, during the same session, in the House of Representatives, choose one of them Governor viva voce."

In Article IV, judicial department, Section 2 provides that the Justices of the Supreme Court "shall be elected by a joint vote of the General Assembly," and, Section 13, Circuit Judges "by joint ballot of the General Assembly."

While it might be argued, and, perhaps, with force, that Section 24, Article II, relates only to elections of officers of the General Assembly, and to elections created by legislation, there can be but little doubt as to its having relation specially to that class of elections, for in only three cases does the Constitution order elections by the General Assembly, and in two of these it specifies the manner of voting, and leaves only the third—the election of Justices of the Supreme Court—sub-

ject probably to the provisions of Section 24, Article II. And if we were undertaking to go behind the words of the Constitution to interpret its meaning, it might be very forcibly shown why a difference is made in the mode of voting for Governor and for Circuit Judges by the General Assembly—the former having been previously voted for directly by the people, and the election of the latter having originated in the General Assembly.

This, however, is irrelevant, and it is unnecessary to do more than lay down the proposition that any general or universal rule is

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*subject to exceptions, when the exceptions emanate at the same time from an equal or the same power, and that is the present case. The 24th Section, Article II, is of force in so far as it is not varied by subsequent provisions in the same instrument.

It appears to me to be clear that the Convention so understood it, and adopted that Section to define the power of the legislative branch of the government, and then provided by succeeding Sections for the specific modes of conducting certain elections which confer offices of great importance.

The question is thus narrowed down to the last proposition, which is the strength of the case. Can the words "by joint ballot" be construed to mean "by joint vote," that thereby the two apparently conflicting Sections may be made to conform, and the election be conducted by voting viva voce? This depends solely upon the meaning of the word "ballot." If "a ballot" or "to ballot" can be considered to mean "a vote" or "to vote," that meaning should be adopted, for it would give the fullest force and effect to both Sections of the Constitution.

I will say here that while the argument was able and ingenious it did not impress my mind, and subsequent reflection has strengthened the conviction that the word "ballot" has a fixed, distinct and clearly-defined meaning, so absolute and so well understood as not to admit of a doubt.

The learned counsel for the defendant base their construction of the word "ballot" upon two grounds:

1. That the theory of the State Constitution is "that in all elections by the Legislature the action of each member should be open to the scrutiny of his constituents, so as to preserve the accountability of the legislator to the people.

2. That the word "ballot" must be taken in its "popular" sense, and in that sense its meaning is the "act of voting," without any designation of the manner of voting.

However plausible may be the policy of the principle set forth in the first ground,—and strong, had it been argued in the Convention, —it is of no avail now. When we go to say what is the law of the land, we must take the law as it is and not as it may have been. The rules of interpretation are well stated, as follows: "The way to ascertain * * * our obligations as they arise from instituted laws is to collect the meaning and intention of the

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law*maker from some outward signs or marks; the collecting such intention from such signs or marks is called interpretation."

"Words are the common signs that mankind make use of to declare their intention to one another; and when the words of a man express his meaning plainly, distinctly and perfectly, we have no occasion to have recourse to any other means of interpretation." —Rutherford's Rules, Potter's Dwarris, 135.

And it is only where the words fail to express the meaning plainly, distinctly and perfectly that we can have recourse to conjecture, whether rational or probable. The first ground, therefore, is removed, unless the second is maintainable.

To cast any obscurity over the words "by joint ballot," it must be shown that the word "ballot" has two meanings when used in such connection and may have been employed in either sense by the Convention. And this becomes a question of evidence and authorities. The "popular" meaning of a word must be understood to be its correct meaning until the contrary is shown. Yet stronger is the presumption that in a convention which frames the constitution of a State words are used in their true signification, and they must be so accepted until the error is clearly proven.

What, then, is the true and correct meaning of this word ballot? It is of French origin, and has been adopted into the English language without any change in its meaning, so far as the authorities give us light. In the standard French dictionaries it is defined to mean "the act of voting by balls or tickets by putting the same into a box or urn;" "secret voting by means of ball or ticket." The examples in Richardson's English Dictionary clearly define its meaning to be the same as the French word, and I will quote one or two to show a little both of the meaning and history of the word in England:

"The greatest of the Parliament men hated this design of rotation and balloting as being against their power." "No Magistrate was to continue above three years, and all to be chosen by ballot; than which choice nothing could be more fair or impartial, as 'twas then thought, though opposed by many for several reasons."

In Worcester's Dictionary it is defined "a secret method of voting at elections: America —where the ballot is practiced." And so Walker, and so does Webster; and certainly had the word had any popular signification other than the above, it would have been given to us by Webster.

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*In an elaborate article on the word in the Encyclopaedia Britannica, the concluding sentence is as follows. "It is one of those matters of which it is necessary in a work like the present to give some historical ac-

count, and at the same time to explain its existing position as a political question, with a fair view of the arguments adopted by either side." So, also, an able essay on the same subject in the Encyclopaedia Americana presents the word "ballot" as expressing the side of secret voting as against viva voce or public voting. In neither of these articles is the slightest deviation from the definition above cited, nor is there an intimation that any other meaning has ever been attached to the word. Ballot represents the one policy and viva voce the other.

It is to-day the question between parties in England. It is the main distinction between elections in England and the United States. It has been characteristic of France in her republican government, and is to-day an open question in every constitutional and legislative body that assembles in the United States. The expression "blackballing" still used in secret votes in clubs and private associations is the perpetuation of the ballot by white stones and black stones, by which the Dikasts cast their votes in the judicial assembly at Athens, and signifies the same as the tabulæ or tabellæ by which the secret votes were taken in Rome. Thus history and literature and the unswerving practice in the constitutional and legislative assemblies from 1788 to the present day show one invariable meaning and application of the word. And as it was used in the Constitution of 1868, so it had been used from the beginning of the existence of the State in reference to judicial elections.

In 1865 the question was agitated, and, as is cited in the argument for the defense, a change was urged by the Provisional Governor of the State, and finally was carried in the Convention assembled that year. The Legislature was commanded to vote viva voce in the election of Judges, and it was openly declared that it was so done to carry into effect the theory of responsibility and subjection of legislators to the scrutiny of their constituents. Again, in 1868, the Constitution was changed and the old method restored. Is it possible that it can be argued that the meaning of the word, so recently and with so much ardor discussed, was not understood? In Section 1, Article VIII, it is said that "in all elections by the people the elec-

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tors shall vote by ballot." Could *the meaning of the word be more sharply defined than it is in that Section? The supposition cannot be sanctioned that the framers of the Constitution could have so trifled with a word of such magnitude as to have used it in senses exactly contrary to each other in two such important Sections of that instrument. The authority adduced to show that "by joint ballot" can mean "by joint vote," or that "ballot" means "vote," without regard to the manner of voting, is this: That in the journals of the Convention and of the General Assembly, and in the reports of elections by the public press, the word ballot is "applied as a generic term, denoting the 'act of voting' as often as it is used as a specific term confined to one particular mode of voting."

There is no authority to show that it has ever been so used in any parliamentary body in debate upon the question or in legislation upon the subject. The proposition, then, is in no wise sustained, nor can I think it sustainable. The use of the word relied upon by counsel is a mere abbreviation for the convenience of journalists and the press, and can in no wise be sanctioned to establish the meaning of words.

The evidence in the body of the instrument shows that the Convention understood the words it used, and upon opening the journal nothing is adduced to strengthen the defense. On the contrary, almost the initiatory debate in that body was upon "ballot" as opposed to voting by viva voce.

The fact that the 13th Section, Article IV, was passed at the second reading in the words "by joint vote," (Journal, p. 617,) and that it was subsequently changed and ratified in the words "by joint ballot," (Journal, p. 856,) compels us to conclude that the change was made for a purpose, and that purpose can be but the one indicated by the distinction between the words.

Finally, the ratification and adoption of the Constitution was submitted to the people of the State. The instrument was adopted as it is written, and that is what it means, and so it must stand.

It is with unfeigned reluctance that a majority of the Court has arrived at the conclusion reached in this case; but whatever may be the inconvenience or the individual hardships involved in the decision, it is our solemn duty to declare the law as it is written.

It is, therefore, ordered and adjudged that the plaintiff have judgment of ouster against the defendant, as prayed for in the complaint.

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*McIVER, A. J. While concurring fully in the opinion filed as that of the majority of the Court, it has been thought due to the dignity of the office in question, and the importance and gravity of the questions involved, that each of us should formally express our opinions. I, therefore, propose to state briefly some of the reasons which have brought my mind to such conclusion, although I cannot hope to add anything to the argument presented in the opinion of the majority of the Court.

The sole question involved in this case is, whether an election of a Circuit Judge by the General Assembly voting viva voce is a valid election. To determine this question, it is necessary to consider the provisions of the Constitution of this State relating to this subject, for the purpose of ascertaining whether that instrument requires such election to be made in any particular mode, and, if so, what that mode is. For no one will deny that if, by the terms of the Constitution,

the election is required to be made in any particular mode, that mode is essential to the validity of such election, and a person who has been elected in any other mode has no legal title to the office.

It cannot escape the attention of the most casual reader of the Constitution that there are two distinct modes of voting not only provided for, but prescribed by that instrument in express terms—the one by ballot and the other by the viva voce system. It is likewise equally certain that these modes of voting differ in one, at least, most essential particular, the one implying secrecy, the other involving publicity, and, as matter of history, we know that the respective merits of these two essentially different modes of voting have been, and are yet, the subject of discussion in every country where the right of suffrage exists. Does the Constitution then prescribe that either of these modes of voting shall be adopted in the election of a Circuit Judge? and, if so, which of them is so prescribed? To answer this question, we naturally turn to the fourth Article of the Constitution, styled the "judicial department," and in Section 13 of that Article we find it ordained in explicit terms that "for each circuit a Judge shall be elected by joint ballot of the General Assembly." Now, if this Section stood alone, I presume it could not be doubted that the only constitutional mode of electing a Circuit Judge would be by ballot. But it is said that in Section 24 of Article II it is ordained that "in all elections by the General Assembly, or either house

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thereof, the members shall vote *viva voce, and their votes thus given shall be entered upon the journals of the house to which they respectively belong," and that it is necessary to put a construction upon the word ballot as used in Section 13 of Article IV different from its primary and well-recognized signification in order that the two Sections may be brought into harmony, upon the well-recognized principle that in construing an instrument like a constitution we must look at it as a whole and so construe its several parts as will prevent conflict and bring about harmony; and that for this purpose, if it should become necessary, words and phrases may be read in a sense different from their usual and primary signification. It is, therefore, contended that the word ballot, as there used, signifies simply the act of voting, and is not designed to prescribe the mode of voting, and hence that the two Sections, thus read together, prescribe that the Circuit Judge shall be elected by the General Assembly, the two branches voting in joint assembly, but that the mode in which the voting is to be done must be by the viva voce system and not by ballot. It is very obvious that the word ballot is not used in this secondary sense anywhere else in the Constitution, for the only other place in which we have been able to find it is in the first Section of the eighth Article,—"in all elections by the people the electors shall vote by ballot,"—and there it is undoubtedly used in its proper and legitimate sense, as no one will for a moment contend that in any election by the people the electors would be at liberty to adopt the viva voce system. Now, while it may be admitted that, in a proper case, it is allowable, in construing a constitution, to attribute secondary significations to words and phrases differing materially from their usual and proper meaning in order to prevent a conflict between the different parts of such an instrument, yet this should not be done when such conflict can be avoided in a more natural and proper way, especially when, as we have seen, the rule contended for involves the necessity of giving a word of well-defined meaning not only different significations in different parts of the same instrument but a signification practically the very opposite of its original and usual meaning. Let us inquire, then, whether this apparent conflict between these two Sections of the Constitution cannot be reconciled in a more natural and proper way than by distorting the meaning of a well-defined term and attributing to the framers of the Constitution such gross carelessness and inattention to their duties as using the word ballot in one Section in its

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*proper and legitimate sense and in another Section in an opposite sense; for certainly voting by ballot and by the viva voce system are, for all practical purposes, precisely the opposite of each other.

There is no doubt of the correctness of the rule that where general terms, no matter how comprehensive they may be, used in a will, a statute or a constitution, are apparently in conflict with subsequent special provisions, such conflict may be avoided by regarding the latter as exceptions to the former, and that for this purpose Courts will read the two clauses as if words of exception were inserted. Applying this principle, then, to the two clauses under consideration, there is no real conflict, and they may be read together as providing that in all elections by the General Assembly the members shall vote viva voce, &c., except in the election of a Circuit Judge, in which case they shall vote by ballot. The fact that this is not the only instance in the Constitution in which this mode of reconciling an apparent conflict between different Sections becomes necessary indicates the propriety of adopting it rather than the one contended for by defendant's counsel. In at least one other instance there is an apparent conflict between other Sections of the Constitution, which can only be reconciled upon the principle which we have adopted in this case. In Section 10 of Article XIV it is ordained that the election for all State officers shall be held at the same time as is provided for

that of members of the General Assembly. It is very manifest that in order to avoid a conflict with other Sections of the Constitution this Section must be read in connection with such other Sections by incorporating words of exception, e. g., except such as are required to be elected by the General Assembly. It does seem, therefore, that the correct view to take of the two Sections of the Constitution which give rise to the controversy in this case (Section 24 of Article II and Section 13 of Article IV) is to regard the former as simply declaring a general rule for the guidance of the General Assembly, to which the latter furnishes an exception, and that while, as a rule, the viva voce system was to be the mode of voting in elections by the General Assembly, yet that, in case of the election of a Circuit Judge, an exception was established requiring that such election should be by ballot. This view is sustained by reference to the journal of the Convention which framed the Constitution, to which we are at liberty to refer in cases of doubt, in order to ascertain, if practicable, what intention was in the minds of those

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who used the words in ques*tion. This journal shows: 1. That the distinction between the different modes of voting—viva voce and by ballot—was fully understood and appreciated in that body; 2. That the 13th Section of Article IV, as originally adopted, contained the words "joint vote" instead of "joint ballot;" 3. That it was finally adopted in its present form. Why, then, was the change made from "joint vote" to "joint ballot," if these words are now to be construed as meaning the same thing? The conclusion is irresistible that the framers of the Constitution, appreciating, as we have seen that they did, the distinctive feature of the system of voting by ballot, in making the change from "joint vote" to "joint ballot," intended to make a substantial and not a mere verbal alteration. For in substituting for the word "vote," which was equally applicable to either mode of voting, the word "ballot," appropriate only to one of such modes, they unmistakably indicated their purpose that such mode only should be adopted, so far as that particular election was concerned.

It is said, however, that the words "joint ballot" must be construed as meaning merely the act of voting rather than the mode of voting, in order to avoid an absurdity, inasmuch as there can be no such thing as a joint ballot in the primary sense of the term ballot—a small ball or ticket,—and therefore, as here used, it must be given its secondary meaning. Without stopping to consider whether the word ballot has ever acquired such secondary meaning except in the loose and careless language of the public press or in the journals of deliberative assemblies, where abbreviated forms of expression are quite common, no instance of such meaning having been found in any work of authority emanating either from lexicographers or legal writers, or to show that the phrase "joint vote," as found in Section 2 of Article IV, is open to the same criticism, as it is quite as absurd to speak of joint vote as of joint ballot, it being just as impossible for two persons to give a joint viva voce vote as it is for them to put in the ballot box a joint ballot, as they can no more vote with a joint voice than they can with a joint ball or ticket, it is quite obvious that the phrase "joint ballot" means jointly by ballot, just as the phrase "joint vote" means jointly by viva voce vote. In other words, that the word joint was inserted in each instance merely for the purpose of showing that the two branches of the body which was to elect should act together, and not separately, as they do in performing their usual and ordi-

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nary duties. *Accordingly we find, by reference to the constitutional and legislative history of this State, as cited in the argument, that the phrases "jointly by ballot," "by ballot jointly" and by "joint ballot" have been indiscriminately used as interchangeable terms, signifying always the same thing as that above attributed to the words "by joint ballot" in the clause of the present Constitution now under consideration.

I am, therefore, most reluctantly forced to the conclusion that the defendant in this case, not having been elected in the mode prescribed by the Constitution, has no valid title to the office in question, and that upon the demand of the State, through its Attorney General, judgment of ouster must go against the defendant.

WILLARD, C. J., (dissenting.) The Constitution (Article II, Section 24,) provides that in all elections by the General Assembly, or either house thereof, the members shall vote "viva voce," and their votes thus given shall be entered upon the journals of the house to which they respectively belong.

Again, it provides (Article IV, Section 13,) "the State shall be divided into convenient circuits, and for each circuit a Judge shall be elected by joint ballot of the General Assembly."

It is contended by the State that the provision as to electing by joint ballot is equivalent to a declaration that the Circuit Judges shall be elected by ballot, and thus creates an exception to the generality of the words declaring that all elections by the General Assembly shall be by "viva voce" voting. The respondent, on the other hand, contends that the sole object of the declaration as to electing by joint ballot was to designate the body that should elect the Circuit Judges, namely, the united bodies constituting the General Assembly, joined together for that purpose in one body.

The rule of construction applicable to the case recognizes the fact that words express-

ing the universal application of a statutory requirement to all cases of this class to which it relates may be restricted not only by the use of technical words, importing exception or limitation, and by more general expressions having an equivalent effect and directly disclosing an intention to create exceptions or limitations, but also by implication inferring such intent as a necessary means of reconciling provisions otherwise inconsistent.

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*It is only as a necessary implication that such a conclusion can be drawn inferentially. It is only the impulsive force of necessity that can justify an encroachment upon the direct terms of a rule of universal application.

It follows that when the law-making authority has established a rule in terms extending to all cases of the class embraced in it, and has not subjected it to express limitation or exception, an exception or limitation can only be implied where the provisions from which this implication is sought admit of no reasonable interpretation consistent with the direct sense of the terms of the general rule.

It would also follow that where the sense and intention of the words claimed to operate as a limitation are of doubtful import, admitting of different constructions, some consistent with the general rule and others inconsistent with it, an exception or limitation cannot be implied.

I am satisfied that at the least the intention of the Constitution involved in the present case is doubtful. This might be inferred from the fact that the Legislature for eight years immediately succeeding the adoption of the Constitution adopted the sense claimed for it by the respondent, and that the entire circuit judiciary was organized during that time upon that understanding of the Constitution.

It is not an unreasonable construction that the framers of the Constitution may have intended by the language of Section 13, Article IV, to merely designate the body by which the Circuit Judges should be elected, leaving the mode of election to be determined by that Article and Section that dealt directly with that subject. Whether such was their actual intention, it is not important, under the view I take of the case, to inquire, it being sufficient for the purposes of the present case to ascertain that such is not in itself an unreasonable construction.

If this be the case, we are bound to adopt that construction which is in harmony with the antecedent provision prescribing the mode of voting in all cases of election by the General Assembly. In order to warrant an encroachment upon the terms of the general rule, we must find a construction inconsistent with that general rule, for it is only by the fact of such inconsistency that we can compel the terms of the general rule to give way before external force. We are not at liberty to

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raise up a force to antagonize a *great fundamental provision of the Constitution on speculative grounds or verbal refinements, especially where that fundamental provision is intended to apply to a principle inherent in the nature of the exercise of representative powers in government.

It is easy to see that the provision as to viva voce voting by the representatives of the people was based upon the general idea that the voting of representatives should be open and responsible, as they act, not in their own interest, but in the interest of the public. This principle is put in opposition to that of secret voting, which is clearly appropriate when the voter acts from his individual choice, arising solely from his sense of personal duty or interest.

It has been said that this is a speculative opinion merely, about which there have been differences of opinion, but it is clear that the Constitution of 1868 took this question out of the forum of speculative opinion and placed it among the cardinal principles on which the government should be administered, and we are bound to consider it in that light.

I regret that I am compelled to differ from the majority of the Court, but it seems to be the inevitable consequence of my understanding of the rules and spirit of constitutional construction.

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9 S. C. 147

GADSDEN v. WHALEY.

(Columbia. Nov. Term, 1877.)

[*Equity* ⟸381.]

In "cases of chancery" all the issues may be referred by the Circuit Judge to a jury, but their verdict does not conclude the case, the parties having a right to the opinion of the Circuit Judge both on the law and the facts. Their verdict is intended for the purpose of enlightening the conscience of the Judge, and no judgment can be entered thereon until he has given his opinion upon the facts.

[Ed. Note.—Cited in Charlotte, C. & A. R. Co. v. Earle, 12 S. C. 54; Ivy v. Clawson, 14 S. C. 273; Cooper v. Smith, 16 S. C. 333; Brownlee v. Martin, 21 S. C. 402; Meetze v. Charlotte, C. & A. R. Co., 23 S. C. 16; Ryttersen v. Allison, 28 S. C. 85, 5 S. E. 218; Id., 30 S. C. 537, 9 S. E. 656; Keenan v. Leslie, 79 S. C. 476, 60 S. E. 1114.

For other cases, see Equity, Cent. Dig. §§ 813–817, 943; Dec. Dig. ⟸381.]

Before Reed, J., at Charleston.

This was an action by E. H. Gadsden and Rebecca, his wife, against William Whaley, as executor of Joseph Whaley, deceased.

The complaint alleged that the said Joseph Whaley, who was the grandfather of Mrs. Gadsden, held in his lifetime a sum of

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*money amounting to $25,577, of which he had by acts and declarations constituted him-

self the trustee of his said grand-daughter, and it demanded an account from the defendant as executor of the said Joseph Whaley and payment of the same to the plaintiff, Rebecca Gadsden.

The answer of the defendant put in issue the material facts of the case.

All the issues were referred to a jury, who found a general verdict for the plaintiff for dollars, and upon this verdict, without further proceedings, judgment was entered for the plaintiffs.

The defendant appealed upon the ground, amongst others, that "His Honor the presiding Judge submitted the whole case to the jury to find a general verdict upon the issue involved, notwithstanding a motion by defendant that the case was one essentially of equity jurisdiction and could be properly tried by the Court alone, the jury being competent to do no more than to find any particular fact or facts doubtful in the mind of the Judge, and which he required the aid of the jury to ascertain in order to enable him to form his judgment."

[For subsequent opinion, see 14 S. C. 210.]

Rutledge & Young, for appellant.

Porter & Connor, contra.

January 23, 1878. PER CURIAM. This case presents a preliminary question which it is necessary to decide before the merits of the case proper can be considered in this Court. That question is whether the Circuit Judge erred in failing to give his own opinion upon the issues of fact involved, and whether the judgment, which is based solely upon the verdict of the jury, to whom the issues were referred, can be allowed to stand.

It is very clear that the case was what is commonly called an equity case, or to speak more correctly, a case in which the relief demanded was formerly only obtainable in a Court of equity, and therefore it falls among the class denominated in the Constitution as "cases of chancery." In that class of cases as this Court has heretofore determined in the case of Flinn & Hart v. Brown, (6 S. C., 209,) the parties have a right to the opinion of the Circuit Judge, notwithstanding his right to refer issues of fact in such cases to a jury for the purpose of enlightening his conscience; but "the verdict of the jury is not to be accepted as the conclusion which is

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*to govern and control the case, and through the medium of which the judgment is to be pronounced in favor of one side or the other. The judgment in such a case must be the result of the conclusions of the Judge both on the law and the facts." The judgment in this case being based solely upon the verdict of the jury, and not upon the decision of the Circuit Judge, must be set aside, and the case remanded for further proceedings in the Circuit Court.

9 S. C. 149

STATE v. TEAGUE.

(Columbia. Nov. Term, 1878.)

[*Evidence* ⇐157.]

In an action against the executor of a County Treasurer and his sureties for account of moneys collected, the tax duplicate is not the only legal and proper basis of charge; other evidence may be received in the first instance.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 462; Dec. Dig. ⇐157.]

[*Evidence* ⇐250.]

The cash books of the County Treasurer are a proper source of evidence to charge him and his sureties with moneys collected and not accounted for.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 977; Dec. Dig. ⇐250.]

[*Counties* ⇐101; *Evidence* ⇐157.]

Where the cash books of the County Treasurer are given in evidence against him and his sureties in an action for account of moneys collected, the entries therein of payments made are not competent evidence, in the first instance, in their behalf. In cases where the law directs the money to be paid only on the warrants or receipts of other public officers, such warrants or receipts must be produced or their loss accounted for.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 158; Dec. Dig. ⇐101; Evidence, Cent. Dig. § 466; Dec. Dig. ⇐157.]

[*Principal and Surety* ⇐160.]

The contract of the sureties on the official bond of a County Treasurer being that he will discharge the duties of his office, it follows that any evidence that is competent to charge him is competent to charge them, especially where they are parties to the action.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. § 436; Dec. Dig. ⇐160.]

[*Appeal and Error* ⇐966.]

Questions relating to adjournments of a reference are matters within the discretion of the Circuit Court, and are seldom, if ever, regarded as grounds for an appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3837; Dec. Dig. ⇐966.]

Before Maher, J., at Barnwell, June, 1876.

This was an action by the State of South Carolina against D. H. Teague as executor of the last will and testament of Isaac N. Teague, deceased, George E. Steedman, M. F. Molony, Simon Brown, P. W. Farrell and Martin Keeler.

Isaac N. Teague had been County Treasurer of the County of Barnwell from the 9th day of March, 1871, until the 1st day of January, 1873, and the defendants above named, with the exception of his executor, were sureties on his official bond, which bore date the said 9th March, 1871, and was conditioned that he, the said "Isaac N. Teague, shall well and truly perform the duties of the said office as now or hereafter required by law."

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*Isaac N. Teague, during his continuance in office, had collected large sums of money on account of taxes and for licenses issued under the Act approved March 13th, 1872, for a considerable part of which he had not accounted.

This was an action upon his official bond to compel his executor and his sureties to account for the money so collected. The penalty of the bond was ten thousand dollars.

The case was referred to a Referee, who took testimony and reported a balance due on the accounts of the said I. N. Teague of $25,191.62, of which amount the sureties were liable for ten thousand dollars.

The defendants excepted to the report on a number of grounds, which need not be stated in full, the facts upon which the case was decided by this Court sufficiently appearing in the judgment of the Court itself.

His Honor the Circuit Judge confirmed the report of the Referee with slight modifications, and the defendants, the sureties above named, appealed.

Thompson, for appellants.
Aldrich, Aldrich, Hutson, contra.

January 28, 1878. The opinion of the court was delivered by

McIVER, A. J. This was an action to recover from B. H. Teague, as executor of Isaac N. Teague, deceased, late County Treasurer of Barnwell County, and the other defendants, as sureties of said Isaac N. Teague, on his official bond, various sums of money alleged to have been collected by him, as well for the Counties of Barnwell and Aiken as the above named plaintiff, and not accounted for. The record filed in this Court, though quite voluminous, presents but few questions for our consideration. The first error complained of is that the Referee to whom the issues in the action were referred should have regarded the tax duplicate as the legal and proper basis of charge against the County Treasurer and any other evidence as secondary. We are not aware of any statute declaring such a rule of evidence in conducting an investigation of the fiscal transactions of a County Treasurer, and, indeed, it would be very extraordinary if such were the case, for, if so, then the Treasurer would be relieved from accountability for various items, *such as the school fund, the funds derived from licenses and fines, which have no place upon the tax duplicate.

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The next ground of complaint is that the cash books of Isaac N. Teague, deceased, are secondary evidence, and are not admissible so long as "the statutory basis of charge is available."

Besides the considerations which have just been adverted to for the purpose of showing that the tax duplicate, which we understand as designated in this exception by the terms "statutory basis of charge," is not the only evidence in such a case, it is difficult to perceive what objection a party could properly make to the introduction of his own admissions in evidence against him, especially when such admissions are in writing, entered in a book, which, it is but reasonable to suppose, would be kept with all due care. And when, in addition to this, it appears, from the testimony of Hewitt, that Teague, in his lifetime, had stated "that the debits in these books (referring to the cash books) represented moneys received by him as County Treasurer," there cannot be a doubt that these books constituted a proper source of evidence.

It is said, however, that, granting this to be so, if they are received in evidence they should be received as evidence for as well as against the County Treasurer,—that is, if the debit side is to constitute evidence to charge him, the credit side must be received as evidence to discharge him.

Without entering upon the discussion of the general question as to when and in what cases the rule contended for applies, for it certainly does not apply in all cases and under all circumstances, it is sufficient for us to say that the Treasurer is a public officer, who is only allowed to pay out the public money for the purposes, in the manner and upon such authority as the law prescribes; and if in any of these respects the law is not complied with, such omission constitutes an official default, for which both the officer and his sureties are liable. And as the County Treasurer could not lawfully pay out the County funds, except upon the warrant of the Board of County Commissioners, only in certain specified cases, not necessary to be mentioned here, as they do not affect the inquiry which we are pursuing, even before the passage of the Act imposing a penalty for so doing, or the school fund, except upon the approval of the County School Commissioner, or the State funds, except upon the receipt of the State Treasurer, any other evidence of such payments would be secondary and inadmissible until the *proper foundation has been laid for the admission of such secondary evidence, which it is not pretended there was any offer or attempt to do in this case.

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The appellants insist, however, that even if the Treasurer himself cannot successfully sustain the objection to the admissibility of his cash books, that the sureties can, so far as they are concerned. This objection proceeds from ignoring the terms of the condition of the official bond. The sureties as well as the principal bind themselves, not that they, but that the principal, shall perform the duties of his office in the manner required by law. Their contract is simply an undertaking that the principal will perform his duties. Hence, in an action founded on the breach of such contract the conduct of the sureties is not in question. The only inquiry is whether the principal has failed to perform any one or more of such duties, and his admission of such failure is legal and proper evidence of the fact in issue, not only against him, but against his sureties al-

so, when they are, as in this case, parties to the proceeding.

In Ordinary v. Condy, (2 Hill, 313,) Harper, J., says: "It seems to be matter of absolute necessity in many cases that the admissions of the principal, or some of his acts which are equivalent to admissions, should be admitted to charge the sureties."

Indeed, in a somewhat analogous case, the Courts of this State have gone even further and held that, in an action against the sureties upon an administration bond, the decree of the Ordinary fixing a default upon the administrator, even under a proceeding to which the sureties were not parties, is at least prima facie evidence against the sureties, and, unless it is rebutted or shown to be erroneous, will be conclusive.—See Lyles v. Caldwell, 3 McC., 225; Shelton ads. Cureton, 3 McC., 412; The Ordinary v. Condy, 2 Hill, 313. In this case there was no offer or attempt to introduce any evidence tending to show that the admissions of the County Treasurer, as derived from his cash books, were not true or were erroneous, the principal evidence relied upon being the credits which he had given himself on his cash books and certain papers purporting to be vouchers, many of which were so manifestly illegal and defective that no attempt has been made here to sustain them.

The next error complained of, in improperly allowing an amendment of the pleadings, is of no practical importance as we are given to understand at the bar, and therefore has received no consideration either in the argument or at the hands of the Court.

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*The complaint made by appellants of the error committed by the Referee in adjourning the reference is sufficiently disposed of by the remark that such matters rest in the discretion of the Court below, and are seldom, if ever, regarded as any ground for interference by this Court. The last error complained of, which has been urged in this Court, is designated in such general and indefinite terms as renders it difficult for us to understand precisely the cause of complaint. The report of the Referee is accompanied with exhibits showing the items from which the accounts are made up, as from taxes for the various years mentioned, from licenses, from fines, from State Superintendent of Education, from poll taxes, &c., and it is difficult to conceive what more could have been required. It is for the parties who allege errors to point them out specifically, and this the appellants have failed to do. This disposes of all the exceptions which have been urged before this Court; the remaining exceptions, being the same as those taken to the Referee's report, are sufficiently disposed of by the decision of the Circuit Judge.

The motion is dismissed.

WILLARD, C. J., concurred.

9 S. C. 153

LEVY v. WILLIAMS.[1]

(Columbia. April Term, 1876.)

[*Appeal and Error* ⇐797.]

The Court has power at any time during a term to entertain a motion to dismiss an appeal, though the case should not, in regular course, be entered on the docket before a succeeding term.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3149; Dec. Dig. ⇐797.]

[*Appeal and Error* ⇐150.]

An executor has an appealable interest in an order of the Circuit Court affecting the property and the trusts of the will.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 941; Dec. Dig. ⇐150.]

[This case is also cited in De Leon v. Barrett, 22 S. C. 416, as to the facts.]

Before Reed, J., at Charleston, May 11, 1876.

This was an action by Charles F. Levy, his wife and others, against George W. Williams and others, executors of the last will and testament of Jacob Barrett, deceased.

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*The following order was made by His Honor:

"On hearing the report of George Lamb Buist, Special Referee, filed April 28, 1876, the exceptions in behalf of the executors, and the arguments of counsel, it is ordered that said report be confirmed in all respects, except as to the costs, which are to be charged upon the estate generally.

"It is further ordered and adjudged that the executors do pay to James B. Campbell the sum of twenty-five hundred dollars, and that the costs be paid to the parties respectively entitled, and that they pay to Laura L. Levy an extra one-eighth part of the income as recommended by the report; and to enable the executors to make these payments, they are authorized and directed to sell sufficient of the personal estate, the same to be charged against the extra share referred to in the report, and the income of that share hereafter to be diminished proportionably."

The executors appealed, and this was a motion to dismiss the appeal.

Simons & Siegling, for appellants.

Campbell & Campbell, for the motion.

July 31, 1876. The opinion of the Court was delivered by

MOSES, C. J. We do not see how we are concluded by any rule of the Court from entertaining at any time, when in term, a motion to dismiss an appeal, though the case in regular course will only be entered on the docket of the succeeding term. This is a power which the Court should not deprive itself of exercising on proper occasions, unless forced to do so from the want of legal rights.

[1] NOTE.—This case belongs properly to Vol. VIII, but no brief could be procured in time for its insertion therein.

Its interposition might be very necessary to prevent any undue advantage by time or otherwise to a frivolous appeal. It should be retained, too, as a check upon appeals by mere nominal parties, having no interest in the case to be affected by the judgment of the appellate tribunal, but who seek it from vexatious or other improper motives.

The ground on which the motion is asked to dismiss the appeal of the executors is "for the want of any appealable interest or duty in the appellants," under the order of May 11, 1876.

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*By the will of the testator, Jacob Barrett, certain real estate was specifically devised to each of his children at a valuation fixed by him. On the final disposition of his estate the share assigned to each child was to be charged with the sum or valuation so annexed. This final division was to embrace all the rest and residue of his real and personal estate, of whatever character or kind, which he left "in trust of" his executors for the benefit of his children and grandchildren, the interest of all such property to be invested in safe securities and kept together until (by the codicil) ten years after his death, then the final division to be made, etc.

The title to the rest and residue vested and remained in the executors, as trustees, for the "benefit of his children and grandchildren." The executors were to invest the interest in safe securities, to be kept together until the final distribution of the estate. The trust imposed by the will on the executors was to retain the property until the period fixed by the will, when it was to be transferred to the hands of the devisees and legatees.

The order appealed from acts directly on the property, diverts it from the purpose for which it was to remain under the management of the executors, and directs such an amount of the personal property to be sold to meet the sum decreed by the order to be paid as a fee to the counsel of Mrs. Levy and to be charged against the extra share heretofore allowed her by the judgment of the Court. It is the duty of the executors to carry out the purpose of the testator in the mode declared by the will, which is the power under which they act. It is true, in a proper case made, a Court of competent jurisdiction may take control of the estate, or instruct the executor as to the manner in which he is to execute the will. Until, however, so ordered, he must conform to its provisions, and when directed to do otherwise by the Court its order is his protection. He is not bound, however, to follow the action of a Circuit Court, directing his administration of the estate in a particular manner, but has the right to seek the judgment of the appellate Court, which has the power to reverse or modify it.

While an executor may not be bound to appeal, and may, therefore, be excused for not doing so, we cannot see how he can be prevented from questioning by appeal the order of a Court which requires him to dispose of a part of the estate directed by the will to be kept in his hand for a certain designated time and purpose. If it should be held that an executor has no right to ask the judg-

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*ment of the Court of last resort on an order of the Court below, made by consent even of all the devisees and legatees, but against his concurrence, the object of the testator in devolving upon him by the will the administration of the whole estate to the uses and on the condition and limitations expressed might be wholly perverted and defeated.

The executors here were charged with certain trusts, and they had the right to appeal from any order changing or in any way affecting their execution according to the intent of the testator apparent on the will.

All that we are to be understood as deciding is that the executors have such an interest in the order of May 11, 1876, as permits them to be heard by appeal in this Court. Any further judgment would be premature.

The motion is dismissed.

WRIGHT, A. J., concurred.

WILLARD, A. J., absent at hearing.

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9 S. C. 156

STATE OF SOUTH CAROLINA v. BUTTZ.

(Columbia. April Term, 1877.)

[1. *Officers* ⇐55.]

A Solicitor who accepts the office of Representative in Congress thereby vacates his office of Solicitor.

[Ed. Note.—Cited in State v. Coleman, 54 S. C. 284, 32 S. E. 406.

For other cases, see Officers, Cent. Dig. § 79; Dec. Dig. ⇐55.]

[2. *Officers* ⇐55.]

Where one holding an office accepts another which is incompatible therewith, he thereby vacates the first.

[Ed. Note.—For other cases, see Officers, Cent. Dig. §§ 76–84; Dec. Dig. ⇐55.]

[3. *Officers* ⇐30.]

There is nothing in the Constitution of this State which abrogates the common law rule that the same person cannot hold at the same time two incompatible offices.

[Ed. Note.—For other cases, see Officers, Cent. Dig. §§ 37–43; Dec. Dig. ⇐30.]

[4. *Officers* ⇐30.]

The office of State Solicitor and Member of Congress are incompatible with each other.

[Ed. Note.—For other cases, see Officers, Cent. Dig. §§ 37–43; Dec. Dig. ⇐30.]

This was an information filed in the Supreme Court to oust the defendant from the office of Solicitor of the First Circuit of the State.

The case is fully stated in the opinion of the Court.

[For subsequent opinion, see State ex rel. Buttz v. Comptroller General, 9 S. C. 259.]

W. Jervey, for relator:

It appears from the evidence that Charles W. Buttz was a candidate for the office of Solicitor of the First Judicial Circuit at the

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*election of November 7th, 1876, and, claiming to have been elected, filed his bond, and on November 30, 1876, received from Daniel H. Chamberlain, Governor of South Carolina, his commission as such Solicitor; and that subsequently, to wit, at the first sitting of the Court of General Sessions for Charleston County, in said Circuit, he appeared and duly entered upon the discharge of the duties of said office. It further appears that the said Charles W. Buttz was at the same election likewise a candidate to fill the unexpired term of Representative of the State of South Carolina to the Forty-fourth Congress, and that after he had received his commission as Solicitor as aforesaid and entered upon the duties of the said office, he did, on or about the 23d day of January, 1877, qualify as Representative to Congress and took his seat as such. We claim:

1st. That the two offices of Solicitor of the First Judicial Circuit of the State of South Carolina and Representative of the State of South Carolina in Congress are incompatible; and,

2d. That two incompatible offices cannot be performed by one and the same individual; and the acceptance of the latter of two such offices forfeits and makes vacant the former.

1. As to the incompatibility of the two offices—

5 Bac. Abr., 205: "Offices are said to be incompatible and inconsistent, so as to be executed by the same person, when, from the multiplicity of business in them, they cannot be executed with care and ability, or when their being subordinate and interfering with each other it induces a presumption they cannot be executed with impartiality and honesty."—4 Inst., 100.

Under the first division of this definition come the two offices in question. The duties to be performed in the one require the residence of the incumbent in Washington for at least a considerable portion of the year, besides which he is at all times subject to the call of the United States government for a meeting of Congress; while it is required by law that the other (the Solicitor) shall reside within his Circuit. (Con., Art. IV, § 29.) And the amount of business in either position would make it impossible for the same individual to execute the duties of the other office with "care and ability."

Nor can the incumbent claim that while attending to his duties in the one office in his own person he may conduct the business of the other by deputy. It will not be contended that he may send his deputy to Congress.

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*Can the Solicitor perform his office by deputy?

5 Bac. Abr., 207: "A judicial officer cannot, it is said, make a deputy, unless he hath a clause in his patent to enable him, because his judgment is relied on in matters relating to his office, which might be the reason of the making of the grant to him. Neither can a ministerial officer depute one in his stead if the office be to be performed by him in person; but when nothing is required but a superintendency in the office he may make a deputy."

The office of Solicitor is instituted by the fourth Article of the Constitution, which treats of the "judicial department:" and it is clear, from a consideration of his duties, that he is in fact, as well as in design, a judicial officer. To his judgment and judicial discretion, in the first instance, are submitted all questions involving the lives and liberties of the people of his circuit, and on his personal attainment and knowledge of the law, to a great extent, depends the protection of the people against crime and lawlessness. Even if, however, it be denied that the Solicitor hold a judicial office, yet the office is certainly one of "trust and confidence," whereof there can be no deputy.—2 Jacobs' L. D., 252. Furthermore, with regard to certain other elective officers, such as Sheriff, Clerk and Coroner, there are statutory provisions authorizing the appointment of deputies, (Rev. Stat., Ch. XX, § 11; Ch. XXII, § 1; and Ch. XXI, § 6,) while no such power is given the Solicitor; on the contrary, the Circuit Judge is authorized by law to appoint a Solicitor pro tem. in the event of an absence of the incumbent or a temporary vacancy.

2. Two incompatible offices cannot be held by one and the same individual, and the acceptance of the latter of two such offices forfeits and makes vacant the former.—5 Com. Dig., 190. "So the grant of an office to one who has another office incompatible is not good, for the first office will thereby be void."—Doug., 398. "So a man shall lose his office if he accept another office incompatible."—Dyer, 197.

In The King v. Godman, it is stated "that if the two offices are incompatible then the acceptance of the higher, ipso facto, vacates the other."—Doug., 398, (note). And this rule, says Lord Coke, "is of that importance that if all civil offices were only executed, each by a different person, it would be for

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the good of the com*monwealth, advancement of justice and preferment of deserving men."

In Milward v. Thatcher, Buller, J., says: "If they be incompatible, the election to the latter office is good, because the acceptance of the second vacates the first office. * * *

If the two offices be incompatible, the acceptance of the latter vacates the former."

And, likewise, Amherst, J., in the same case says: "I think that the acceptance of the latter does absolutely and ipso facto avoid the former, although the superior office, if they be incompatible."—2 T. R., 81.

And in The King v. Sir W. Trelawney, Lord Mansfield says: "It seems to me very strong that if these two offices were incompatible the acceptance of the latter would imply a surrender of the former."—3 Burr., 1616.

So much for the English law on this subject. In America, where offices are not in the gift of a crown, but where the sovereignty resides in the people, this plurality of office is looked upon with even more disfavor than in England. Here, too, there is no power to compel a person to accept an office. He cannot prevent the people voting for him for any number of offices they see fit; but he is not obliged to accept any one of them, and if he does he must elect which office he will accept if they are incompatible. This distinction is illustrated by the case of Rex v. Patterson, 4 B. & Ad., (24 Com. Law R., 11,) wherein it is decided that the "acceptance of an incompatible office does not operate as an absolute avoidance of a former office in any case where the party could not divest himself of that office by his own act." This exception does not find expression in our books, and is not necessary in the United States, where every man is free to accept or resign any office to which he may be elected without the permission or acquiescence of the sovereign power.

It is laid down in McCrary's Am. Law of Elections, Section 253, as the general rule, that "an office may be abandoned by removal from the State, County or district to which the officer is restricted by the law of his office; by accepting an incompatible office; or by the relinquishment of any express qualification; or by the assumption of any absolute disqualification, or by resignation."

McCrary's Am. Law of Elections, Sections 238, 239: "Whether the incumbent of an office

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becomes disqualified by accepting *another depends upon the question whether the law forbids the holding of the two offices by the same person; and if not, then upon the further question whether the functions and duties of the two offices are incompatible. * * * If there is a statutory or constitutional provision prohibiting the same person from holding both offices at the same time, then, of course, the question of their incompatibility does not necessarily arise, for in such a case the acceptance of the second is ipso facto the abandonment and resignation of the first, though the duties of the two may be entirely compatible. But if the statute and Constitution are silent upon the subject, then the question whether the two offices can be held at the same time by the same person depends upon their compatibility."

For example, suppose A. B. were the successful candidate for Sheriff and Clerk of the Court at the same election. There is no constitutional nor statutory provision forbidding A. B. from accepting and discharging the duties of both these offices; and yet it would hardly be contended that he could act in both capacities and draw the emolument of both offices at the same time, because these offices are incompatible; and the case in point is even more exaggerated than this, because the duties of Sheriff and Clerk may be performed in the same County, perhaps in the same building, while the duties of the Solicitor and member of Congress must be performed in different portions of the United States. Moreover, these two offices are in different departments of government, the one being judicial and the other legislative, the holding of which by one person is contrary to the spirit of our laws as evinced by that constitutional provision which provides that the three departments of government "shall be forever separate and distinct from each other, and no person or persons exercising the functions of one of said departments shall assume or discharge the duties of any other."—Con., Article 1, § 26.

Extract of Dawes's Report on cases of Schenck and Blair in United States House of Representatives.—McCrary, Sec. 242.

McCrary, § 243: "There can be no doubt but that the accepting of the office of Representative in Congress and entering upon the discharge of its duties amounts to a resignation and abandonment of any incompatible office previously held, and hence a formal resignation is not necessary in any such case."

People, ex rel. Martin, v. Board of Police. —35 Barb., 553.

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*Melton & Wingate, contra:

1. The right of the elector in this State to hold more than one office, State or Federal, as a general proposition, is definitively declared by the express provisions of the Constitution.

In Section 21, Article 1, it is provided that "every inhabitant of this Commonwealth possessing the qualifications provided for in this Constitution shall have the right to elect officers and be elected to fill public office." And in Section 7, Article VIII: "Every person entitled to vote at any election shall be eligible to any office which now is, or hereafter shall be, elective by the people in the County where he shall have resided sixty days previous to such election, except as otherwise provided in this Constitution or the Constitution and laws of the United States." Whilst there is no provision in general terms restricting the right so declared to a single office, there are several exceptions

limiting the right to hold more than one office in particular instances, which serve, whilst declaring what offices are to be deemed incompatible, to approve the rule that, as a general proposition, offices are not incompatible. Incompatibility of office is the exception, not the rule. These limitations are:

a. No person exercising the functions of any one of the three departments of the government of this Commonwealth, legislative, executive or judicial, shall assume or discharge the duties of any other.—Art. I, § 26.

b. Any person who shall fight a duel, or send or accept a challenge for that purpose, &c., shall be deprived of holding any office of honor or trust in this State.—Art. I, § 32.

c. No person is eligible to a seat in the Senate or House of Representatives who has not been a resident of his County for three months next preceding the election, or who has been convicted of an infamous crime. Senators shall be at least twenty-five years of age.—Art. II, § 10.

d. No person shall be eligible to a seat in the General Assembly whilst he holds any office of profit or trust under this State, the United States, or any of them, or under any other power, except officers in the militia, Magistrates or Justices of inferior Courts whilst such Justices receive no salary. And if any member shall accept or exercise any of the said disqualifying offices he shall vacate his seat.—Art. II, § 28.

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*e. No person shall be eligible to the office of Governor who denies the existence of a Supreme Being; who is not thirty years of age, and has not been a citizen of the United States and a citizen and resident of this State for the two years next preceding the day of election. No person while Governor shall hold any office or commission (except in the militia) under this State, or any other power, at one and the same time.—Art. III, § 3. The Lieutenant Governor shall be possessed of the same qualifications.—Art. III, § 5.

f. A member of the Senate or House, being chosen and acting as Governor or Lieutenant Governor, shall thereupon vacate his seat.—Art. III, § 8.

g. The Judges of the Supreme Court and Circuit Courts shall not hold any other office of trust or profit under this State, the United States or any other power. Such Judge must be a citizen of the United States, thirty years of age and a resident of the State for five years next preceding his election.—Art. IV, §§ 9, 10.

h. A Sheriff or Coroner is disqualified for a second term if it appear that he is in default for moneys collected by virtue of his office.—Art. IV, § 30.

i. No person shall be allowed to hold office who is or may be disqualified therefor by the Constitution of the United States until such disqualification be removed, or while in any alms house or asylum, or of unsound mind, or confined in any public prison.—Art. VIII, § 2.

j. Any officer charged with the safekeeping, transfer and disbursement of State, County and school funds who shall embezzle the same shall be deemed guilty of felony, and upon conviction, "shall be disqualified from ever holding any office of honor or emolument in this State," unless such disability be removed by the General Assembly.—Art. IX., § 15.

k. No person shall be elected or appointed to any office in this State unless he possess the qualifications of an elector.—Art. XIV, § 1.

l. No person who denies the existence of a Supreme Being shall hold any office under this Constitution.—Art. XIV., § 6.

Several of these limitations affect the eligibility of the elector in other relations, but most of them have direct reference to incompatibility of offices: 1. The offices of the different departments are incompatible; 2. That of a member of either branch of the General Assembly is incompatible with any other, save in three particulars; 3. The Governor cannot hold any other office, except in

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the *militia; 4. The Lieutenant Governor is subjected to the like qualifications; 5. The member chosen Governor shall vacate his seat; 6. Judges are disqualified for any other office. And it will further be observed that in several instances the same disqualifications are repeated in different Articles with emphasis.

The framers of the Constitution have thus given to this subject—the qualifications for office—especial consideration, and provided with exceptional care exact and repeated expression of the particulars in which offices are forbidden to be held by the elector and of the instances in which they shall be deemed incompatible.

Expressio unius, exclusio alterius, is an acknowledged canon of constitutional construction. As expressed by Judge Story (Const., § 448,) "A specification of particulars in an instrument is the exclusion of generals," and "a negative provision in a particular case admits the existence of the same thing in every other case." As Lord Bacon has it, "an exception strengthens the force of a law in cases not excepted." Judge Story, Const., § 449: "There can be no doubt that an affirmative grant of powers in many cases will imply an exclusion of all others. As for instance: The Constitution declares that the powers of Congress shall extend to enumerated cases. This specification of particulars evidently excludes all pretensions to a general legislative authority, because an affirmative grant of special powers would be absurd as well as useless if a general authority were intended." The correlative proposition holds for a stronger reason—the denial

of a right in particulars affirms the right in general; because if the right did not exist in general, the denial in special instances "would be absurd as well as useless." It was easy for the Constitution to declare, if it were so intended, that no elector should hold two offices, State or Federal, at the same time, except officers of the militia, Magistrates and Judges of inferior Courts, and this would have covered the whole ground in a single sentence. It is not so written, because it was intended that the elector should have the right to hold more than one office, except in the several particulars here and there enumerated.

But "where the intent is plain, nothing is left to construction," says Chief Justice Marshall.—2 Cranch, 386. The Constitution declares in express terms, easily understood, that the elector shall be eligible to any office "except as otherwise provided in this Constitution;" and the cases where he is not eligible because of holding an incompatible office are distinctly "otherwise provided in

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this *Constitution." The whole question is here concluded, if the Constitution is to be the supreme law of this Court.

The legislative power to add to or restrict these provisions is equally denied. They may be restricted by either the laws or the Constitution of the United States; but, in the State, by the Constitution alone. But strike out this exception and the provision would remain complete and conclusive. "When the Constitution defines the circumstances under which a right may be exercised or a penalty imposed, the specification is an implied prohibition against legislative interference to add to the condition or to extend the penalty to other cases. On this ground it has been held that where the Constitution defined the qualifications of an officer it was not in the power of the Legislature to change or superadd to them unless the power to do so was expressly or by necessary implication conferred by the Constitution itself."—Thomas v. Owens, 4 Md., 189; Cooley Con. Lim., *64, and cases there cited. Here the power is not only not conferred, but is specifically denied.

If the authority to add to these limitations or to prescribe another rule of qualification for office be denied to the legislative power, either expressly or by implication, will it be conceded to the Court? May the Court find a law higher than the Constitution and set aside the express provisions of the fundamental law in obedience to its own conception of public policy?

It is said to be curious that, in the absence of any express provision in the Constitutions, the judiciary should have assumed to exercise the extraordinary power of checking Legislatures to the extent of declaring statutes to be null and void when passed in violation of constitutional restrictions.—Potter's Dwarris, 366. But the jurisdiction in this respect is now universally conceded, and it is said that "those who controvert the principle that the Constitution is to be considered in Court as a paramount law are reduced to the necessity of maintaining that Courts must close their eyes on the Constitution and see only the law. This doctrine would subvert the very foundation of all written constitutions."—Ib., 365. But it is not for the Courts to hold a law to be void which is not prohibited by the Constitution, because in their opinion it violates the spirit of our institutions or impairs any of those rights which it is the object of a free government to protect; nor can they declare it to be unconstitutional because it is morally wrong or unjust. The Constitution itself contains all the inhibitions that exist against

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*legislative action. If the Courts can add to these, they alter this fundamental instrument, which they are not authorized to do, and themselves become the aggressors, and violate both letter and spirit of that organic law as grossly as the Legislature could.—21 Penn., 167. If the Courts can add to the things that are inhibited, they can also take away. If they can change at all, they can destroy entirely. They cannot supply what they may suppose a casus omissus in the Constitution, nor declare unconstitutional an Act which they conceive to be wrong, unjust or oppressive. They cannot inquire whether the Legislature has violated the genius of government, or the general principles of liberty, or the rights of man, or whether these acts are wise or expedient, but only whether the Legislature has transcended the limits prescribed by the fundamental law.—Potter's Dwarris, 369, and cases cited. The restrictions (or other provisions) may be regarded as inconvenient and as interfering with favorite policies, but in this respect the remedy lies in the power of amendment rather than by a hazardous extension of the power of construction, which would be in effect the making of a constitution the people have not made. Such an act of construction by a Court would be a usurpation of functions not committed to them. "The sound principle is to declare ita lex scripta est; to follow and obey. It should be, so far at least as human infirmity would allow, not dependent upon the prejudices and excitements growing out of particular policies, nor upon the passions of parties of particular times, but the same yesterday, to-day and forever."—Story Con., § 426.

If this be the rule of judicial action in reference to statutes, and they are beyond the power of the Court except where they conflict with the Constitution, where is the warrant of authority upon the like pretexts to disregard the Constitution itself? To do this, we repeat, is to assume a right to change the Constitution; to supply what we might conceive to be its defects; to fill up every

casus omissus; and to interpolate into it whatever in our opinion ought to have been put there by its framers.—Sharpless v. The Mayor, 21 Penn., 147.

The argument of such a proposition would be unpardonable, if it were possible to conceive any other upon which the Attorney General can rely in support of the case before the Court. Resort must be had to some imaginary doctrine of the common law which, ab inconvenienti, will authorize this Court

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to do what the fundamen*tal law has forbidden. "Constitutions are to be construed in the light of the common law, and of the fact that its rules are still in force. By this we do not mean that the common law is to control the Constitution, or that the latter is to be warped and perverted in its meaning in order that no inroads, or as few as possible, may be made in the system of common law rules; but only that for its definitions we are to draw from that great fountain, and that, in judging what it means, we are to keep in mind that it is not the beginning of law for the State, but that it assumes the existence of a well-understood system which is still to remain in force and be administered, but under such limitations and restrictions as that instrument imposes."—Cooley on Con. Lim., 61.

2. There is nothing in the "Constitution and laws of the United States" to qualify or in any manner restrict the provisions of the Constitution of this State touching the issue in this case.

In the sixth Section of the first Article, it is provided that "no Senator or Representative shall be appointed to any civil office under the authority of the United States which shall have been created or the emoluments whereof shall have been increased during such time; and no person holding any office under the United States shall be a member of either house during his continuance in office."

In Section 1, Article II, "No Senator or Representative, or person holding office of trust or profit under the United States, shall be appointed an elector" of President or Vice President.

The implications to be adduced from the fact of an express affirmative provision in a State constitution do not apply with equal force to the Federal Constitution, the latter being a grant of limited powers. It is sufficient to show that the right to hold offices under each government contemporaneously is not denied, except in the instance stated, and this must be strictly construed.

If any implication can be made, it is that the holding of an office under the United States renders the member ineligible to a seat—not that the qualification of a member shall operate to vacate the former office. But all this does not apply.

In the earlier times there existed extreme jealousy between the States and the general government, which created a public sentiment against the officer of the one at the same time holding office under the other, and statutes were very generally passed to prevent it—it being conceded then that there

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existed no inherent *incompatibility, nothing of inconsistency in the nature and reason of the thing outside of statute. To this jealousy the Pennsylvania cases refer, (4 Dall., 229; 17 Serg. & Rawls, 219; 5 Bar., 67;) and an exhibition of it was early made in South Carolina, (5 Stat. at Large, 20.) But the public sentiment is now changed. The Federal government is not a foreign power and does not antagonize the States. The contrary is the law. These are empires within an empire, all in harmonious action; and the reason of the thing would seem to encourage the idea that, the officer being competent and well-disposed, his official identification with both governments would tend to promote the order, concord and peace which are the vital elements of the national life.

II. The complaint bases the action upon the ground that the offices in question are incompatible; that is to say, that the duties of the two offices cannot be performed by the same person, and, therefore, by accepting the latter, the defendant has "vacated, surrendered and forfeited" the former. Accepting the premises as stated, the defendant has not, strictly speaking, vacated or surrendered or forfeited his office. This is a matter for technical precision. If the defendant has accepted an incompatible office, he is said to have resigned the former office; if he has accepted two offices, the duties of which, although not incompatible, cannot for another reason be performed by the same individual, he must be said to have abandoned the office first taken; at any rate, we propose to use the terms in this sense.—Angell & Ames on Cor., § 433, et seq.; 1 Dill. Municip. Cor., § 164. In either event the effect may be the same; the principles of law applied to the cases are radically different.

1. The learning on this subject applies the term incompatible most frequently to corporate offices belonging to the same corporation, where it is defined thus: "Where different persons, filling two offices, would be in the relation of master and servant to each other, such offices are incompatible and cannot be held together by the same person."—Cole on Quo Warranto, *156; or, to refer to the quaint black letter, "where the one has controlment of the other."—Vin. Ab. Officers, R. 3. Whatever may be the cause which renders it impossible for the same person to hold two offices together, they are not, in legal phrase, held to be incompatible, unless the duties of the one impinge upon, conflict with and are inherently inconsistent with

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and contrary to each other as to the *nature of the duties of each. They must be in intimate relation the one to the other, so that

at any time the duty of the one may be in antagonism to the duty of the other.

A reference to the cases will make this plain. The office of Alderman and Town Clerk of a borough are incompatible, and therefore an Alderman vacates his office by accepting the appointment of Town Clerk.—Rex v. Pateman, 2 T. R., 777; Rex v. Tizzard, 9 Barn. & Cres., 418. So with Justice of the Peace and Overseer of the Poor.—King v. Gayer, 1 Burr., 245. So a Jurat and Town Clerk.—Millward v. Thatcher, 2 T. R., 81. So the Town Councillor and Clerk of the Court of Requests.—Staniland v. Hopkins, 9 Mee. & W., 178. These cases went on the ground that the offices were of the same corporation: the higher elected the lower, or paid him, or audited his accounts, or in some other way exercised a supervising or antagonistic duty. As Lord Kenyon says, in King v. Pateman, (2 T. R., 779.) "I do not think the offices of Alderman and Town Clerk are necessarily incompatible, for in some corporations Aldermen are not judicial officers. If an Alderman be also a Magistrate and the Town Clerk act ministerially under him, then indeed these two offices cannot be held by the same person. Now here it is a question whether the Town Clerk's accounts are not allowed by the Alderman. If they are, I think the two offices are incompatible. In the King v. Gayer, (supra,) it seemed to be agreed that the offices of Justice of the Peace and Overseer of the Poor were incompatible, because the accounts of the latter are subject to the control of the former."

On the other hand, in Rex v. Jones, (1 B. & Adol., 677,) the Court held that the office of Town Clerk, Clerk of the Peace and Prothonotary of the borough of Carmarthen were not incompatible with the office of a Common Councilman of the borough; for that the Common Council neither appointed such Town Clerk, nor paid him, nor had any power to make by-laws to regulate his fees nor to audit his accounts. Lord Tenterden here advances the definition of an incompatibility to be "where different persons filling two offices would be in relation of master and servant their offices are incompatible."—p. 679.

"The making a Justice of C. B. a Justice of B. R. determines and drowns the inferior authority of being a Justice of C. B. And it is impertinent that one may reverse his own judgment, as in this case he might, by error brought in B. R.; but the same person has

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*been Justice of C. B. and Chief Baron of the Exchequer, as Brooke, in the time of Henry VIII, and Starkie in the time of Henry VII. But a man may be Justice of C. B. and Justice in Oyer and Terminer, or of gaol delivery; for none of those Courts have controlment of the other." Knevit was Chief Justice and Chancellor together in the time of Edward III.—Vin. Ab., supra.

"So the grant of an office to one who has another office incompatible is not good, for the first office will thereby be void. As if a forester by a patent for life be made Justice in Eyre of the same forest, pro hac vice, the office of forester will be void; for it is incompatible, being subject to correction by the Justice in Eyre.—4 Inst., 310. A Bishop cannot have a benefice by commendam in his own diocese, for he cannot visit himself.—1 Sid., 305. But the Chief Justice of C. B. being made keeper of the great seal continues Chief Justice.—Cro. Car., 600. So, by custom, the same person may be a Judge and an officer to execute process, for he acts in different respects.—Cro. Car., 138. (Com. Dig., Office, B. 6. Office incompatible—what shall be such.) A man shall lose his office if he accepts another incompatible, as if the one be under the control of the other.—Ib., K. 5; Dy., 197, b.

That the acceptance of an incompatible office is held to be a resignation by implication appears clearly from the current of the English cases, where it is held that it does not operate as an avoidance in any case where the party could not divest himself of that office by his own act and without the concurrence of another authority to his resignation, unless such authority be privy and consenting to the second appointment.—Rex v. Patteson, 4 B. & Adol., 9, and cases there cited. In this country the better opinion is that all resignations are absolutely within the discretion of the officer, and the doctrine, for this reason, does not apply in the American cases, but the reason of the thing remains in equal force.

In the United States the question as to incompatibility of offices was early determined by statutes in the several States, and the occasions for the application of our doctrine were rare. A case will be found in 2 Oregon, 246, (State v. Hoyt,) where the offices of Councilman and City Marshal were held to be incompatible because the Councilman passed upon the accounts of the Marshal, and it would not be competent for him to pass upon his own accounts and vote money out of the city treasury into his own pocket.

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*In Howland v. Luce, (16 Johns., 136,) it was held that the offices of District Clerk and Collector of a school district were not incompatible. The ground is not stated, but it is clear that whilst both offices are responsible to a common Board they are independent of each other.

The eighth Section of the second Article of the Constitution of Pennsylvania provides that "no member of Congress from this State, nor any person holding or exercising any office of trust or profit under the United States, shall at the same time hold or exercise the office of Judge, Secretary, Treasurer, &c., or any office in this State to which a salary is by law annexed, or any other office which future Legislatures shall declare incompatible with offices or appointments under

the United States." Whilst he held the office of Recorder of the city of Philadelphia, Judge Dallas was appointed District Attorney for Pennsylvania. The issue was made that the tenure of these offices by the same person at the same time was incompatible. Shippen, C. J., held that although the office of Recorder was judicial he was not a Judge in the State, within the meaning of the Constitution, and that the offices were not incompatible.—Com. v. Dallas, 4 Dall., 230. The reason is plain: Judge Dallas was a Magistrate of the corporation, not of the State, and his office, therefore, did not come within the constitutional inhibition; and, independently of the inhibition, the offices were not inherently related to and inconsistent with each other. This, although, palpably, it would often occur that whilst he would be in the discharge of the duties of the one he would thereby be prevented from discharging the duties of the other, and, "from the multiplicity of business in them, the offices could not be executed with care and ability by the same person," as Bacon has it.

The application of the doctrine, thus clearly established in the cases in this country and in England, is obvious. The term incompatibility, as defined at common law, does not apply to the offices of Solicitor of a circuit and Representative in Congress. There is no relation whatever between them. It is impossible to refer to offices more essentially different and foreign to each other in every respect. There is no "controlment" of the one over the other; neither is the master, neither the servant, and the duties of the one can never impinge upon or conflict with the duties of the other. It may happen, or it may not, that to fill the one may cause the officer to neglect at times to perform the

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duties of the other. Of this *hereafter. But this is a mere accident and does not touch upon the relation, nature or inherent qualities of the offices. They are wholly independent of each other, and of them the idea of incompatibility cannot be predicated. It is simply a bold, naked misapplication of the term. Then, whatever there may be in the argument that his right is determined by the express provisions of the fundamental law, there is nothing in the clearly-ascertained principle of the common law to impeach the title of this defendant to his office.

III. It is not denied that offices may be inconsistent, so that the acceptance of the one may be treated as an abandonment of the other. This, from the necessity of the case, where the officer has permanently and forever put it out of his power to discharge any of the duties of his office, either by himself or another. There is, then, at least in analogy to corporate offices, a cause of amotion. So if an Alderman removes out of the borough, and upon express summons refuses to attend the service there.—4 Mod., 36. "But an Alderman with his family having left the borough for four months is not a good cause." —Com. Dig. Franchise, F. 31. The disability must be permanent, not temporary and accidental, and may exist without reference to the acceptance of any other office. A mere absence, with the avowed purpose of not returning during the term, would supply the case fully; whilst a temporary absence, upon whatever pretext, especially when attended by an avowed purpose to return within a limited time and an adequate provision for the discharge of the duties of the office by deputy in the meantime would not supply the case. This is no more than any other absence, from any cause whatever, and occurs in every department of the public service every day. Cases in Iowa and Indiana illustrate these points; also, 1 Dillon Mun. Corp., § 167.

In Dillon as cited it is said, note to § 166, that "incompatibility in offices exists where the nature and duties of the two offices are such as to render it improper, from considerations of public policy, for one incumbent to retain both. It does not necessarily arise when the incumbent places himself, for the time being, in a position where it is impossible for him to discharge the duties of both offices."—Bryan v. Cattel, 15 Iowa, 538.

Cattel's case was that of an incumbent of the office of District Attorney—the same as Solicitor in this State—and Captain in the volunteer service of the United States for a

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limited period. Here *they were held not to be incompatible, although certainly they materially interfered the one with the other during the temporary tenure of the latter office.

In contrast with this is the case of State v. Allen, 21 Ind., 516. The decision contains a statement of the case. After disposing of technical questions as to the form of appeal, and holding that "an office may be resigned by parol, and of course acts may speak that resignation," the Court say:

"Now, whenever the Auditor voluntarily permanently disables himself to perform the duties of his office, he, by that act, constructively resigns the office by abandonment of it. A temporary disability to discharge the duties of the office might not of itself create a vacancy. In an office capable of being served by deputy the deputy of the principal might doubtless continue to act during the temporary disability of the principal; and if no deputy had been appointed, perhaps the sureties of the principal might appoint. See The State v. Pidgeon, 8 Blackf., 132. But a disability designed to continue for the whole term of office must vacate the office. And the question now arises, did the Auditor in this case, by enlisting as a private soldier in the army of the United States for three years or during the war, thus disable himself? Of this we have no doubt. What did he undertake, what did he agree to do, by

that enlistment? In what situation did he place himself? He placed himself in the service of the Government of the United States, and agreed, yes, legally bound himself, to leave, not only the County of Vigo, but the State of Indiana, and remain absent, if required, for three years, devoting his entire time to the service of the United States in parts remote from the State of Indiana. This we judicially know, because we know that the Government was not enlisting soldiers to serve in Vigo County nor in the State of Indiana; for there was no rebellion existing within those limits to be put down by an army. Allen not only undertook to leave the State, and did leave it, but he further deprived himself of the power to return, of his own volition, for a period of three years. The soldiers, as we judicially know, were enlisted for the war which was being carried on in the Southern States; and while we concede the nobleness and patriotism of the spirit which prompted the defendant to enlist, still we cannot allow such considerations to control in the decision of a question of law. Legal decisions should not rest upon the impulses of the hour, but upon principles

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of per*petual application. The proper way to test the decision in this case is to turn ourselves back to a period prior to this war, and to suppose an officer to be recruiting for the regular army; to suppose, further, that Allen, then the Auditor of Vigo County, enlists for three or five years in that army and is marched off to a frontier military post of the United States; would anybody say, in that case, that he had not abandoned the office of County Auditor? Such, in law, is this case. See Kerr v. Jones, 19 Ind., 351. It could make no difference that Allen should afterwards and before the expiration of the term of his enlistment get released therefrom, that fact being a mere accident; the vacancy having once become complete by abandonment could not be refilled by an accidental voluntary or forcible reoccupancy.—See Rex v. Harris, 4 Barn. & Ad. 936; Page v. Hardin, 8 B. Mon., 648."

Now, whilst attending Congress, the defendant was absent forty days. The circumstances of his election show that it was intended by the people that he should hold both offices, and the circumstances of his absence avow his purpose to retain the title thus conferred upon him. He received the permission of the Court for this temporary absence from duty, and his duties were efficiently discharged meantime by a substitute, appointed for the purpose according to law and at no charge to the public. It materially reinforces the argument presented in the outset to note that, whilst the Constitution nowhere else contemplates in terms the failure of any other officer to discharge his duties, it takes especial care to meet the contingency of the Solicitor's absence from his post of duty, (and invites him to the enjoyment of other offices; why not?) by providing that in all cases where he "fails to attend and prosecute according to law the Court shall have power to appoint an attorney pro tempore."—Art. IV, § 29. This is on all-fours with Cattel's case, (15 Iowa, 538,) except that in Cattel's case the absence was for at least a year; and our case has the added force of the argument that the Constitution has by strong implication declared that a "failure to attend and prosecute" shall not operate to vacate the office.

IV. Statutes are sometimes merely declaratory, and from them nothing of legislative intention can be inferred. Again, they operate to alter and amend the common law, and in such case are regarded as a legislative declaration both of the remedy and the mischief. Then the judicial mind cannot avoid

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the implication, *whatever it may be worth in clear cases, that the Legislature regarded the law existing at the time such as to render necessary the amending or repealing effect of the statute.

In 1787, by "An Act for regulating and fixing the salaries of several officers," (No. 1368,) the General Assembly of this State provided "that no officer heretofore elected, or hereafter to be elected, to any pecuniary office in this State, above one hundred and fifty pounds, shall hold any other office of emolument under this or the United States."—5 Stat. at Large, 21. To illustrate: The question occurs, if these offices are incompatible at common law, where the necessity of the statute? No penalty is affixed, and nothing appears beyond the purpose of altering the pre-existing law in this particular. Now, as if the new Constitution did not of itself operate a repeal by implication, this statute has been specially repealed by the General Assembly.—Gen. Stats., "seventeen hundred and eighty-seven," p. 798. And in the same line of argument, may not the repeal be regarded as a legislative declaration of intention that thereafter these offices shall be regarded as not incompatible, and that no disability should exist against the holding of both by the same person at the same time?

V. The doctrine presented by the plaintiff here is in "derogation of private right," and all presumptions are against it. Moreover, it must be made to appear clearly and conclusively, "to support an application for a quo warranto information for exercising a public office, after having accepted a second incompatible one, the affidavits must clearly show that the two offices are incompatible."—Cole, *157; Rex v. Patteson, 4 B. & Adol., 9; Com. v. Binns, 17 Serg. & Rawle, 219. An extract from the opinion of the Court in this, a Pennsylvania case, will be deemed specially in point, whilst the entire case is ably and exhaustively discussed. The Court says, p. 226:

"This identical case may not have been decided, but the principle is settled, if anything of the kind can be said to be settled. The question of incompatibility is no new question. The established rule is to give the strictest possible construction to every part of the Constitution and to every Act of Assembly declaring State offices incompatible with offices or appointments under the Federal Government, or declaring different State offices incompatible with each other, and never to hold anything to be within the prohibition unless expressed and named, and to take

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in no possible *case by construction. This principle has been established by every authority known in the land—by the people in their elections; by the Legislature in their appointments; by each separate branch of the Legislature in their solemn decisions; by the Governor in his appointments, and by the Courts of law in their judgments. The reasons why the rule has become so deeply fixed as never to be varied from in any case are not, I think, for us to examine. If they were, I should be inclined to dissent from one of the counsel of Mr. Binns, who has adduced the maxim which requires a strict construction of all penal laws. There appears something in that too technical for the production of such universal effect. I would rather believe the effect to be produced by the apparent harshness of taking (unless where some plain and unequivocal precept requires it) from the people or from the agents of the people their power of entrusting the public business to those men whom they may think most fit to be trusted." * * *

VI. It may be permitted to say that the defendant was elected to the office he now claims by the people of the two Counties constituting his judicial circuit by a decisive majority of over six thousand votes.

"Courts are anxious rather to sustain than to defeat the popular will."—1 Dill. Mun. Corp., § 136, and cases cited.

September 20, 1877. The opinion of the Court was delivered by

McIVER, A. J. This was an original proceeding, instituted in this Court by the Attorney General in behalf of the State to oust the defendant from the office of Solicitor of the First Circuit, upon the ground that he had "vacated, surrendered and forfeited" his said office of Solicitor by accepting the office of Representative in the Congress of the United States. The facts in the case are all conceded, and are as follows: The defendant, on the 7th day of November, 1876, was elected to the office of Solicitor of the First Judicial Circuit of this State for the term of four years, and, having duly qualified, was commissioned as such Solicitor on the 30th day of November, 1876, and thereupon entered upon the duties of his said office. That on the 7th day of November, 1876, the defendant was also elected to the office of Representative in the Congress of the United States for the Second Congressional District of this State for the unexpired term, to end on the 4th day of March, 1877, and on the 23d day of January, 1877, duly qualified and

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entered *upon his duties as such Representative, and thereafter discharged such duties until the expiration of the said term. It is also alleged in the defendant's answer that "whilst the said defendant was discharging his duties as such Representative only one term of the Court of General Sessions was held in the First Judicial Circuit, that is to say, on the third Monday in January, 1877, for the County of Orangeburg, at which term the said defendant, with the concurrence and consent of the Circuit Judge of the said Court, failed to attend in person and prosecute, and the duties of the office were discharged in the name of the said defendant, as Solicitor, by an attorney appointed pro tempore by the Court according to law." Whether these allegations are, in fact, true, we did not deem it necessary to inquire, as, for the purposes of this case, they may be conceded to be true; but we do not see how they can in any way bear upon the issue involved in the case. The sole question is one of law,—whether the defendant, by accepting the office of Representative in Congress while he held the office of Solicitor vacated the office of Solicitor. It was very properly conceded in the able and ingenious argument of the counsel for the defendant; and the proposition is clearly demonstrated by the authorities cited in the briefs of counsel, that, at common law, where a person holding a public office accepts another public office incompatible with the first, such acceptance is an implied resignation of the former, and it is thereby vacated.

It is contended, however, that by the express terms of the Constitution of this State this rule of the common law has been abrogated, and that there is nothing to prevent one from holding at the same time two incompatible offices in this State. The provisions of the Constitution which are relied upon to support this proposition are Section 31, Article I, declaring that "every inhabitant of this Commonwealth possessing the qualifications provided for in this Constitution shall have an equal right to elect officers and be elected to fill public office," and Section 7, Article VII, declaring that "every person entitled to vote at any election shall be eligible to any office which now is, or hereafter shall be, elective by the people in the County where he shall have resided sixty days previous to such election, except as otherwise provided in this Constitution or the Constitution and laws of the United States," read in connection with various other Sections in which officers of the three great departments of the government—legislative, executive and judi-

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cial—are *prohibited from holding other offices, viz.: Article I, Section 26; Article II, Section 28; Article III, Sections 3, 5 and 8; Article IV, Section 9; and other Sections declaring various disqualifications for office, viz.: Article I, Section 32, disqualifying any person who shall be engaged in a duel; Article II, Section 10, requiring a residence of three months in the County, instead of sixty days, before one shall be eligible to a seat in the House of Representatives, and requiring that Senators shall be at least twenty-five, instead of twenty-one years of age; Article IV, Section 10, declaring that no person shall be eligible to the office of Judge unless he is at the time of his election a citizen of the United States, of the age, at least, of thirty years, and a resident of the State for five years next preceding his election; Article IV, Section 30, and Article IX, Section 15, disqualifying certain officers who may have been guilty of defaults in office or of embezzlement of the public funds; Article VIII, Section 2, disqualifying those who are disqualified by the Constitution of the United States until such disqualification shall be removed by the Congress of the United States, and also persons while kept in any alms house or asylum or public prison, and persons of unsound mind; and Article XIV, Section 6, disqualifying every person "who denies the existence of the Supreme Being."

From these provisions it is argued that as the Constitution has declared every person entitled to vote eligible to any office elective by the people, with the exceptions above specified, that it necessarily follows that unless the person in question comes under some one or more of the exceptions named that his right to hold any office cannot be questioned, and the fact that he holds one office is no bar to his holding any other office, because, if it were, another qualification, not prescribed by the Constitution, would be added to those required by that instrument. One defect in this argument is that it assumes that the word "any," in the seventh Section of Article VIII, means all, every, or any two or more, or something equivalent thereto, and that when the Constitution declares that a person possessing certain qualifications is eligible to "any" office it means that he is eligible to all or at least any two or more offices at the same time. This construction does not seem warranted by any rule that we have been enabled to apply. A more serious objection, however, to this argument is that it fails to distinguish between the qualifications required for holding an office and those required for election to office. It is very manifest that the two things are entire-

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ly *distinct and different. A person while sitting as a member of the General Assembly is eligible to the office of Judge, but he is incapable of holding both offices at the same time. The Governor of the State is eligible to the office of United States Senator, but he cannot hold both offices at the same time. Now, it is very clear, from the express terms of the two Sections under consideration, that they relate exclusively to eligibility for office and not to holding an office. In Section 31 of Article I the language is "shall have the right to elect officers and be elected to fill public office;" while in Section 7 of Article VIII the words are "shall be eligible to any office." So that, while it may be conceded that, under the provisions of the Constitution of this State, a person holding one public office is eligible to another public office incompatible with the former, the question would still remain as to what effect the acceptance of the latter would have upon the right to hold the former. It may have the effect of vacating the former without in any manner abridging the right secured by these Sections of the Constitution; for, as we have seen, the only right secured is the right to be chosen to office, and this right would not be interfered with by declaring that after he has been chosen to and has accepted the incompatible office he has thereby vacated the former.

Again, it is argued that whilst there is no provision in general terms restricting the right declared by Section 31, Article I, and Section 7, Article VIII, to a single office, there are several exceptions limiting the right to hold more than one office in particular instances, as appears by the various Sections above cited, and that under the maxim expressio unius exclusio alterius, the construction must be that in all but the particular instances named the right to hold two offices at the same time is guaranteed by the Constitution.

This argument, besides ignoring the distinction above pointed out between being eligible to office and holding an office, proceeds upon the assumpton that the words "except as otherwise provided in this Constitution" relate only to cases in which certain officers, viz., those of the great departments of the government—legislative, executive and judicial—are prohibited from holding more than one office at the same time; whereas it seems to us to be the proper construction that those words should rather be applied to those causes which are declared by the Constitution to constitute ineligibility for any office, e. g., atheism, dueling, embezzlement, unsoundness of mind, confinement in alms house or prison.

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*Again, this argument assumes that the Constitution, in the Sections referred to as containing exceptions to the general right guaranteed by Section 31, Article I, and Section 7, Article VIII, is dealing with the right to hold two incompatible offices, while in fact it is dealing with the right to hold any two offices, whether incompatible or not. Hence,

to give full force to the maxim, the result would be that the Constitution, having declared that, in certain instances, it should not be lawful for a person to hold at the same time any two, not any two incompatible offices, in all other instances it left the rule as it stood at common law, to wit: that while any person might hold two offices at the same time which were not incompatible, he could not hold two offices at the same time which were incompatible. An expression of intention to change in one particular excludes the idea of an intention to change in any other particular. For, as remarked by Judge Cooley in his work on Constitutional Limitations, 60: "Constitutions are to be construed in the light of the common law and of the fact that its rules are still left in force. By this we do not mean that the common law is to control the Constitution or that the latter is to be warped and perverted in its meaning in order that no inroad, or as few as possible, may be made in the system of common law rules, but only that for its definitions we are to draw from that great fountain, and that in judging what it means we are to keep in mind that it is not the beginning of law for the State, but that it assumes the existence of a well-understood system, which is still to remain in force and be administered, but under such limitations and restrictions as that instrument imposes." And in Potter's Dwarris on Statutes and Constitutions, 185, we read that "Statutes are to be construed in reference to the principles of the common law; for it is not to be presumed that the Legislature intended to make any innovation upon the common law further than the case absolutely required. The law rather infers that the Act did not intend to make any alteration other than what is specified, and besides what has been plainly pronounced; for if the Parliament had had that design, it is naturally said, they would have expressed it." This, though a rule of statutory construction, may well be applied to the Constitution; for in the same book, at page 654, Judge Potter says: "There is a striking analogy and generally an entire harmony between the rules of interpretation of constitutions and those of statutes."

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*The framers of the Constitution of this State found that by the existing law, except as modified by the third Section of the Act of 1787, (5 Stat., 21,) a person might hold two offices at the same time, provided they were not incompatible, and by the provisions relied upon they proposed to make a change. What was the change intended? Certainly, not that the particular officers specified should not be allowed to hold at the same time two incompatible offices, for that would have been no change at all. It must then have been the intention to declare that, in certain specified instances, the same person should not hold at the same time any two offices, not any two incompatible offices, and that with regard to holding incompatible offices they left the law as they found it. These remarks will also dispose of the argument drawn first from the enactment and next from the repeal of the Act of 1787, above referred to, the language of which is "that no officer heretofore elected or hereafter to be elected to any pecuniary office in this State, above one hundred and fifty pounds, shall hold any other office of emolument under this State or the United States." This Act, it will be observed, applied only to a certain class of officers, to wit: those who were elected to offices of emolument exceeding a specified sum, and the prohibition was against holding, not being eligible to any other office, not any other incompatible office. Hence the argument that the enactment of this statute might be regarded as an indication that in the absence of such a statutory provision there was no law to prevent one from holding at the same time two incompatible offices, or that its repeal afforded an indication of the legislative will that thereafter a person might at the same time hold two incompatible offices, loses all its force.

In reference to the argument drawn from the maxim expressio unius exclusio alterius, we find, in the same Section from which it is cited, (1 Story on Const., § 448,) that the distinguished author advises caution in the use of such maxims in construing the Constitution. He uses this language: "These maxims, rightly understood and rightly applied, undoubtedly furnish safeguards to assist us in the task of exposition; but they are susceptible of being applied, and, indeed, are often ingeniously applied, to the subversion of the text and the objects of the instrument. The truth is, that in order to ascertain how far an affirmative or negative provision excludes or implies others, we must look to the nature of the provision, the subject-matter, the objects and the scope of the instrument.

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*These, and these only, can properly determine the rule of construction. * * * In relation, then, to such a subject as a constitution, the natural and obvious sense of its provisions, apart from any technical or artificial rules, is the true criterion." These views of Judge Story are quoted with approval by Judge Potter in his edition of Dwarris on Statutes, pp. 674–5, and in Cooley on Constitutional Limitations, p. 83, we find similar vews. Now, the various Sections of the Constitution referred to, in which certain officers are prohibited from holding more than one office, all relate to the heads of one or the other of the three great co-ordinate departments of the government; and as the framers of the Constitution were evidently impressed with the importance of keeping these departments separate and distinct from, and, as far as practicable, independent of each other, after first declaring, in general terms,

by Section 26, Article I, that "in the government of this Commonwealth the legislative, executive and judicial powers of the government shall be forever separate and distinct from each other, and no person or persons exercising the functions of one of said departments shall assume or discharge the duties of any other," they very naturally, when they came to prescribe the qualifications for office in the heads of these several departments, applied to each the general principle, previously declared applicable to all, so that, as far as possible, no room for construction should be left. Especially was this desirable in reference to the legislative department, in which each house is made the "judge of the election returns and qualifications of its own members"—judges in their own case, as it were. Hence, perhaps, the difference in the phraseology used in reference to this department, for we see that, while one may be eligible to the office of Governor or Judge whilst he holds another office, though he is prohibited from holding any other office while Governor or Judge, with certain unimportant exceptions in regard to the Governor the language in reference to the legislative department is different. "No person shall be eligible to a seat in the General Assembly whilst he holds any office, &c. * * * And if any member shall accept or exercise any of the said disqualifying offices he shall vacate his seat."

Now, looking "to the nature of the provision, the subject-matter, the object and scope of the instrument," as we are advised by Judge Story to do, it seems to us much more natural to suppose that the framers of the Constitution, in the provisions relied upon,

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*intended merely to put into practical operation the fundamental idea that the three great departments of the government were to be kept separate and distinct, rather than that, by declaring that a Judge or a member of the General Assembly should not hold any other office, they intended to convey the idea that every other officer should be at liberty to hold at the same time as many offices as he could succeed in obtaining, either by election or appointment, whether such offices were compatible or incompatible; especially when, by such construction, the rule of the common law would be abrogated by implication merely. We must, therefore, conclude that the provisions of the Constitution relied upon for the purpose do not abrogate the rule of the common law in this particular.

The only remaining inquiry, then, is whether the offices of Solicitor and Representative in Congress are incompatible. It seems to be supposed that, in order to render two offices incompatible, there must be some such relation between them as that of master and servant—that the one must have "controlment of the other," or that the one must be charged with the duty of auditing or supervising the accounts of the other, or that the one must be chosen by or have the power of removal over the other. Now, while authorities have been cited to show that offices bearing such relations to each other have been held to be incompatible, they merely afford instances of incompatible offices, and do not furnish, nor do they pretend to furnish, definitions; and therefore it does not by any means follow that these are all the instances in which offices can be said to be incompatible. For example, the case of Rex v. Jones, 1 B. & Adol., 677, (20 E. C. L. R., 467,) is cited apparently for the purpose of introducing what is called "a definition" of incompatible offices by Lord Tenterden. But it is apparent, not only from the context, but from the very phraseology quoted, that his remark was not intended as a definition but merely as an instance or an illustration of what would be incompatible offices. The question in the case was whether the offices of Town Clerk and Common Councilman of the borough of Carmarthen were incompatible. The only ground upon which it was claimed that the two offices were incompatible was that the Town Clerk was required to keep minutes of the proceedings of the Common Councilmen, and it was held that "there is nothing inconsistent in one member of a body noting down the acts of the body." In discussing the case Lord Tenterden uses the language cited:

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"Where different persons *filling two offices would be in the relation of master and servant to each other, those offices cannot be held by the same person;" which is obviously used as a mere illustration, for he proceeds to say: "Thus, if the Common Council had the power of fixing the Town Clerk's salary or of removing him, the offices would be incompatible; but here there is no power of amotion." As well might the language just quoted be cited to show that Lord Tenterden's definition of incompatible offices is where one has power to fix the salary of another or where one has the power to remove the other from office. In this very case another one of the Judges, (Taunton, J.,) delivering a separate concurring opinion, gives another instance or illustration of incompatible offices; for says he: "Verrior v. The Mayor of Sandwich, (1 Sid., 305,) Milward v. Thatcher, (2 T. R., 81,) and Rex v. Pateman, (2 T. R., 777,) are clearly distinguishable from the present case. The offices of Mayor, of Jurat and of Alderman, in these cases, were judicial, and therefore incompatible with that of Town Clerk," implying plainly that he considered the offices incompatible, not because the one was subordinate to the other, but because the one was judicial while the other was ministerial.

In Rex v. Tizzard, (9 B. & C., 418,) Bayley, J., gives still another instance of incompatibility, when he says: "I think that the two offices are incompatible when the holder cannot in every instance discharge the duties of each." By which he probably means that when the duties of the two offices are such

that the performance of the duties of the one necessarily involves the neglect of the duties of the other, then the two offices would be incompatible. Turning to the cases in this country, we find that in Magil v. Stoddard, (25 Conn., 565,) the office of Constable of a town was held incompatible with that of Justice of the Peace. In 3 Maine, 486, the Supreme Court of that State, in answer to the Senate, says "that the office of Justice of the Peace is incompatible with that of Sheriff, Deputy Sheriff or Coroner." And in Stubbs v. Lee, (64 Maine, 195,) reported also in 18 Amer. Rep., 251, the office of Trial Justice was held incompatible with that of Deputy Sheriff. It appears, therefore, that the books furnish us with other instances of incompatible offices besides those cited in the argument. What, then, does constitute incompatibility in offices? In 5 Bac. Abr., Title Offices, K, we find the rule laid down, upon the authority of Lord Coke, in these words: "Offices

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are said to be *incompatible and inconsistent, so as to be executed by the same person, when, from the multiplicity of business in them, they cannot be executed with care and ability; or when their being subordinate and interfering with each other it induces a presumption they cannot be executed with impartiality and honesty." And in Dillon on Municipal Corporations, in a note to Section 166, it is said that "incompatibility in offices exists where the nature and duties of the two offices are such as to render it improper, from considerations of public policy, for one incumbent to retain both." Apply either one of these definitions to the case in hand and it is very manifest that the two offices in question are wholly incompatible. It certainly needs no argument to show that "the multiplicity of business" in each of these offices is such as to render it not only impossible for the same person to perform the duties of both "with care and ability," but impossible often, and very often too, to perform them at all. It is equally certain that the nature and duties of these two offices are such as that every consideration of public policy renders it improper for one incumbent to retain them both, and it is none the less certain that the duties of the two offices are such that the performance of the duties of the one necessarily involves the neglect of the duties of the other. The fact that in this particular case the defendant accepted the office of Representative in Congress for an unexpired term, which happened to be of very short duration, and the fact that the public suffered no immediate detriment in this particular instance, cannot alter the principle applicable to the case.

Without considering in detail the various duties of the two offices, the briefest examination of some of these duties will be amply sufficient to demonstrate the propriety of the foregoing observations. Here are two offices held under two distinct governments; the duties of the one are to be performed in Washington, while those of the other are to be performed in this State. To perform the duties of the one the officer must be in Washington, while to perform the duties of the other he must be in this State, and that, too, at the very time when the duties of the other call him to Washington; for we are bound to know, judicially, that the sessions of Congress cover the same time as that appointed by law for the sessions of some, and, it may happen, of all the Courts of the First Circuit. The Constitution of the United States requires the one to be in Washington for a

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large part of the time, and at all *times to be subject to the call of the proper authorities there, while the Constitution of the State requires the other to "reside in" his circuit, not merely to be a resident of his circuit,—the former phrase being considered by some Courts as more significant of an intention that the officer should continuously remain in his circuit than the latter. See State v. Allen, 21 Ind., 516. And so important was this regarded that the Legislature, by the Act of 24th March, 1876, (16 Stat., 151,) specially declared "that in case any Circuit Solicitor shall cease to reside in his circuit his office shall be deemed and taken to be vacant." By an Act of the Legislature of this State (Gen. Stat., Chap. XVI, Title V, § 41, p. 111,) the Solicitor is "specially charged with the prompt and vigorous prosecution" of certain offenses, and is made liable to arrest, trial and conviction for a failure to perform this duty, which he must necessarily fail to perform if he perform his duty as a member of Congress. But, under the provisions of the Constitution of the United States, (Art. 1, § 6,) he would be, as a member of Congress, exempt from arrest during his attendance upon Congress and while going to and returning from the same for an offense of this kind. So that by reason of his obligations as an officer of the State government he may become liable to arrest and imprisonment, and at the same time by reason of his privileges as an officer of the Federal government he would be exempt from such arrest and imprisonment. As was well said by the Attorney General in his brief, "The one office prevents him from performing the duties of the other and shields him from punishment for such non-performance." By the laws of the State the Solicitor is required to attend the sessions of the Courts in his circuit, while by the Constitution of the United States a member of Congress is not only required to attend the sessions of Congress, but such attendance may be enforced in a very summary manner. In this very case, if the defendant had chosen to neglect his duties as member of Congress instead of those of Solicitor (for he necessarily had to neglect one or the other) and had attended the Court in Orangeburg at the January Term, 1877, the Sergeant-at-Arms of the United States House of Rep-

resentatives might have arrested him in the very presence of the Court, while engaged in the most important duty, and carried him to Washington. His oath as a member of Congress required him to be in Washington, while at the same time his oath as Solicitor required him to be in Orangeburg. He could not comply with the obligations of the one

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with*out at the same time violating the obligations of the other. It will not do to say that a person in either of these offices may appoint a deputy and thus avoid the difficulties which have been, and many others which might be, suggested.

It has not been and will not be pretended for a moment that a member of Congress can perform his duties by deputy, nor do we think that it can be successfully contended that a Solicitor can, without special authority given by an Act of the Legislature, (and there is now no such Act) perform his duties by deputy. Indeed, in view of the provisions of Section 29, Article IV, of the Constitution of this State, declaring that "in all cases where an attorney for the state, of any circuit, fails to attend and prosecute according to law the Court shall have power to appoint an attorney pro tempore," it may be doubted whether even the Legislature could confer such a power upon a Solicitor after the Constitution had conferred that power upon the Court, but this is a question which we are not now called upon to decide. It seems that the Congress of the United States has thought it necessary, by special statute, to confer such a power upon the District Attorney, and in analogous office to that of Solicitor, and in this State the Legislature by the Act of 1786–87, (Stat., 204,) specially authorized the Attorney General to appoint a deputy; and again upon the establishment of the District Court system a special clause was inserted in the Act, authorizing the Attorney General or Solicitor to conduct prosecutions in that Court by deputy.—Act of 1866, 13 Stat., 388.

This certainly warrants the inference that, without such special authority, such a power was not supposed to exist: and when we consider the nature of the duties incident to the office, requiring for their proper performance a high degree of skill and knowledge, and involving the exercise of the largest discretion, even in the gravest of issues, it is very obvious that the office of Solicitor is one of the highest personal trust and confidence, and that it does not belong to that class of offices in which the holder may appoint a deputy.—5 Com. Dig., Title Office, 56; 1 and 2 Jac. Law Dic., Title Office, 251–2. We are, therefore, of opinion that the officers of Solicitor and Representative in Congress are wholly incompatible, and that the defendant by accepting the latter vacated the former office.

In accordance with these views judgment of ouster has heretofore been entered against the defendant.

WILLARD, A. J., concurred.

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*SHAND v. GAGE.

(Columbia. April Term, 1877.)

[*Limitation of Actions* ⇐48.]

On a promissory note, which fell due May 18th, 1864, an action was commenced February 3d, 1872: *Held*, That the action was barred by the Statute of Limitations.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 259–265, 351; Dec. Dig. ⇐48.]

[*Limitation of Actions* ⇐114.]

The military orders known as Order No. 10 and Order No. 164, issued in 1867, did not have the effect of suspending the operation of the Statute of Limitations of the State.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 524; Dec. Dig. ⇐114.]

[*Corporations* ⇐608; *Limitation of Actions* ⇐114.]

A Governor's proclamation declaring a corporation dissolved, by forfeiture of its charter, cannot, of itself, have that effect. The fact which caused the forfeiture must first be judicially determined.

[Ed. Note.—Cited in State ex rel. City Council of Spartanburg v. Spartanburg, C. & G. R. R. Co., 51 S. C. 133, 28 S. E. 145.

For other cases, see Corporations, Cent. Dig. § 2417; Dec. Dig. ⇐608; Limitation of Actions, Cent. Dig. § 524; Dec. Dig. ⇐114.]

Before Moses, J., at Union, June, 1875.

This was an action by Robert W. Shand as Receiver of the Cotton Planters' Loan Association of the Fifth Congressional District of South Carolina against Columbus Gage. There were six other actions, by the same plaintiff, against as many different defendants, in which the facts and questions raised were the same as in the action above named.

The action was upon a promissory note for $679.97, dated May 18th, 1863, payable twelve months after date, to one W. C. Dunn, and endorsed by the defendant, before maturity, to the Cotton Planters' Loan Association, of which the plaintiff was the Receiver.

The action was commenced by service of the summons February 3d, 1872, and the defendant, amongst other defenses, pleaded the Statute of Limitations of the State.

At the trial the plaintiff gave in evidence a proclamation of Governor Orr, issued September 8th, 1866, whereby he declared the charter of the said Cotton Planters' Loan Association forfeited, upon the ground that the association had not transmitted, through its President and Treasurer, to the Comptroller General of the State the monthly statement as required by its charter. It was also proved, on behalf of the plaintiff, that the association was organized in 1862, and that the organization was kept up until the proclamation of Governor Orr was issued.

The defendant requested His Honor to charge the jury—

1. That the proclamation of Governor Orr did not dissolve the corporation, but that it continued to exist until its charter expired, by its own limitation, on January 1st, 1869.

2. That the military orders known as General Order No. 10 of April 11th, 1867, and as Order No. 164, of December 31st, 1867, did not suspend the operation of the Statute of Limitations.

The request was denied, and the defendant excepted.

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*His Honor then charged the jury—

1. That Governor Orr's proclamation dissolved the corporation.

2. That the Statute of Limitations of the State was suspended, by the orders above mentioned, until the ratification by the Legislature of the State of the fourteenth amendment of the Constitution of the United States.

3. That the plaintiff's action was not barred by the Statute of Limitations.

The defendant excepted to the charge, and then appealed.

Steedman, for appellant.
Munro, Shand, contra.

The opinion of the Court was delivered by

WILLARD, C. J. The seven cases above entitled were heard together and involve the same questions. Several questions of law are raised by the appeals and have been discussed at bar, but the objection to a recovery presented by the plea of the Statute of Limitations will, if entitled to be sustained finally, dispose of all the matters in controversy and render it unnecessary to consider the other questions discussed. The several causes of action, which are based upon obligations for the payment of money, arose, as appears by the general statements of the brief, on the 21st of May, 1864. The actions against J. R. Jeter were commenced June 8th, 1872, and all the other actions on or about February 3d, 1872.

The time within which an action was required to be brought after the cause of action arose, in cases of this class, as the law stood at the time the causes of action in question arose, was four years. The change to six years made by the Code (Section 114) is, according to Section 96, inapplicable to causes of action that arose prior to the adoption of the Code. The present causes of action being of the latter class, the former law is applicable to them, and the objection that the actions were not brought within four years next after such causes of action arose, if properly sustained, must lead to a dismissal of the complaint. In computing the lapse of time, the period during which the operation of the Statute of Limitations was suspended under the Act of 1861 and the annual Acts continuing it in force will be excluded (Ward-law v. Buzzard, 15 Rich., 158 [94 Am. Dec. 148],) as presenting the plaintiff's case most

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favorably. The *suspension of the statute lasted just five years, from December 21, 1861, to December 21, 1866.—Harlee v. Ward, 15 Rich., 231. We need not consider whether, under the Act of 1861 as affected by the yearly renewals, the plaintiff's causes of action were such as to enjoy the suspension of the Statute of Limitations, unless we find ourselves compelled to conclude that a cause of action arising December 21st, 1866,—the termination of the stay law—would not have become barred at the time the present actions were commenced.

From December 21st, 1866, to the date of the commencement of the actions under consideration was a period of more than four years. Unless, then, the plaintiff can show that a portion of this time, sufficient to reduce it within four years, ought not to be counted against him, the statute is a bar. This the plaintiff has attempted to do by pleading an order made by an officer of the United States, in military command within the territory of the States of North and South Carolina, under the authority of an Act of Congress, and by the appointment of the President of the United States, and with powers conferred and limited by the provisions of an Act of Congress popularly known as the first Act of reconstruction. On the day last mentioned, the military commander promulgated a general order, known as General Order No. 10, containing the following paragraph:

"Proceedings in such causes of action (i. e., arising between the 19th of December, 1860, and the 15th of May, 1865,) shall be stayed, and no suit or process shall be hereafter instituted or commenced for any such causes of action."

This order, made by Major General Sickles, was afterwards, by Order No. 164 of December 31st, 1867, made by General Canby, who had succeeded General Sickles in such command, modified as follows:

"Proceedings for such causes of action now pending shall be stayed, and no suit or process shall be instituted or commenced in such causes of action until after the civil government of the respective States be established in accordance with the laws of the United States."

Two inquiries arise from the consideration of this order, first as to its nature, and next as to its effect, if any, upon the currency of Statute of Limitations. The orders in question did not proceed from or derive force under the laws of this State, but emanated

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*from a source of authority for the time being impugning those laws. The essential object of the order was to prevent for a limited time an appeal to the laws of the State for certain remedies by action at law. The force

that thus intervened acted externally to the laws of the State, and was exercised in the name of the United States government; and if a rightful exercise of public authority must be regarded as having proceeded from the Constitution and laws of the United States wholly, we have to consider the nature of the Act assumed as one of rightful public authority, and its effect, if any, upon the operation of the Statute of Limitations. The nature of the general powers of the military commanders, as conferred by the Acts of reconstruction, was considered in Raymond v. Thomas, (91 U. S. 712 [23 L. Ed. 434]). In that case, decided by this Court, ([Thomas v. Raymond] 4 S. C., 347,) and affirmed by the Supreme Court of the United States, the question was as to the effect of an order made by the military commander, whose powers are now under consideration, assuming to vacate and set aside a final judgment of the Court of Chancery of this State. This Court did not find it necessary to call in question in that case the authority of the military commander, as we found what was regarded as a fatal defect through the failure of the order to describe the judgment upon which it was supposed to act. On appeal, the Supreme Court of the United States did not hesitate to call in question the authority of the military commander to issue such order.

There are several noticeable features in the opinion of the Court that help to an understanding of the true bearing of the judgment of that Court. In the first place the date of the restoration of nominal relations between the State of South Carolina and the United States is fixed at July 11th, 1865, though it is not definitely indicated as the intention of the Court to hold that at that date there was such a full and final exercise of the power of establishing conditions of peace on the part of Congress that the special authority and jurisdiction of that body, resulting from the existence of the state of war, had absolutely ceased at that day. Under the view taken of that case by that Court it was not necessary to announce such a conclusion, which would have been necessary had the case turned on the validity of the Acts of Congress under which the military commander derived his authority, for the ultimate conclusion of the Court was that the Acts of

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Congress did *not warrant the exercise of such authority as had been asserted by the military commander in question.

It may be fairly concluded, however, that from and after the 11th day of July, 1865, the commanding officer of the military forces of the United States within this State did not possess those general powers, arising from the laws of war, that result when a belligerent force occupies conquered territory. Should it be made to appear that the military orders in question in the present case cannot have the force and effect contended for under the authority of the Acts of Congress prescribing the powers of the officers from whom they emanated, then it will not be necessary for this court to pass upon the authority of Congress to enact these laws, for the same reason that deterred the Supreme Court of the United States from entering upon that question.

It is necessary, however, to form some conclusion as to the nature and extent of the authority intended to be conferred by Congress on the military commanders in question, in order to determine the nature of the military action in question. In deducing such intent from the language of the Acts of Congress, the constitutional limits of the authority of Congress must be held in view as those limits are defined by the Supreme Court of the United States. As that Court has held that the general effects and consequences of the state of war ceased on the 11th of July, 1865, prior to the passage of the Acts of reconstruction, it must be assumed that Congress did not intend to perpetuate in the military commanders, after that date, authority that could not constitutionally be exercised except as one of the effects and consequences of an existing state of war. Active hostilities having ceased, and the power of pacification having been fully exercised at the date last mentioned, according to the decision of the Supreme Court, as interpreted by the opinion of the Court, we can see no other explanation of the purpose of Congress than such as might result from a conviction, on the part of that body, that it was constitutionally responsible for the preservation of a state of domestic peace in the States embraced in their action until State authority should be so fully rehabilitated as to be sufficient for the accomplishment of that end. This would seem to imply a claim of right to exercise police powers, having in view the preservation of the peace and the protection and security of persons and property connected with the national administration, civil and military. Whatever authority Con-

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gress may have possessed to *control the rehabilitation of the States by provisions limiting the voluntary action of the political powers of the State may well be regarded as superadded to the powers last defined without materially affecting the nature of those powers. We are not called upon to define the limits of the authority of Congress as affecting the formation of the organic law of the State, but refer to the subject for the purpose merely of indicating the independence of the two classes of powers, in their nature and objects such that the incidents of the one are not necessarily modified by the other. The exercise of police power is not necessarily confined to the arrest and detention of offenders and disposing of unlawful assem-

blies, but often goes to the extent of interference to prevent unoffending citizens from exercising their strictly legal rights. Ordinary illustrations of this class are abundant. It is exercised by preventing citizens from performing acts otherwise lawful, where, in times of public danger, such acts may occasion unintentional injury to the community. Such interferences frequently take place when the community is threatened by civil commotion, conflagration or contagious disease. To what extent such powers are capable of being enlarged in order to keep pace with all the forms of common peril to which the body politic is exposed cannot be distinctly defined, for they result from a principle applying itself to ever-varying circumstances rather than to a rule of statutory or customary law. Such powers are clearly distinguishable from those that result from the existence of a state of war in the hands of the commander of a military force.

To gain a clear view of the effect of the decision of the Supreme Court in the case under consideration, it is important to keep this distinction in view: where martial law prevails, except where its scope and effect is limited by the supreme authority of the State, to which those who exercise military authority as well as those who exercise civil authority are subject, the functions of the civil government are for the time being completely displaced, or, what is equivalent, subordinated to the military authority. The action of every public body or functionary not possessing the right to control the military authority is subordinated. This would embrace the Legislature of a State in which martial law prevails by the authority of Congress and is enforced by the military power of the United States. It would also embrace the action of the Courts exercising civil authority alone. When authority of that class

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exists and the *military commander assumes to nullify the decree of a Court, during the continuation of martial law, such act would be efficacious, whatever might be its effect after the restoration of civil authority. A Court passing upon such an act, after the restoration of civil authority, could not pronounce it void ab initio.

It is inferable, therefore, from the result to which the Supreme Court of the United States arrived in the case under consideration, as well as from the statement of the ground of such conclusion, that it did not recognize the military commanders of this State after 11th July, 1865, as possessed of such powers as are conferred on such commanders by the existence of martial law or the right of conquest.

Upon the further examination of that opinion, it appears to us that ground appears for the conclusion that it was the intent of Congress to confer merely enlarged police powers upon the officer placed in command under the Acts of reconstruction as affecting the persons and property of private citizens.

Justice Swayne, in commenting upon the act of the military commander, observes that "it is not an order for mere delay. It did not prescribe that the proceeding should stop until credit and confidence were restored and business should resume its wonted channel." These expressions are consistent with the idea that the powers of the commanders were in the nature of police powers and clearly imply the absence of any power to create changes in the statutory or customary law of the places under their military jurisdiction. They imply, at the most, a temporary authority to deprive the citizen of the benefit of the local laws for a limited time, not by changing the abstract operation and effect of those laws, but, by the application of force to his person, to prevent him from asserting certain rights and privileges conferred upon him by law, an exercise of authority that could not be justified, from whatever source it may have proceeded, except where an extraordinary emergency exists involving the safety of the community. We think that this definition of the nature of the powers of the military commanders is also the result of another principle laid down in the opinion under consideration. Justice Swayne says "it is an unbending rule of law that the exercise of military power, where the rights of the citizen are concerned, shall never be pushed beyond what the exigency requires." The application of this principle precludes us from construing the Acts of Congress relat-

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ing to re*construction as intending more than providing for the peace of the communities to which they related while the process of rehabilitation was taking place.

For the foregoing reasons, we are inclined to hold that, as it regards the operation and effect of the laws of the State, the action of the military commanders is to be regarded as of the nature of enlarged police powers, which in their exercise might temporarily interrupt the laws of the State but could not engraft changes of any kind upon them. It was not competent for the military commanders to create any exception or limitation to the Statute of Limitations that could be recognized in the civil Court during the supremacy of civil law. The utmost effect of the orders in question was, by force acting upon or threatened against the person of the citizen, derived from a source external to the laws of the State, to deter him from pursuing his legal remedies in the Courts of justice.

The question then presents itself whether an act of interference of this nature, that prevents a citizen from prosecuting his claims within the time prescribed by law for that purpose, operates to extend such time in contravention of the terms of the statute.

It is very clear that only the legislative

authority that could create the statute can repeal it in whole or in part or create new exceptions or conditions to it. When, therefore, the sovereign who makes the law does an act the effect of which is to impede the right of the citizen to his remedy, it may well be considered whether or not a repeal or modification of the restrictive part of the statute was not implied in such act of interference. The case just stated is probably the strongest that could be put for introducing constructive exceptions to the Statute of Limitations, and yet, even as it regards that case, the authorities are in great conflict and uncertainty.

The present case is clearly distinguishable from that just stated, inasmuch as the interference with the plaintiff's remedy did not occur through the act of a source of authority competent to enact or modify any State statute, but from a source as independent of the law-making power of the State as if it had been produced by the forces of nature. We can find no precedent or principle that warrants any interference with the Statute of Limitations on any such ground. We have not been able to discover any authority in any case or text writer that would warrant

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the interpolation in the *statute of such an exception as that implied in the plaintiff's claim in his argument in this case.

While the case is, in its effect, one of hardship, as affecting the plaintiff's right, its remedy is beyond the power of this Court. Wrongs that occur in the intercourse of individuals are usually capable of redress; but there are many deprivations of right that result from inevitable accident that are irremediable as far as the laws are concerned, and among the most fruitful causes of such disasters, wars and domestic revolution may be enumerated. If, in attempting to eliminate the evils that follow in the train of war and civil discord, there is danger that the simplicity and symmetry of the civil law will become impaired, it is better that individuals should suffer these evils than that they should be transferred to the body of the laws and thus propagated through the indefinite future of the community.

It is necessary to notice the defendant's request to charge refused by the Circuit Judge and the charge given in its stead.

The proposition charged was in effect that the Cotton Planters' Loan Association, of which the plaintiff is Receiver, was actually dissolved under the operation of the sixth Section of the Act incorporating it, (13 Stat., 41,) by reason of a proclamation of the Governor of the State in September, A. D. 1866. The substance of the request to charge was that such proclamation could not, under the operation of the charter, effect actual dissolution. The intended effect of this charge, as made, upon the case was that the corporation having become dissolved prior to the period when the Statute of Limitations became operative by the expiration of the Stay Law there was at that time no one who could maintain an action on the causes of action in suit, and that this state of things continued until the appointment of the plaintiff as Receiver of such corporation in September, 1871, and that the Statute of Limitations did not commence to run until such appointment of a Receiver, and, therefore, that the actions were commenced in due time. The proposition involved in the request to charge was that at the expiration of the Stay Law the corporation was competent to sue, and, therefore, the statute commenced to run. If the defendant's proposition was correct, then, under the views of the operation of the statute already expressed, the actions were already barred at the period of their commencement. The question to be considered involves the construction of a portion of the

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sixth Section of the Act "to charter a *Cotton Planters' Loan Association," passed December 21st, 1861.—13 Stat., 41. The language of this Section involved is as follows: "And the President and Treasurer shall, on the first day of every month, transmit a statement, sworn to by them, showing the amount of cotton on hand, the amount of bills and notes issued and in circulation, and the amount of loans and discounts made by such Association; and in case such report shall not be made for two consecutive months, as herein required, it shall be the duty of the Comptroller General to report that fact to the Governor, who shall forthwith issue his proclamation declaring the charter of such Association forfeited."

The principles governing the construction of these provisions were stated by this Court in Ahrens v. The State Bank, (3 S. C., 401). It was there held that where a statute declares a forfeiture of corporate franchises as the consequence of a failure of legal duty on the part of a corporation, the statute is to be regarded as penal in its nature, and the act of wrong must be judicially ascertained in a direct and proper judicial proceeding before the penal consequences imposed by the statute become operative.

The present case is a stronger one for the application of these principles than the case presented in Ahrens v. The State Bank. In that case the statute declared a direct forfeiture in terms in the event that the corporation failed to comply with the particular requirements that were the subject of the statute, (14 Stat., 212,) while in the present case that intent is not in terms declared, though inferable from the directions given to the Governor in that event to issue his proclamation "declaring the charter of such association forfeited." In another aspect the case in hand is stronger for the application of those principles. In the present case the act of public authority claimed to have work-

ed an actual dissolution was that of an executive officer, the Governor, while in the case of Ahrens v. The State Bank a judicial act was necessary, namely, the appointment of a Receiver. This Court held in the last named case that although a judicial act was the proper mode of accomplishing the dissolution of a corporation after an act of forfeiture, yet an ex parte act, like that of appointing a Receiver, was not such an exercise of judicial authority as could accomplish that result by binding the parties to an actual determination of the facts. This reasoning would exclude an executive act from having any such effect. It will be observed that

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the two cases have an aspect in *common that was the subject of comment in Ahrens v. The State Bank. In both cases the act looking to forfeiture was to be performed on the authority of a statement made by the Comptroller General. We are clearly of opinion that the proclamation of Governor Orr did not work an actual dissolution, but that the corporation possessed the faculty of suing at the time the law ceased to operate, and the statute from that date commenced to run on the causes of action in suit, and accordingly they were barred. Under this view, that disposes of all questions that are essential to a final disposition of the actions, it will be unnecessary to examine the other questions presented by the brief.

There must be a new trial.

McIVER, A. J., concurred.

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9 S. C. 197

WARREN, WALLACE & CO. v. BURTON.

(Columbia. Nov. Term, 1877.)

[*Mortgages* ⇐427.]

A prior encumbrancer is not a necessary, but only a proper, party to an action to foreclose a mortgage, and the action may proceed to judgment without making him a party.

[Ed. Note.—Cited in Evans v. McLucas, 12 S. C. 61; Ex parte Mobley, 19 S. C. 339; Marion County Lumber Co. v. Tilghman Lumber Co., 84 S. C. 509, 66 S. E. 124, 877.

For other cases, see Mortgages, Cent. Dig. § 1284; Dec. Dig. ⇐427.]

Before Carpenter, J., at Edgefield, July, 1876.

Action by Warren, Wallace & Co. against Geo. W. Burton to foreclose a mortgage of real estate given by the defendant to the plaintiff.

The defendant by his answer alleged that he had given a prior mortgage to D. L. Turner, who had assigned it to one Jacob Burton, and that the mortgaged premises were subject to the lien of that mortgage, and he prayed that the complaint be dismissed on the ground that Jacob Burton had not been made a party to the action.

Other defenses were alleged by the answer, and at the trial testimony was taken on both sides.

His Honor rendered a decree for the plaintiff, and the defendant appealed on the grounds—

1. Because the weight of testimony shows that the note dated March, 1872, was not given to secure past indebtedness, but only future advances.

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*2. Because the testimony is positive and uncontradicted that the note given 31st of March, 1875, was not to secure the balance due on the mortgage debt alone, if at all, but that it included accounts and claims against the defendant that had nothing to do with the mortgage debt.

3. Because the note of the 31st of March, 1875, is not a renewal of the mortgage debt, said debt having been paid and extinguished.

4. Because the note of the 31st of March, 1875, itself extinguished the original mortgage debt, if it had not already been extinguished by payment.

5. Because the mortgage was only intended to secure legal charges for advances made to defendant, and plaintiffs charged defendant in their account more than legal interest, and both interest and commissions on the same advances.

6. Because the lands covered by the mortgage had been conveyed to Jacob Burton by defendant, and he should have been made a party before any judgment was rendered in this action.

Norris, for appellant.

Addison, contra.

February 28, 1878. The opinion of the Court was delivered by

McIVER, A. J. This was an action to foreclose a mortgage of real estate, and the only legal question involved is whether to such an action an antecedent encumbrancer is a necessary party. While such an encumbrancer may be and is a proper party to such an action, in order that the purchaser at the sale in which such an action results may obtain a clear title, free from such encumbrance, yet he is not a necessary party, and the action may proceed to judgment without making him a party.—Story Eq. Pl., § 193; Cal. on Parties, 128–138; Pomeroy on Remedies, §§ 333–342; Rose v. Page, 2 Sim. Rep., 471; Richards v. Cooper, 5 Beav., 304; Delabere v. Norwood, 3 Swans., 144.

There are cases like Finley v. Bank of the United States, (2 Wheat., 304 [6 L. Ed. 480]), Haines v. Beach, (3 Johns. Ch., 459), and DeSaussure v. Bollmann, (7 S. C., 329,) which hold that unless an antecedent encumbrancer is made a party to a bill for foreclosure and sale of mortgaged premises he will not be bound by the decree, and, therefore, if it is

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desired so to bind him, he must be made *a

party. But, on the other hand, the authorities above cited fully sustain the conclusion that while such an encumbrancer may be a proper party he is not a necessary party, and the action may be prosecuted to judgment without making him a party, the only effect being that, as he is not bound by the judgment, the purchaser at the sale made under such judgment takes subject to the encumbrancer.

The other questions raised being questions of fact which have been determined adversely to the appellant in the Court below, this Court, as has been repeatedly decided, will not undertake to review such findings of facts, except where they are shown to be without any evidence to sustain them, or where "the overbearing weight of the evidence" is against the conclusion reached by the Circuit Court. Without undertaking to go into an examination of the testimony, it is sufficient to say that, so far from finding either of these conditions of things, the conclusions reached by the Circuit Court seem to be supported by the evidence.

The motion is dismissed.

WILLARD, C. J., and HASKELL, A. J., concurred.

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9 S. C. 199

STATE, ex rel. WISE, v. RANSOM.

(Columbia. Nov. Term, 1877.)

[*Counties* ⇐168.]

A warrant drawn on the County Treasurer, under the Act of 19th March, 1874, § 84, to defray the expenses of making assessments for taxation is payable "from the first collection of County funds" of the fiscal year for which the assessments were made, and not of the fiscal year in which they were made.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 251; Dec. Dig. ⇐168.]

[*Counties* ⇐168.]

The Act of 19th March, 1874, § 84, is not repealed, either expressly or by implication, either by the Act of 7th June, 1877, to reduce and fix the salaries of certain officers, or by the Act of 9th June, 1877, to raise supplies and make appropriations for the fiscal year commencing November 1st, 1876.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 251; Dec. Dig. ⇐168.]

[This case is also cited in State ex rel. Conant v. Fuller, 18 S. C. 253, as to facts.]

January 28, 1878. The opinion of the Court was delivered by

McIVER, A. J. This was an application for a mandamus to compel the respondent, as Treasurer of Aiken County, to pay a warrant drawn by the County Commissioners of Aiken against the regular tax "to pay the expenses of making assessments for taxation" incurred between the 1st of June and 1st of October, 1876.

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*The return of the respondent denies that "he has any funds in his hands that are applicable in payment of the check [warrant] in question."

It is admitted, however, that the respondent reported to the County Commissioners on the 15th of August, 1877, "that he had on hand, subject to their draft for the present fiscal year, $3,955.96 for County purposes only, and $1,319.20 for back indebtedness of the County," and that on the next day the warrant in question was drawn. The only question which is raised in this case and which we are called upon to determine is whether the claim in question is payable out of the taxes levied for the fiscal year beginning 1st November, 1876, represented in this case by the fund of $3,955.96, or out of the taxes levied for back indebtedness, represented by the fund of $1,319.20.

The legislation upon this subject is apparently confused and conflicting; but we think it may be, and should be, so read as to avoid this apparent conflict and bring the several Acts relating to this subject into harmony. The several statutes to which we have referred as regulating this matter are as follows: The Act of 19th March, 1874, § 84, 15 Stat., 762; the Act of 25th March, 1876, § 3, 16 Stat., 194; the Act of 7th June, 1877, § 3, 16 Stat. 248 and the Act of 9th June, 1877, § 2, 16 Stat., 287. Inasmuch, however, as the services upon which this claim is based were rendered between the 1st of June and the 1st of October, 1876, and the Act of 25th March, 1876, by its express terms was not to take effect until the 1st of November, 1876, we do not think its provisions apply to the present case. The Act of 19th March, 1874, the only law in force at the time this claim was incurred, provides that the County Auditor shall keep his office open from the 1st of July to the 20th of August in each year for the purpose of receiving returns and making assessments, as a basis for the collection of taxes, for the fiscal year beginning 1st November following, and in Section 84 declares as follows: "That the Treasurer of each of these above Counties shall pay to his County Auditor, or his order, the sum specified in the Auditor's warrant from the first collection of County funds of that fiscal year."

Without stopping to inquire how it is that the claim in question is not represented by the Auditor's warrant rather than by the warrant of the County Commissioners, as no question on this subject is raised by the County Treasurer, the important inquiry

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which arises *out of the language of the Act above quoted is: what fiscal year is designated by the terms "of that fiscal year?" What does the word "that" refer to? Does it refer to the fiscal year in which the services were rendered, or does it refer to the fiscal year for which the services were rendered? We think that a proper construction of these

words, viewed in the light of the context, requires us to regard these words as referring to the fiscal year for which the services were rendered. The other provisions of the Act were manifestly designed to put into operation and regulate the machinery by which the taxes for the fiscal year commencing on the 1st of November following the period in which the services were rendered were to be collected; and when the Act declares that those services are to be paid for out of the collections of that fiscal year, the natural and necessary inference is that the Legislature intended to designate by the word "that" the fiscal year of which they had been previously speaking, viz., the year commencing 1st November following the period when such services were rendered.

Again, the language of the Act is that these services are to be paid for out of the first collection of that fiscal year. Now, as we have seen, these services are to be rendered near the close of the fiscal year, and in view of the general provisions of the law fixing the time for collecting the taxes it is very obvious that these services could not be paid for out of the first collections if the words in question are to be construed as designating the fiscal year in which the services were rendered, because the claim would not accrue until long after the time fixed for the collection of the taxes. It is argued, however, that, conceding this construction of the Act of 19th March, 1874, to be correct, it is still not conclusive of the question, as that Act has, if not expressly, at least by implication, been repealed by the Act of 7th June, 1877, and by the Act of 9th June, 1877. The former is an Act to reduce and fix the salaries of certain officers, and, after fixing the salary of County Auditors, provides that the expenses of the assessments, not exceeding certain fixed sums, shall be paid from the first collections of County funds of the fiscal year in which the work shall be performed, and the fifth Section repeals all Acts and parts of Acts inconsistent with this Act.

It will scarcely do to say that this Act operates upon the claim now in question, which arose under the previous legislation in pursuance of which the services had been perform-

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ed before the passage *of this Act, and was also audited and allowed before that time, the account having been approved by the Board of County Commissioners on 16th January, 1877, though the warrant was not drawn until the 16th August, 1877. It had, therefore, become an established claim before the Act claimed to be a repealing Act was passed. The objection to the construction contended for by respondent would be not merely that this was retroactive legislation, but there would be a conflict as to the amount; for by law, as it stood when the services were performed, the amount was limited to eight hundred dollars, while by the Act of 7th June, 1877, the amount is limited to four hundred dollars. It seems to us, therefore, that the provisions of the Act of 7th June, 1877, must be confined to cases arising since the passage of that Act.

It only remains for us to inquire what is the effect of the provisions of the Act of 9th June, 1877, upon the question which we are called upon to determine. This is "An Act to raise supplies and make appropriations for the fiscal year commencing 1st of November, 1876." By the terms of the second Section a tax of three mills is levied for County purposes generally for the fiscal year commencing 1st November, 1876, and an additional tax in the County of Aiken of one mill to pay the past indebtedness of said County for the years 1875 and 1876. Under the former or three mill tax, the fund of $3,955.96 has been collected, and under the latter, the one mill tax, the fund of $1,319.20 has been raised. The past indebtedness here provided for must necessarily be that arising during the years of 1875 and 1876, but prior to the 1st of November, 1876, because the indebtedness arising subsequent to that date is provided for by the general levy of three mills.

This construction is aided by reference to the public events, of which we may take judicial notice, which were before the mind of the Legislature at the time this Act was passed. It is a fact that no taxes were collected for the fiscal year commencing first November, 1876, by any legal authority, except such as were levied under the Act of 9th June, 1877; and it is equally true that the services which constitute the basis of the claim now in question were rendered long before the passage of this Act, for the purposes of another supposed levy. The Legislature, knowing these facts, may well be supposed to have intended by the use of the terms "past indebtedness of said County for the years of 1875 and 1876" to provide a special fund out of which such services could be paid, leaving

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the *general levy to meet the expenses charged against it, in express terms, by the Act of 9th June, 1877. Any other construction would lead to a conflict between the Act of 7th June, 1877, and the Act of 19th March, 1874; while by the construction which we adopt the provisions of these two Acts may be harmonized; for, if by the terms of the Act of 19th March, 1874, the relator is entitled to be paid out of the collections for the fiscal year beginning 1st November, 1876, he is by the same Act equally entitled to be paid from the first collections for such fiscal year, while, as we have seen by the terms of the Act of 7th June, 1877, the Auditor who made the assessments during the fiscal year of 1876–77 is likewise entitled to be paid from the first collections of the same year. This conflict may be, and doubtless was, intended to be avoided by making the latter payable out of the general levy for the fiscal year year commencing 1st November, 1876, while

the former is provided for by the special levy of one mill to pay past indebtedness. The force of the argument that the claim here in question cannot be classed as past indebtedness is not perceived. The obligation to pay arose when the services were rendered, and the amount and correctness of the claim was ascertained and fixed on 16th January, 1877, when the claim was approved by the County Commissioners, all of which was prior to the passage of the Act providing for the payment of past indebtedness.

We are likewise unable to see how this construction can be regarded as violating the obligation of contracts. The fund out of which it is claimed the warrant in question ought to be paid was raised by virtue of the provisions of the Act of 9th June, 1877, and surely the Legislature, while raising the fund, had a right at the same time to direct its application, especially when, at the same time and by the same Act, another fund is provided for the payment of claims of the class in which the one now in question stands. If, therefore, the warrant now in question had been drawn payable out of the fund provided for the payment of past indebtedness, we do not see how the Treasurer could have refused to pay it out of the fund which he then had on hand applicable to that purpose.

The motion is dismissed.

WILLARD, C. J., concurred.

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9 S. C. *204

*Ex parte DAVIS, in re WALKER v. AUXILIARY JOINT STOCK COMPANY.

(Columbia. Nov. Term, 1877.)

[*Mechanics' Liens* ⟸183.]

A mechanic's lien upon a "building or structure and upon the interest of the owner thereof in the lot of land upon which the same is situated:" *Held*, To include several adjoining lots enclosed by a common fence and used and controlled by the owner of the building for one common and avowed purpose, though as to some he was not the absolute owner.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 320; Dec. Dig. ⟸183.]

Before Kershaw, J., at Columbia, August, 1877.

The facts of the case are fully set forth in the opinion of the Court.

Bachman & Youmans, for appellant.

Clark, contra.

February 1, 1878. The opinion of the Court was delivered by

HASKELL, A. J. In an action brought by G. M. Walker, trustee, against the Auxiliary Joint Stock Company, to foreclose a mortgage on land, George W. Davis comes in and sets up his claim to a prior lien on said land by virtue of the provisions of Section 7, Chapter CXX, Revised Statutes, p. 550. It seems that the respondent, Davis, had erected buildings for the appellant on the land involved prior to the execution of the mortgage to Walker, and had duly filed the statement of his account in the office of the Clerk of the Court of Common Pleas, as is required by law. About that there is no dispute.

The question is as to the land to which this "mechanic's lien" attaches, and does it in this case attach to a certain tract which will hereafter be more particularly described?

The determination of the respective rights of the mortgagee and the contractor in this case depends upon the construction given to the words of the statute, viz.: The builder "shall have a lien upon such building or structure, and upon the interest of the owner thereof in the lot of land upon which the same is situated."—§ 7, Chap. CXX, Rev. Stat., p. 550. It appears by a plat exhibited in the case that the buildings erected by the contractor, George W. Davis, were a "grand stand" for spectators and a "judges' stand," on a race course then in the possession of the

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appellant. That there *were four tracts of land parallel to each other and contiguous, their lines running North and South, of which three, Nos. 2, 3 and 4, constituted the race course, while No. 1 was known as the Fair Grounds, No. 1 being the Westerly, No. 4 the Easterly of the four; that the building for spectators, called the "grand stand," was situated on tract No. 1, at its Eastern border; that the "judges' stand" was on tract No. 2, near its Western border and opposite the center of the "grand stand," and that the race track was between these two stands—ran around, passing over and comprehending the greater part of tracts 2, 3 and 4; that these three tracts (2, 3 and 4) were enclosed by one fence, and that the nearer side of the track was also marked by a common fence. The appellant, for whom the buildings were erected was in possession and control of all four tracts, but held an absolute title to only one of them—tract No. 3. Neither of the buildings was upon tract No. 3, and it is contended by the appellant that this tract No. 3 has been improperly held to be a part of the lot "of land on which the buildings are situated."

The word "lot," in its most comprehensive sense, might include the whole tract of land upon which any buildings might be situated, without regard to the dimensions of the tract or the nature of the building; for example, a kitchen or other out-door building upon a large plantation.

In its most limited sense, the word might be confined to the area actually covered by the building; as the land beneath a residence but without means of approach.

In the latter the security intended by the statute would be deprived of all value, while in the former the law would be unreasonable and oppressive. When a word has various

significations and its meaning in a statute comes in question, that which is most reasonable is adopted by the Court as the sense in which it was used by the law-makers, and that certainty is most reasonable which accords at once with established principles of law and the manifest intention of the Legislature.

It is safe to say that the extent of land to which the mechanic's lien attaches cannot be less than the land which would pass by a grant of "the buildings and the lot of land on which the same are situated." When that rule of measurement has been ascertained, it will be regarded as governing the cases arising under this statutory lien.

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*When a house or building is the principal thing in a grant and land is not named, does any land go with the house? and if land is named but not described with particularity, how is it to be measured? It is a maxim, "Cincunque aliquid conceditur, conceditur etiam et id sine quo, res ipsa non esse potuit."

"When anything is granted, all the means to attain it and all the fruits and effects are also granted, and will pass inclusive together with the thing itself."—Greenleaf's Cruise on Real Property, Vol. II, p. 265.

Or, under the grant of a thing everything passes which is part and parcel thereof.

The application of this principle to the proposition above submitted cannot be better done than by quoting the language of Mr. Justice Story in the case of Whitney v. Olney, 3 Mason, 280 [Fed. Cas. No. 17,595]. His recital of authorities is very full, and the points most urged by counsel in the present case are considered. He says:

"My opinion is that by the devise of the mill and its appurtenances all the land under the mill and necessary for the use of it and commonly used with it passed to the devisees. * * * I do not proceed upon the ground that the land was a mere appurtenance to the mill, but that it was parcel thereof.

"It is true that land cannot strictly be appurtenant to land so as to pass under the term appurtenances; * * * but where the intention is clearly expressed that land should pass under that name, the law will give effect to the grant, notwithstanding the misnomer. Thus, where it was averred in pleading that certain land was appurtenanced to a messuage, the Court held that, in point of law, it could not be appurtenant to the messuage, but that it was, nevertheless, well in a grant, because it shall be intended to mean such land as is usually occupied with the messuage, or lying with the messuage, and therefore a devise of a messuage with the land to the same appertaining is good to pass such lands as were usually occupied, used or lying with the messuage. Therefore, in Boocher v. Sanford, (Cro. Eliz., 113,) it was held that lands usually occupied with a house, though at a distance from it, might well pass by a devise of it as a tenement with its appurtenances in which H dwelleth in E.

"In these cases the lands pass not as appurtenances, but as parcel of the granted or devised premises, upon the intention of the

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*parties collected from the instrument and explained by reference to the facts.

"But in the present case I lay no stress whatever upon the words in the devise 'with the appurtenances.' The land under the mill and adjacent thereto, so far as necessary to its use and commonly used with it, passed by force of the word 'mill.' * * * A grant of a messuage conveys all the land within the curtilage thereof; so the grant of a house.—Shep. Touch., 94. * * * The good sense of the doctrine on this subject is that under the grant of a thing whatever is parcel of it, or of the essence of it, or necessary to its beneficial use and enjoyment, or in common intendment is included in it, passes to the grantee. In common sense and in legal interpretation a mill does not mean merely the building in which the business is carried on, but includes the site, dam and other things annexed to the freehold necessary for its beneficial enjoyment."

Apply these principles.

The lien is a statutory mortgage, and is of the nature of a grant. All classes of buildings are comprehended; the building is the principal thing in the grant, and is clearly defined in each case as it may arise; and in each case, according to the nature of the building and existing facts and circumstances, such portion of the land on which it is situated as may be "necessary and convenient for its reasonable use" goes with the building under the lien.

See also The Bank of Charleston v. Curtis, (18 Conn. R., 348,) decided upon the principles of law in the case of Frank v. Branch, (16 Conn. R., 259,) similar to the case of Whitney v. Olney. In each case arising under the statutes there is a mortgage of the building and the land upon which it is situated, not upon which the foundation of the building stands, but the land not only on which the building rests but over which the purposes for which the building was avowedly erected extends and on which the usefulness of the building depends. In this case it is a mortgage on the grand stand and judges' stand on a race course. Certainly the land controlling the use of the water power had as well be taken from a mill as the land containing the race track be taken from the stands for the spectators and the judges.

No difficulty arises from the facts in this case if the law thus announced is sound. The several tracts, two, three and four, were bought, procured and held for a common and avowed purpose; they were together encios-

ed by a common fence; the track which
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passed *over the three was marked by a common fence on the inner side; they constituted one parcel adjacent to the main building and occupied by the smaller; they were used together for a special purpose, and the buildings were erected exclusively to aid in this purpose.

The entire lot containing the three tracts should properly be regarded, for the purposes of the statute, as the lot of land on which the buildings were situated.

The judgment of the Circuit Court is confirmed and the appeal dismissed.

WILLARD, C. J., and McIVER, A. J., concurred.

9 S. C. 208

STATE v. McEVOY.

(Columbia. Nov. Term, 1877.)

[*Grand Jury* ⇐30.]

Under the Act (General Statutes, Chapter CXXXIX, § 1, p. 746,) grand jurors were drawn in January, 1876, to serve during that year, and at the next term of the Court, held in the same month and year, they were, before being empaneled, discharged by the Court on the ground of fraud and illegality. A special term was then ordered by the Judge to be held in March of the same year, and the grand jury which had been drawn in January, 1875, having been summoned to attend, did so, and at the regular term in May found a bill of indictment for murder: *Held*, That the indictment was valid.

[Ed. Note.—For other cases, see Grand Jury, Cent. Dig. § 68; Dec. Dig. ⇐30.]

[*Grand Jury* ⇐30.]

Under the law as it stood in 1876, (see General Statutes, Chapter CXXXIX, § 1, p. 746,) if a grand jury drawn in January to serve during that year should be discharged at the next term of the Court before they were empaneled, the grand jurors who had been drawn and who had served during the preceding year could be recalled and their acts would be valid.

[Ed. Note.—For other cases, see Grand Jury, Cent. Dig. § 68; Dec. Dig. ⇐30.]

[*Homicide* ⇐210.]

At the trial of an indictment for murder, certain declarations of the deceased, which were reduced to writing by a Trial Justice and signed and sworn to by the deceased about one hour after the fatal wound was given, and which he the next day, within about an hour of death, when he was conscious of his hopeless condition, in speaking to his physician, said that he intended these to be considered as his dying declarations, were properly received in evidence.

[Ed. Note.—Cited in State v. Beleher, 13 S. C. 463; State v. Gill, 14 S. C. 413; State v. Nance, 25 S. C. 172; State v. Johnson, 26 S. C. 153, 1 S. E. 510; State v. Bradley, 34 S. C. 139, 13 S. E. 315; State v. Talbert, 41 S. C. 529, 19 S. E. 852; State v. Taylor, 56 S. C. 374, 34 S. E. 939.

For other cases, see Homicide, Cent. Dig. § 442; Dec. Dig. ⇐210.]

Before Maher, J., at Aiken, May, 1876.

This case is fully stated in the opinion of the Court.

Whipper, for appellant.

Henderson, contra.

February 4, 1878. The opinion of the Court was delivered by

McIVER, A. J. The prisoner was indicted for the murder of James J. Gregg at Granite-
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ville, in the County of Aiken, on the *20th day of April, 1876. The bill of indictment was found at the May Term of the Court of General Sessions for that County, of the same year, and the prisoner was tried and convicted of murder at the same term. Upon his arraignment, and before pleading, the prisoner, by his counsel, moved to quash the indictment, upon the ground "that the grand jury by which the said indictment was found are not the legally constituted grand jury of the said County, they having already been drawn and returned, and having served at each term of said Court for the year 1875 and until another grand jury was empaneled in their stead as required by law, to wit, the grand jury which was empaneled at the January Term of this Court for the year 1876," as will appear by reference to the records hereunto annexed marked "B." This motion was overruled by the Circuit Judge and the defendant excepted. The trial then proceeded, and during its progress testimony as to certain declarations made by the deceased shortly before his death was offered on the part of the State as the dying declarations of the deceased, and objected to by the counsel for the prisoner, upon the ground "that the said declaration was not distinctly and substantially proven to have been made by the deceased while conscious in his own mind of his impending death." This objection was also overruled and the testimony received as competent, to which the prisoner, by his counsel, excepted. The prisoner, by his counsel, now moves in this Court to arrest the judgment, upon the ground that the grand jury which found the bill of indictment was not a legal grand jury, and for a new trial upon the ground of error in admitting the declarations of the deceased as dying declarations.

The facts upon which the motion in arrest of judgment is based, as disclosed by the records marked B, are as follows: At the January Term, 1876, of the Court of General Sessions for Aiken County, after the names of the persons summoned as grand jurors for that year had been called, but before they were empaneled, it was brought to the attention of the Circuit Judge that the drawing of the jury "had been fraudulently conducted, and that the jury box had been practiced upon;" whereupon, after investigation, "the Court declared that the listing and drawing of the jurors for the present term was a palpable fraud, and that the persons returned and in attendance as jurors were not lawful jurors, and ordered that they be discharged." A special term of the Court was then ordered to be held on the fourth Monday in March

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next after the *date of the order, and the Sheriff was ordered to summon the grand jurors who had served during the year 1875, to attend as such at the special term, and they did attend, with the exception of three who were absent. It would seem, therefore, that in consequence of the fraud in drawing jurors for the January Term, 1876, no new grand jury for that year could be obtained, inasmuch as, under the law as it then stood, grand jurors could only be drawn prior to that term, and, therefore, from necessity, the grand jury which had been drawn for the year 1875 was continued.

The question is, therefore, presented whether such a grand jury was a legal grand jury. We are glad to be relieved from the necessity, in so grave a case as this, of considering the technical question, which has been raised, as to whether a motion to quash the indictment was the proper mode of presenting the objections, because, even conceding that the objection was presented in the proper mode, we are entirely satisfied that the objection cannot be sustained. By Section 1 of Chapter CXXXIX of General Statutes, page 746, it is provided that "the Clerk of the Court of General Sessions in each County, not less than fifteen days before the commencement of the first term of the Court in each year, shall issue writs of venire facias in each County for eighteen grand jurors, to be returned to that Court, who shall be held to serve at each term throughout the year and until another grand jury is empaneled in their stead." The grand jury, therefore, which found the bill of indictment in this case was the legal jury, not only for the year of 1875, but also until another grand jury was empaneled in their stead; not merely until another grand jury was drawn or summoned, but empaneled.

Now, leaving out of view the question as to whether the persons who were supposed to have been drawn as grand jurors for the year 1876 could be said to have been legally either drawn or summoned in face of the determination of the Court that the proceedings of the Board of Jury Commissioners by which such persons were said to have been so drawn "was a palpable fraud," and it is very certain that such persons were never empaneled as a grand jury, and, therefore, by the express terms of the statute above quoted, the persons who had served as a grand jury during the year 1875 continued to be the legal grand jury of that County, and were so when they found the bill of indictment in this case. Stress is laid upon the fact that at September Term, 1875, the Circuit Judge ordered "that the grand jury be discharged, and that it be paid," and it is

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*argued that after the grand jury has been formally discharged and has left the presence of the Court it cannot be recalled. Passing by the question whether the words above quoted from the journals of the Court imported anything more than the usual discharge at the termination of the labors of the grand jury at each term of the Court, and conceding the fact, which does not appear in the case, that this was designed to be a final discharge, we are at a loss to see how it can affect the question under consideration, for certainly the order of a Circuit Judge cannot have the effect of repealing or suspending the operation of a statute. If in this case the Circuit Judge had, at September Term, 1875, in the most explicit terms finally discharged the grand jury for that year, and if, at the same time, as we have seen, the statute continued them in office until another grand jury was empaneled, it surely could not for a moment be doubted that the statute would render such a discharge a nullity.

The motion for a new trial upon the ground of error in admitting the declarations of the deceased as dying declarations grows out of the following state of facts:

The fatal wound was inflicted in Graniteville on the 20th April, 1876, and on the same day the deceased made the declarations in question, which were taken down in writing, signed and sworn to by the deceased, before a Trial Justice, while deceased was on the railroad train which took him to his home in Augusta, Ga., where he died the next day. A very short time before his death, probably about an hour, Dr. Campbell, who was in the train when the Trial Justice read the declarations to the deceased, had a conversation with the deceased, as to which he testified as follows:

"I asked him, 'Mr. Gregg, what do you think of your case?' He replied, 'What do you think of it?' I said, 'You know, James, gun-shot wounds in the abdomen are very uncertain.' He then said, 'If you say that, I will die certain.' He referred to my general disposition to have a hopeful view of a case; my opinion was then that his case was hopeless—bleeding and impossible to tie vessels without reopening his abdomen. I did all I could to keep him from any consciousness of his hopeless condition, but he was conscious. * * * I asked him this: 'Do you recollect a statement made by you before a Magistrate at Graniteville about this difficulty?' He answered, 'Yes, I recollect it.' I asked, 'Did

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you *intend that as a dying declaration, James?' He said, 'Yes, I did.' I said, 'Would you make that statement now as your dying declaration?' He answered, 'Yes.'"

The rule of law as to the admissibility of dying declarations is well established, and, as stated in a recent case, (The State v. Quick, 15 Rich., 349,) is as follows: "In order to the proper admission of such declarations it must appear satisfactorily that death was imminent at the time, and that the declarant was so fully aware of this as to be

without any hope of life." Certainly the facts of this case were fully sufficient to make it appear satisfactorily that both of these conditions existed, for death was imminent, if not at the time the declarations were originally made, certainly when they were in effect repeated to Dr. Campbell within an hour before the death actually occurred, and every expression which came from the deceased renders it very manifest, to use his own language, that he made these declarations under the belief that he would "die certain" from the effects of the wound.

It is very clear, therefore, that there was no error on the part of the Circuit Judge in admitting these dying declarations as competent testimony.

The motions in arrest of judgment and for a new trial are refused.

WILLARD, C. J., and HASKELL, A. J., concurred.

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*SNIDER v. ROBERTSON.

(Columbia. Nov. Term, 1877.)

[*Wills* ⇨662.]

Testator having a brother H. who was an alien, and the chief object of his bounty, devised certain real estate to R. G. in trust and "for the use and benefit of my brother H. if alive at my death, the legal title to remain and be vested in the said R. G. until such time as the said H., now an alien, shall become duly qualified, according to Acts of Congress of the United States of America, to take and to hold said real estate. When the said H. becomes so qualified, the said R. G. is hereby directed to execute to the said H. a valid conveyance in fee to said" real estate, "the rents and profits to go to the said H. from the time of my decease."

H. never became naturalized under Acts of Congress, but after the death of testator he became a denizen under the laws of this State: *Held*, That, according to the legal construction of the will, H. upon his becoming a denizen, became qualified to take the real estate, and, therefore, there was no lapse or failure of the devise.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1557; Dec. Dig. ⇨662.]

[*Wills* ⇨439.]

[Cited in Robert v. Ellis, 59 S. C. 148, 37 S. E. 250, to the point that in the construction of a will testator's intention should, if possible, be ascertained.]

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 952, 955, 957; Dec. Dig. ⇨439.]

Before Mackey, J., at York, June, 1876.

This was an action by William H. Snider and M. Alice Latimer against Charlotte J. Robertson, Ader E. Hacket (now Faulconer) and E. Almoen Hacket to recover possession of certain real estate.

The case arose out of the provisions of the will of William Hacket, Sr., which is as follows:

"In the name of God, amen! I, William Hacket, of the District and State aforesaid, desirous of disposing of my worldly estate, and being of sound and disposing mind and memory, do make this my last will and testament, in manner and form following, viz.:

"First. I will, desire and so direct my executors, hereinafter named, to promptly pay all just debts that I may owe at my decease.

"Second. I will, bequeath and devise to Robert G. McCaw, of said District and State, my plantation on Turkey Creek, known as the Latimer tract of land, containing about two hundred and forty acres; my house and lot in Yorkville, known as lot No. 19, whereon I now reside; and my tract of land near the village of Yorkville, known as the Chambers tract, containing about eighty acres, (reserving one acre of the Chambers tract adjoining the graveyard of the Independent Presbyterian Church,) in trust and upon condition for the said Robert G. McCaw to have and to hold the said tract of land and house and lot for the use and benefit of my brother, Hugh Hacket, if alive at my death, now residing in the North of Ireland, at Drumahagles, near Balleymaney, County of Antrim, the legal title to remain and be vested in the

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said Robert G. McCaw until *such time as the said Hugh Hacket, now an alien, shall become duly qualified, according to Acts of Congress of the United States of America, to take and to hold said real estate. When the said Hugh Hacket becomes so qualified, the said Robert G. McCaw is hereby directed to execute to the said Hugh Hacket a valid conveyance in fee to said tracts of land and house and lot; the rents and profits of said Turkey Creek tract and house and lot in Yorkville to go to the said Hugh Hacket from the time of my decease.

"Third. I will, bequeath and devise to my said brother, Hugh Hacket, if alive at my death, my negroes, viz.: Isaac, Cely and son Ben, Till and her daughter Laura, Hiram, Delhi and her children Osceola, Charles, Wyona, Nero and Hariet, Margaret, and the increase of said female slaves that may hereafter be born previously to my death.

"Fourth. I will, bequeath and devise unto my said brother, Hugh Hacket, if alive at my death, my negroes Alcey, Mary and her daughter Louisa and Dick, in special charge and confidence that as soon as may be practicable after my decease he do erect a comfortable house for them to live in upon the Chambers tract of land devised in the second clause of this my will; and that the said Hugh permit Alcey, Mary and her daughter and Dick there to reside in the enjoyment of all the rents and profits of said last mentioned tract, without any person exacting or requiring any service or labor from either the said Alcey, Mary or Louisa, and that they be supported and maintained on the said tract of land, during their several lives, out of the interest of the sum of one thousand dollars hereby set apart to the said Hugh

Hacket for that purpose, and the labor and hire of boy Dick to be applied to their common support.

"Fifth. Should my brother, Hugh Hacket, not be alive at my decease, in that event I will and do devise to the said Robert G. McCaw all the real estate named in the second clause of this my will, in trust for the use and benefit of my nephew, William Hacket, eldest son of the said Hugh Hacket, (if the said William be alive at my death,) to be held and conveyed upon like trusts and conditions declared in said second clause of my will. I also give and devise to my said nephew, William Hacket, in the event of my brother, Hugh Hacket's not being alive at my death, all the personal property named in

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the third and fourth clauses of this my *will, subject to the same special charges and confidence declared in the fourth clause of my will.

"Sixth. Should neither my brother, Hugh Hacket, or my nephew, William Hacket, be living at my death, I will and devise the real estate named in the second clause of this my will to the said Robert G. McCaw, in trust, to have, hold and convey the same to my nephew, James Hacket, son of the said Hugh Hacket, when the said James becomes legally qualified to take and hold said real estate. I further give and bequeath to the said Robert G. McCaw my lot of land in Yorkville, known as lot No. 32, in trust, to hold for the use and convey upon said qualification to the said James Hacket. [I declare the devise of lot No. 32 for the use and benefit of James to be in no wise dependent upon the contingency of the deaths of brother Hugh and William at the time of my decease.] Should neither Hugh or my nephew, William, be alive at my death, I will that all the personal property named in the third and fourth clauses of this my will shall go to my nephew James, subject to the same special charges and confidence declared in the fourth clause of this my will.

"Seventh. All my other lands, not hereinbefore disposed of, I will, and hereby empower my executors, to sell on a credit of one and two years with note and approved security, and that all my judgments, notes and book accounts be collected by my executors as soon as practicable.

"Eighth. I will and devise unto my brother, Hugh Hacket, if alive at my death, all the household and kitchen furniture in my house in Yorkville, also all my mules, cows, hogs, horses or other stock and farming utensils on my Turkey Creek plantation. If the said Hugh be dead at my decease, then I devise the property named in this clause to my nephew, William Hacket, if alive; otherwise, to my nephew, James Hacket.

"Ninth. I give and devise to my nephew, James Hacket, my negroes, Adam and Patience with her increase.

"Tenth. I give and devise to my sister, Jeney Mallet, two thousand dollars.

"Eleventh. I give and devise to my niece, Elizabeth, now Mrs. Ratchford, five hundred dollars.

"Twelfth. I give and devise to my niece, Margaret Mallet, one thousand dollars.

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* "Thirteenth. I give and devise to the daughters of my brother, Hugh Hacket, out of my estate not otherwise disposed of, five hundred dollars each.

"Fourteenth. I will and declare, if I am possessed of anything not included in the above and not hereinbefore disposed of, that my executors divide the same, together with any legacies that may fall back, equally between my brother Hugh and my sister Jeney Mallet, share and share alike.

"Fifteenth. Should any of the legatees under this my will complain or express any dissatisfaction with any dispositions of my estate herein made, I hereby direct and empower my executors, in their discretion, to revoke any and all legacies such complaining legatee or legatees might have been entitled to, and to dispose of the same between my other legatees as to my executors may seem just and proper.

"Sixteenth. Whereas in the seventh clause of this my will I have directed my executors to sell all my lands not otherwise disposed of, I hereby declare I mean such of the persons named by me as executors as may qualify before the Ordinary.

"Lastly. I nominate and appoint Robert G. McCaw, J. Bolton Smith and James R. Bratton executors of this my last will and testament, hereby revoking all former wills by me made. In testimony whereof I have hereunto set my hand and seal, this sixteenth day of October, 1847."

The issues of the case were tried by the Judge, without a jury, and the case is fully stated in his judgment, which is as follows:

Mackey, J. This is an action brought to recover certain real estate in the possession of defendants, of which William Hacket, Sr., died seized and possessed, and to which plaintiffs claim they are entitled as the next of kin of said deceased capable of taking under our Statute of Distributions.

The facts of the case as admitted in writing by the counsel for the parties are as follows:

I. William Hacket, Sr., a naturalized citizen, died in York County, S. C., October 18th, 1850, testate, and his will was duly admitted to probate, and a copy thereof and the endorsements thereon were admitted in evidence.

II. That he died seized of the lands described in the complaint.

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*III. That the relatives of the said William Hacket, Sr., who were living at the date of his death were his brother, Hugh Hacket,

an alien, residing in Ireland; James Hacket, a son of said Hugh, an alien, also residing in Ireland; William K. Hacket, a son of said Hugh, likewise an alien, residing in Yorkville, S. C.; Mrs. Jane Mallet, sister of the said Hugh, also an alien, living in York County; Mrs. Margaret Snider and Mrs. Eliza Ratchford, also aliens, the daughters of his said sister, Jane Mallet, and their respective children, (the plaintiffs in this action,) viz.: William H. Snider (son of Margaret Snider,) and Mrs. M. Alice Latimer, (daughter of Mrs. Eliza Ratchford,) both of said plaintiffs being natives of this State, and their fathers citizens thereof.

The plaintiff William H. Snider was born on December 21, 1849, and the plaintiff Mrs. M. Alice Latimer was born in March, 1848.

IV. Office copy admitted in evidence of deed from Hugh Hacket, dated February 15th, 1851, to his son, William K. Hacket, in which deed the said Hugh Hacket granted, bargained and sold to his son, the said William K. Hacket, the real estate mentioned in the second clause of the will of the testator, Wm. Hacket, Sr., "and all the estate, right, title, interest, property, claim and demand, either at law or in equity, of him, the said Hugh Hacket, in and to the same, or any part thereof."

V. That on the 6th day of November, 1854, Hugh Hacket, still an alien, arrived in the United States from Ireland, and came to Yorkville, S. C., and on the 14th day of November, 1854, he filed in the office of the Clerk of the Court for York County his declaration of intention to become a citizen of the United States.

That on December 13th, 1854, he became a denizen of the State of South Carolina, under the Act of 1799, by taking the oath of allegiance, duly authenticated and filed in the office of the Secretary of State, at Columbia, S. C.

That he returned to Ireland in 1855, and died there March 25th, 1873, without ever having returned to the United States.

VI. That James Hacket never came to this State or to the United States.

VII. That Wm. K. Hacket, father of the infant defendants and husband of the defendant, C. J. Robertson, was a resident of this state at the date of testator's death, and became a naturalized citizen thereof on the 16th day of March, 1855.

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*That in the year 1851, he, Wm. K. Hacket, took possession of the real estate described in plaintiffs' complaint, and held the same, continuously, until his death in 1862, leaving the defendants, as his heirs-at-law and devisees, in possession, and that said defendants have ever since held possession of the same.

VIII. That the said Mrs. Mallet died an alien in June or July, 1874.

That her daughters, the said Mrs. Snider and Mrs. Ratchford, the respective mothers of the plaintiffs, are still alive, and are aliens.

IX. That Robert G. McCaw never executed any formal deed of conveyance or instrument in writing to Hugh Hacket, or to any one else, and that the said McCaw died in 1870.

X. That William K. Hacket had no children alive when the testator, William Hacket, Sr., died in October, 1850; and that the two children of William K. Hacket, the infant defendants herein, were born, respectively, in the years 1855 and 1860.

XI. That on May 31st, 1854, a notice signed R. W. Ratchford, for Margaret A. Ratchford (now the plaintiff Mrs. Latimer) and William Hacket Snider, per J. J. Snider, parents of the plaintiffs, was served, through the Sheriff of York District, on Colonel Robert G. McCaw, the trustee under the will of William Hacket, Sr., notifying him that trespasses were being committed on and damage done to the Chambers tract of land by persons having no title thereto, and that in behalf of said children they would hold him responsible therefor whenever their titles became vested.

Having thus recited the admitted facts in the premises, I now proceed to determine the issues of law involved in this case.

The testator, William Hacket, Sr., by the second clause of his will, devises certain real estate, including property sued for in this action, to Robert G. McCaw, as trustee, which said devise is in the following terms, to wit: "In trust and upon condition for the said Robert G. McCaw to have and to hold the said tracts of land and house and lot for the use and benefit of my brother, Hugh Hacket, if alive at my death, now residing in the North of Ireland, at Drumahagles, near Balleymaney, County of Antrim, the legal title to remain and be vested in the said Robert G. McCaw until such time as the said Hugh Hacket, now an alien, shall become duly qualified, according to Acts of Congress of the United States of America, to take and hold the said real estate. When the said Hugh Hacket becomes so qualified the said

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Robert G. McCaw is hereby directed *to execute to the said Hugh Hacket a valid conveyance in fee to said tracts of lands and house and lot, the rents and profits of said Turkey Creek tract and house and lot in Yorkville to go to the said Hugh Hacket from the time of my decease."

As Hugh Hacket was alive at the date of the testator's death I deem it (to use the language of the Court in McCaw v. Galbraith, 7 Rich., 80,) "unnecessary to notice the provisions made by the will of William Hacket in favor of the sons of Hugh upon the contingency of his death in the lifetime of the testator."

The intention of the testator must be gathered from the plain language of the will, and

must be the legal intention, to be ascertained by settled rules of construction.—See Parker v. Marchant, 1 Phil. Ch. 360; 6 Cruise's Dig., 148, 3d edition.

A will of real estate, wherever it be made, must be construed according to the laws of the country where the property upon which it is intended to operate is situated, and the testator is presumed to have executed his will in contemplation of the force and effect of such laws.—Bovey v. Smith, 1 Vern., 147.

The testator in this case expressly provides that Hugh Hacket "shall become duly qualified, according to Acts of Congress of the United States of America, to take and hold said real estate," and when he "becomes so qualified" the trustee is directed to execute a valid conveyance in fee to him. The beneficial interest is given absolutely to Hugh Hacket, during his life, and that interest was capable of being expanded into a fee simple upon his becoming "duly qualified to take and hold said real estate." The due qualification, clearly contemplated by the testator, was the becoming a citizen of the United States, by naturalization, pursuant to Acts of Congress. Hugh Hacket himself asserted this interpretation of the will, and acted upon it to the extent of filing his declaration of intention to become a citizen of the United States,—an intention, however, which he never executed. Hugh Hacket having died without having "become duly qualified to take and hold said real estate," it reverted, and, not being disposed of by the will, is in the heirs of the testator, and this reversion, undevised, descended to the next of kin capable of taking. This intestacy of William Hacket, Sr., is caused by the failure of Hugh Hacket to comply with the express requirement of the will, a contingency which the testator does not appear to have contemplated, or, if regarded as possible, he has left to be provided for under the laws of the land.

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*It would appear that Hugh Hacket, in the first instance, actually declined complying with the condition precedent annexed to the devise in question, for on the 25th of February, 1851, within four months after the decease of the testator, he released by deed all his interest in the estate in favor of his son William Hacket. Hugh Hacket subsequently came to this country on November 6th, 1854, but returned to Ireland in 1855 and there remained without again visiting the United States, and died in Ireland on the 25th day of March, 1873.

No stronger evidence than this could possibly be adduced to show the deliberate purpose to abandon his previously declared "intention" to become a citizen of the United States. His becoming a denizen of this State in December, 1854, was not a compliance with the condition of the devise.

In the United States there is no such condition as denizenship.—1 Bouvier L. Dic., 404; Walker's American Law, 138.

It is solely the creation of State law, and the rights and privileges of denizens as to property are determined entirely by the lex rei sitæ, and it only confers the specific rights mentioned in the statutes creating it. The Act of the Legislature of South Carolina of 1799, under which Hugh Hacket filed his oath of denizenship, (Statutes at Large, Vol. V, p. 355,) only gives the right "to purchase and hold real property." The terms of the devise required that he "shall become duly qualified, according to the Acts of Congress of the United States of America, to take and hold said real estate" before the trustee could convey the estate to him.—[Richards v. McDaniel] 2 Nott & McCord, 352–355.

The "Naturalization Acts of Congress" required five years' residence immediately preceding the time of admission to citizenship. Three years after the declaration of intention to become a citizen the applicant is required to take the oath of allegiance and abjuration. In the language of the Supreme Court of the United States, "the oath of allegiance and abjuration is the sine qua non of admission to citizenship."—2 U. S. Stat., 811; Act March 3, 1813.

It is contended, however, that Hugh Hacket actually became qualified to take, in accordance with the intention of the testator. But how are we to ascertain the intention of the testator better than by taking his very words that he designed to express that intention, and which are free from any obscurity or ambiguity? Are we to resort to inference as

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to the meaning when there is no *doubt as to the plain import of the words of the will? The testator did not say that Hugh Hacket "shall become qualified according to the laws of South Carolina," or "qualified according to law," or simply "qualified," but he prescribes the mode in which he shall become qualified, namely, by his becoming a citizen of the United States, that is, "qualified according to Acts of Congress." It seems to be perfectly clear from the will that this mode and degree of qualification formed a part of testator's mind and purpose.

Did testator simply intend that Hugh Hacket should have the benefit of so much in value of his estate? If so, why did he not devise the land to Colonel McCaw to sell and give the proceeds to Hugh Hacket? This he could have done.—Craig v. Leslie, 3 Wheat., 563 [4 L. Ed. 460].

The testator imposed a condition upon this devise, and the Court has no right to aid the proposed devisee in his manifest effort to evade that condition. A perusal of the will shows that the testator in designating Hugh Hacket as the principal beneficiary of his bounty, entertained the two-fold purpose of having his brother, the said Hugh, become

a resident of York County, and that he should without delay remove his alienage by becoming a naturalized citizen of the United States, to the end that he might be vested with the real estate in fee. The former purpose is made manifest by his constituting the said Hugh Hacket the trustee of a considerable fund, with a special charge that he should invest the same for the use and benefit of certain slaves, the objects of testator's peculiar solicitude. Hugh Hackett was virtually constituted by the testator, as to those slaves, both their trustee and guardian.

Words cannot mirror human thought more clearly than this purpose is reflected in the fourth clause of testator's will, for the trust and guardianship which that clause imposes could only be effectually executed by Hugh Hacket's actual residence in York County and through his personal care and supervision. This is made evident by a mere recital of the fourth clause of the will, which is as follows:

"Fourth. I will, bequeath and devise unto my said brother, Hugh Hacket, if alive at my death, my negroes, Alcey, Mary, and her daughter Louisa and Dick, in special charge and confidence that as soon as may be practicable after my decease he do erect a comfortable house for them to live in upon the Chambers tract of land, devised in the second clause of this my will, and that the said

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Hugh *permit Alcey, Mary and her daughter Louisa and Dick there to reside in the enjoyment of all the rents and profits of said last mentioned tract, without any person exacting or requiring any service or labor from either the said Alcey, Mary or Louisa, and that they be supported and maintained on said tract of land, during their several lives, out of the interest of the sum of one thousand dollars, hereby set apart to the said Hugh Hacket for that purpose, and the labor and hire of the boy Dick to be applied to their common support."

How could Hugh Hacket carry out the beneficent purpose of the testator as to the slaves above named by making a hurried visit to this country, four years after testator's death, becoming a denizen within one month after his arrival, and after a mere temporary stay of a few months in York returning to Ireland and there voluntarily remaining all the days of his life? If testator had not himself prescribed the mode of qualification, there could be no doubt but that Hugh Hacket, becoming thus qualified and then adandoning the State, would have been a fraud upon testator's bounty and clearly the defeat of his intention.

If Hugh Haeket had become naturalized according to Acts of Congress and then abandoned the country, deserting his charge of the slaves mentioned, and thus violating the "special confidence" reposed in him by testator, this would have been a fraud upon testator's bounty; but still Hugh would have been entitled to the land, for the will so says, and while the intention of testator as to residence is plain he has not expressed that intention in a legal way, and Courts ought not to construct codicils to wills. If necessary to decide the point, I would hold that the denizenship of Hugh Hacket did not qualify him to take by devise. Denizenship only gives the specific rights enumerated.

In England denizens can take by purchase and devise, but not by inheritance. Our Act of 1799 gives the right "to purchase and hold." This right was intended to be conferred only on persons residing or intending to reside within the limits of this State. The Act, by its terms, (see Section 1, Act 1799,) grants the rights and privileges of denizenship only to those "who now are, or hereafter shall become, residents in this State." Hugh Hacket was never a resident in South Carolina. All of his acts stamped him as a mere transient person in the State, who had no intention of taking up his permanent abode within its limits. But, even grant-

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ing his *legal denizenship, the Act of 1799 cannot avail to accomplish the end for which it is invoked by those who claim through him the real estate in question. The word "purchase," as used in the Act, clearly means to buy for a consideration, and does not refer to one who takes by devise "as purchaser," as distinguished from one who takes by "limitation." In construing the denizen Act it may well be held that there is a difference between the active power to "purchase" and the passive power of taking "by purchase" or "as purchaser" under a will. The statute was manifestly intended to encourage aliens to "become residents in this State" and to bring their capital here and invest it by the "purchase" of "real property." If Hugh Hacket could take as devisee, by his mere taking and subscribing the oath of allegiance to this State, then his immediate resumption of his allegiance to the British Crown and his instant and final abandonment of his pretended residence in this State would operate as a successful fraud, both on the intention of the framers of the Act of 1799 and upon the will of William Hacket, Sr.

Hugh Hacket never having had any legal estate in the real property now in suit, it follows that those who claim under him have no legal right thereto.

The defendants cannot derive title through William K. Hacket, for he was an alien at the date of testator's decease, and his subsequent naturalization, in 1855, several years after testator's death, could not have a retroactive effect. In 1 Sp., 533, (case of Wightman v. LaBorde,) the Court says: "The effect of naturalization is to invest the alien with all the rights of native-born citizens, but it has no such retroactive operation as to make an alien capable of taking as heir of

one who died before his naturalization. He who takes as heir must take at the instant. There can be no restoration of the right of succession by removing the disability." In the case of McKellar v. McKellar (1 Sp., 536,) the plaintiffs were the grand-nephews of the deceased and the defendants were his alien brothers, who had removed to South Carolina and given notice of their intention to become citizens, but had not completed their naturalization when the intestate died. The Court there held that the descent was cast upon the plaintiffs, the only relatives who were citizens at the death of the intestate. In the case of Keenan v. Keenan (7 Rich., 345,) the defendant was the widow of the intestate and an alien when he died, in 1847.

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*In November, 1847, after intestate's death, she announced her intention of becoming a citizen, and was naturalized in November, 1853.

The Court held that she could not take; that naturalization is not retrospective, and that "an alien becoming a citizen in the most regular manner does not acquire a right to inherit or to take and hold land which belonged to his ancestor who died before he became a citizen, so as to divest the right of a remoter heir who was a citizen at the time of the death of the ancestor." The native or naturalized children of aliens, if native or naturalized at the time of descent cast, take, notwithstanding the alienage of parents, for they take by our statutes and not at common law.—North et al. v. Valk, Dud. Eq., 215–224.

The plaintiffs herein are the only relatives of William Hacket, Sr., alive at his death who were not then aliens, and they claim as "next of kin" under clauses 7 and 8, Sec. 1, of No. 1489, Vol. V of Statutes at Large, p. 163.

If there were any nearer of kin these plaintiffs would have to claim in right of their mothers, and if their mothers were equally near, then in the stead of their mothers under the second clause of the said Section (p. 162); but they cannot so take, because—1st. Their mothers are alive; 2d. Because the mothers are aliens.

But the claim of the plaintiffs is direct as next of kin to William Hacket, Sr., and not by descent at common law, nor under the second clause of the statute above referred to.

Upon this point Chancellor Kent lays down the law thus: "If a citizen dies and his next heir be an alien who cannot take, the alien cannot interrupt the descent to others, and the inheritance descends to the next of kin who is competent to take, in like manner as if no such alien had ever existed."—2 Kent Com., 56.

Of course the alien referred to by the author is supposed to be living.

In Edwards v. Barksdale, (2 Hill Eq., 417,) the Court says: "In giving construction to the words 'next of kin,' we must take them to mean such 'next of kin' as on general principles of law are qualified to take. For example, if the next of kin were an alien, he is within the letter of the law, yet no one supposes that he can inherit land, or that if a statute similar to ours were passed in England an attainted person could inherit.

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* * * * We *shall hardly conclude that a man's land may escheat to the State though he may have near kindred to inherit it."

In the case of McClenaghan v. McClenaghan, (1 Strob. Eq., 321 and 322 [47 Am. Dec. 532],) the Court says: "The right of the heir depends not merely on the Act of Distributions, but upon his ability to inherit. Thus it has been repeatedly ruled that where the next of kin, who would be entitled to inherit if not an alien, is disabled to take by reason of his alienage, yet the land shall not escheat if there be an heir capable of taking by succession." * * * "No rule is better established than when an alien would take by a course of descent, then the estate should go over to him to whom it would have gone if the alien had been already dead."

In Orr v. Hodgson, the Supreme Court of the United States says: "Where a person dies leaving issue who are aliens, the latter are not deemed his heirs-at-law, for they have no inheritable blood, and the estate descends to the next of kin who have inheritable blood, in the same manner as if no such alien issue were in existence."—4 Wheat., 461 [4 L. Ed. 613].

In the case of Jackson v. Lunn (3 Johns. Cas., 121,) Justice Kent holds that "the law takes no notice of an alien heir, who, as he cannot take by descent, shall not impede the descent to another."

In 1 Speer, 536, supra, it is held that "the succession is cast on the next of kin who can take, passing by those nearest in blood but who cannot take on account of alienage."

The case is divested of difficulty if we bear in mind that the plaintiffs do not claim to take "by representation" nor "by inheritance," but simply as the "only of kin" existing qualified to take, and therefore necessarily "the next of kin" under the statute.

The kinship of blood serves to connect the distributees with the deceased; it is the natural connecting link; but our Statute of Distributions, while regarding this link, or nexus, in determining propinquity of kinship, only recognizes inheritable blood in allowing representation, and citizen or naturalized blood in allowing one to take intestate property. Those who are the next of kin take by the direct operation of the statute, just as if they had been individually named therein. The question of descent or of representation, therefore, does not arise in this case.

Nor are the defendants entitled by right of possession from lapse of time, for the

plaintiffs' right of action did not accrue until the death of Hugh Hacket, in March, 1873.

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*In the case of McCaw v. Galbraith, (7 Rich., 89,) the Court says: "The persons claiming as heirs have no right to present possession, for the devise obstructs the descent."

But, in addition to this, a sufficient time had not elapsed since the plaintiffs attained their majority for the statute to bar when they brought this action.

Nor can the infant defendants claim as heirs of the testator, inasmuch as they were born after the death of testator.—6 Rich., 351; 1 Sp., 533.

It does not appear that any of the grounds of defense set forth in the answer of the defendants are tenable.

William Hacket, Sr., it must be held, died intestate as to this real estate.

The Act of 1791 provides as to "real estate" when one shall die without disposing thereof by will. In Richardson v. Richardson, (Dud. Eq., 196,) the Court held that devise of land was void because the plaintiff, Richardson, was a witness to the will, and speak of the land as "real estate descended," treating it as a case of intestacy. All that prevented the plaintiffs from taking instantly upon the death of William Hacket, Sr., was the contingent devise in favor of Hugh Hacket. That devise obstructed the descent and made it contingent. But upon the death of Hugh Hacket, he dying an alien and not having acquired the title, the estate vested in the plaintiffs, eo instanti, they having been entitled to take then just as they would have taken at the death of William Hacket had he made no contingent devise, their right relating back to the date of his decease, for only those alive and qualified at that date could take.

It is therefore adjudged and decreed that the plaintiffs, William H. Snider and M. Alice Latimer, are entitled to the real estate in question, consisting of the house and lot and the fifty-four acres of land situated within the corporate limits of the town of Yorkville, and the two hundred and forty acres of land on Turkey Creek, in the County of York, described in the complaint herein, and that they do have judgment for the immediate possession thereof. It is further ordered and decreed that unless all of the said real estate be surrendered at once to the plaintiffs, that the Sheriff of York County do forthwith proceed to put the said plaintiffs in possession of the same.

The costs in this action must be paid by the defendants.

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*No claim for rent having been made by the plaintiffs in their complaint, therefore none is allowed.

The defendants excepted to the judgment and appealed therefrom upon the following grounds:

First. Because of error in construing the will of William Hacket, Sr., as requiring Hugh Hacket, the devisee of the real estate, to become a naturalized citizen of the United States and a resident of York County as a qualification to taking said devise in fee.

Second. Because said decree is contrary to the manifest intention of the testator, as appears from the context of his will.

Third. Because of error in holding that the testator, William Hacket, Sr., died intestate as to the real estate in issue.

Fourth. Because of error in holding that the plaintiffs are such next of kin to William Hacket, Sr., as are qualified to take under our Statutes of Distribution.

Fifth. Because even should it be held that the real estate in issue reverted on the death of Hugh Hacket, said decree is erroneous in holding that it descended to the plaintiffs as heirs-at-law or next of kin; it being in evidence that at the date of the alleged reversion the defendants were heirs of the testator, qualified to take the reversion.

Sixth. Because said decree is otherwise contrary to law and equity, as arising from the facts therein.

Hart & Hart, Witherspoon, for appellants, contended that according to the intention of the testator, as expressed in the second clause of the will, construed in connection with the fifth clause, the plaintiffs are entitled to recover, and they cited and commented on the following authorities: Brailsford v. Heyward, 2 DeS., 291; Carr v. Green, 2 McC., (Law,) 84; Sealy and Wife v. Lanneau, 1 DeS., 137; Carr v. Porter, 1 McC. Ch. 75; Bell v. Hughes, 8 Rich., (Law,) 400; Shands v. Rogers, 7 Rich. Eq., 425; Wigram and O'Hara, p. 63; Fronty v. Fronty, Bail. Eq., 516; Keith v. Perry, 1 DeS., 353; Edwards v. Barksdale, 2 Hill Ch., 185; Smith v. Hilliard, 3 Strob. Eq., 217; Hall v. Hall, 2 McC. Ch., 307; Ibbeson v. Beckwith, Tabot, 157; Wright v. Dew, 10 Wh., 229; Brailsford v. Heyward, 2 DeS., 32; Earle v. Grim, 1 Johns. Ch., 499; Newland v. Sheppard, 2 P. Wms., 194; Phillips v. Chamberlain, 4 Ves., 51; 1 Speer, 365; 3 Brev.,

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245; 1 *McC. Ch., 352; McDonough v. Murdoch, 15 How., 404; Whitney v. Emmot, 1 Bald., 303; Wigram and O'Hara on Wills, 2d part, 32–59; Wigram on Wills, 58–59, 265; Story Eq. Jur., § 984; 1 Redf. on Wills, 315, 460; Aulick v. Wallace, Law and Eq. Rep., March 14, 1877, p. 351; Mallet v. Smith, 6 Rich., Eq., 12; McCaw v. Galbraith, 7 Rich., 74; Van Vauckleech v. Reformed Dutch Church, 6 Paige, 600; Craig v. Craig, 3 Barb., 76; Tucker v. Tucker, 1 Seld., 408; Hopewell v. Ackland, 1 Salk., 239; Huxtep v. Brooman, 1 Bro. C. C.; Wilee v. Wilee, 2 Bing., 364, 1 S. C., 23;

Dcav., 25; Burwell v. Mandevell, 2 How., 578; 1 Sp., 365; 2 Brev., 298.

Rion & Wilson, contra, in addition to the authorities cited in the judgment of the Circuit Court, referred to the following amongst other cases: Parris v. Cobb, 5 Rich. Eq., 451; Young v. Dinkins, Rich. Eq., 25; Dougherty v. Dougherty, 2 Strob. Eq., 63; Johnson v. Clarkson, 3 Rich. Eq., 312.

February 4, 1878. The opinion of the Court was delivered by

McIVER, A. J. This was an action to recover possession of certain real estate in the County of York. Both parties claim under William Hacket, Sr., as a common source of title—the plaintiffs as his next of kin and heirs-at-law, and the defendants as the aliencees of his devisee. The plaintiffs contend that though William Hacket, Sr., did leave a will duly executed, yet as to the real estate in controversy he died intestate, and that they, as his only next of kin capable of inheriting, are entitled to the land.

The defendants deny both of these propositions, and contend that the land was well devised by the will, and has come to them from the devisee; but, failing in establishing this proposition, they insist that, even if William Hacket, Sr., did die intestate as to this land, the plaintiffs are not entitled to claim it as next of kin and heirs-at-law.

The facts upon which these questions are to be determined are all conceded and are fully stated in the decision of the Circuit Judge. It is contended on the part of the plaintiffs that inasmuch as Hugh Hacket, the devisee named in the second clause of the will, who was an alien, died before he became qualified, "according to Acts of Congress of the United States of America, to take and to hold said real estate," the devise to him failed, because it was

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only upon his *becoming so qualified "to take and to hold said real estate that the devise could become absolute, and that, therefore, as to such real estate, William Hacket, Sr., died intestate. It becomes necessary, therefore, to determine what is the proper construction of the will. In doing this our first effort should be, if possible, to ascertain what was the real intention of the testator, and this must be done, not by resorting to conjecture as to what was likely to be such intention, but by an attentive and careful consideration of the words of the will in each and every part of it, guided by such rules of law as experience has shown to be useful in seeking such intention. We are to read the will as a whole, and from its terms ascertain, if practicable, what was in the mind of the testator at the time he executed it.

Looking, then, to the terms of this will in this spirit, we cannot fail to see that the testator had in his mind certain prominent intentions:

1st. An intention to dispose of his whole estate; for besides the legal presumption arising from the mere making of the will, we find him saying in the preamble that he is "desirous of disposing of my worldly estate," by which phrase persons are universally understood to express an intention of disposing of all their property or "worldly goods." We next find him, after making various specific dispositions of portions of his property, providing in the fourteenth clause—which must be regarded, as the late Court of Appeals, in Mallet v. Smith, (6 Rich. Eq., 12 [60 Am. Dec. 107],) did regard it, as the residuary clause of the will—not only for the disposition "of anything not included in the above and not hereinbefore disposed of," but also for the disposition of "any legacies that may fall back." These last quoted words conclusively show that the intention of the testator was to provide in this, the residuary clause of the will, not only for the disposition of such property as he may have overlooked in the previous clauses of his will, but also for the disposition of such as might from any cause, whether from lapsed or void legacies or devises or otherwise, fall back into his estate. Nothing can be clearer than that the testator intended that in no contingency should he be regarded as intestate as to any portion of property.

2d. The next prominent intention which appears from the terms of the will is an intention to make his brother Hugh the principal object of his bounty, and after him, in succession, the two sons of Hugh—William and James. This is so manifest that it is

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alto*gether unnecessary to consume time or space in pointing out the various provisions of the will indicating such intention. It furthermore appears, from a general review of all the terms of the will, that it was not drawn with technical accuracy. This is manifest from the indiscriminate use of the terms "bequeath" and "devise"—the former being sometimes applied to real estate and the latter to personal estate; from the insertion of the sixteenth clause of the will, which, as said by Dunkin, Ch., in Mallet v. Smith, (6 Rich. Eq., 16 [60 Am. Dec. 107],) an expert would have known was not necessary; and from the fact that the draughtsman of the will seemed to suppose that an alien could neither take nor hold real estate under a will, and that the right so to take and hold real estate could be derived solely under an Act of Congress.

Finally, it appears that the testator did, by the second clause of his will, devise the land in question to R. G. McCaw, in trust for the use and benefit of Hugh Hacket, in which clause he uses the following words: "The legal title to remain and be vested in the said Robert G. McCaw until such time as the said Hugh Hacket, now an alien, shall become duly qualified, according to Acts of

Congress of the United States of America, to take and to hold said real estate. When the said Hugh Hacket becomes so qualified, the said Robert G. McCaw is hereby directed to execute to the said Hugh Hacket a valid conveyance, in fee, to said tracts of land and house and lots, the rents and profits of said Turkey Creek tract and house and lot in Yorkville to go to the said Hugh Hacket from the time of my decease."

The question then to be considered is, what is the true construction of the words of the will above quoted? Are they to be construed literally, so as to require, as a condition precedent to the vesting of any estate in Hugh, that he should become a naturalized citizen of the United States, or are they to be construed as meaning simply this: that the testator desired to give this property to Hugh, but was only prevented from so doing in absolute terms, vesting a then present estate, by the fact that the alienage of Hugh prevented him from holding real estate, and that so soon as such obstacle was removed he was then to be invested with the full benefit of the bounty clearly intended for him?

Considering this question in the light of the prominent intentions hereinbefore alluded to, which, upon reading the will as a whole, stand out in bold relief, we are irresistibly

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led to the conclusion *that the testator only postponed the vesting of Hugh's estate because of the disability arising from his alienage, and that when such disability should be removed, in any way, the intention of the testator was to vest the absolute estate in his brother Hugh.

We cannot suppose that this proposed bounty was intended as an inducement to his brother to abandon his native land and become a citizen of this country. Such a view is contradicted by the whole tenor of the will. Everything that an alien was capable of taking and holding, even the slaves, for some of whom the testator manifested special care, were given to Hugh without any condition whatever as to naturalization. In addition to this the testator gives to his brother Hugh the rents and profits of the real estate from the time of his decease, showing clearly that his intention was that Hugh should have every benefit from the property possible for an alien to have. This leads to the irresistible inference that but for such disability he would take the absolute estate in the land too. If the property was intended to be offered to him merely as a bribe to become a citizen of this country, it is scarcely probable that he would have been given every benefit to be derived from the property without requiring him to renounce his allegiance to the British Crown and become a citizen of the United States.

The language of the clause under consideration, especially when read in connection with the sixth clause of the will, as it is not only allowable but proper to do, certainly admits of the construction which we have placed upon it. In that (the sixth) clause, the testator, in the event of the death of his brother Hugh and his nephew William before his own death, gives the real estate in question to McCaw in trust to hold the same and convey it to his nephew James, who was an alien, "when the said James becomes legally qualified to take and hold said real estate." Now, it cannot be doubted that this language must be construed to mean that James was to have the legal estate whenever he should in any manner become qualified to hold it, whether by naturalization or otherwise. Hence, to give the language of the second clause a strictly literal construction, as contended for by the plaintiffs, would involve us in the absurdity of supposing that the testator intended to place more stringent restrictions upon the capacity of his brother to take—manifestly the primary object of his bounty—than he did upon a more distant relation, one who was not only not the primary object of his bounty but two degrees removed beyond it.

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*The whole force of the argument in favor of the construction contended for by the plaintiffs rests upon the idea that the essential part of the condition upon which Hugh was to be invested with the legal estate consisted in the manner in which he was to acquire the capacity "to take and to hold." This, we think, to say the least of it, is an unnatural construction, and that the more reasonable and natural construction is that the testator only intended that the capacity "to take and to hold" should be acquired, and that the manner in which it should be acquired was wholly unimportant.

It will be observed that the language of the second clause is, not when Hugh Hacket shall become a citizen or become naturalized, according to Acts of Congress, which would carry with it something more than the mere right to take and hold real estate, but the language is "shall become duly qualified, according to the Acts of Congress of the United States of America, to take and to hold said real estate, not to acquire the right to vote or any other political right, which is the real object of such Acts of Congress. In fact, speaking with strict technical accuracy, it is not correct to say that an alien acquires any more capacity to hold property by virtue of these Acts of Congress, as such rights have their origin solely in the laws of the States. We regard, therefore, the language used in the second clause of the will as a loose and inaccurate form of expressing the same idea which in the sixth clause is embodied in more comprehensive and correct terms, viz.: That as the objects of the testator's bounty were, by reason of their alienage, incapable of holding real estate, provision was made whereby the legal estate

should be held by a trustee until such incapacity was removed. And when we find a testator applying the terms "devise" and "bequeath" indiscriminately to real and personal property, we are prepared to expect to find similar inaccuracies of expression in other portions of the will and in relation to other matters.

This being the proper construction of the terms of the second clause of the will, it follows necessarily that there was no intestacy as to the real estate in question, and hence that the plaintiffs failed to establish their right to recover; for even if, as was argued, Hugh Hacket failed to acquire the capacity to hold real estate by the proceedings taken by him for the purpose of becoming a denizen, he certainly became legally qualified to hold such real estate by virtue of the provisions of the Act of 1872, (15 Stat.,

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73,) placing *aliens upon the same footing as natural-born citizens so far as the capacity to acquire and hold real estate was concerned.

It is not true, as has been supposed, that the decision of the late Court of Appeals in the case of McCaw v. Galbraith (7 Rich., 74,) precludes us from taking the view hereinbefore advanced. That case, though not relied upon as having the effect of res adjudicata, as it could not be for lack of the necessary identities, it is contended, authoritatively determines certain principles which are inconsistent with the construction which we have placed upon this will. We do not so understand it. In that case not more than two Judges out of the six composing the Court agreed upon any proposition except the point actually decided in the case; and that point was that the inquisition of escheat should be quashed, because the case as made by the proceedings did not show that the escheator was entitled to possession of the real estate of which William Hacket died seized and possessed. Anything else to be found in the case must be regarded as merely an obiter dictum; and though entitled to the highest respect on account of the source from which it comes, certainly does not carry with it the weight of authority. And in estimating the weight to be allowed to the dictum relied upon by the plaintiffs, we must remember that at the time that case was heard Hugh Hacket had taken no step whatever towards becoming a denizen, he not having come to this country until the 6th of November, 1854, while that case was decided at November Term, 1853. Hence the Court did not and could not have had before it the question which we have been considering, because no event had then occurred which could give rise to such a question.

From the view which we have taken of this case, it becomes unnecessary to enter upon the inquiry, which would be a purely speculative one, whether the plaintiffs would be the only next of kin of William Hacket, Sr., capable of inheriting his real estate if he had died intestate as to such real estate.

The motion is granted.

WILLARD, C. J., and HASKELL, A. J., concurred.

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*ARTHUR v. ANDERSON.

(Columbia. Nov. Term, 1877.)

[*Deeds* ⇐194, 208.]

Proof of the execution of a deed, with proof of acknowledgment, is not conclusive evidence of delivery.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 574, 625; Dec. Dig. ⇐194, 208.]

[*Deeds* ⇐44, 57.]

Where a deed shows upon its face that it was intended to be jointly executed, so that all parties should be bound by the covenants, an execution and delivery by some of the parties only is incomplete and does not bind them.

[Ed. Note.—Cited in Fraser v. Davie, 11 S. C. 56, 70; McDaniel v. Anderson, 19 S. C. 215; Carrigan v. Byrd, 23 S. C. 91; Harrelson v. Sarvis, 39 S. C. 19, 20, 17 S. E. 368; Kolb v. Jones, 62 S. C. 194, 40 S. E. 168.

For other cases, see Deeds, Cent. Dig. §§ 88, 126; Dec. Dig. ⇐44, 57.]

[*Specific Performance* ⇐121.]

Specific performance refused, on the ground that the evidence of a contract to convey was insufficient.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 387–395; Dec. Dig. ⇐ 121.]

Before Cooke, J., at Columbia, May, 1876.

This was an action by Jesse Arthur, William L. Arthur, John F. Arthur, F. H. Mitchell and Mary L. Mitchell, his wife, against Robert Anderson, Eliza Anderson, Margaret A. Meeker and Cornelia Arthur.

The case is fully stated in the Referee's report, which is as follows:

I. John W. Arthur, the father of plaintiffs, died on or about March 9, 1862, intestate, leaving surviving him, as stated in the complaint, four, but, as appears in evidence, five children, all infants under the age of twenty-one years, and one of whom died shortly afterwards, the time of her death not appearing in evidence. The intestate also left his widow, the defendant Cornelia Arthur.

II. The intestate died possessed of some considerable property, for a description of which reference may be had to the evidence herewith submitted. It also appears that he died considerably in debt. A portion of his estate was the lot of land in the city of Columbia which is the subject matter of litigation in this action.

III. Mrs. Cornelia Arthur, some time in the year 1863, contracted with one Robert Anderson, the younger, for the sale to him of the lot in question, for what price does not appear. Received from him the purchase money, put him in possession of the premises, and executed to him a bond, with one G. V.

Antwerp as surety, in the penalty of nine thousand dollars, conditioned to procure for him good and sufficient titles to the lot, through the Court of Equity, within one year from the date of the bond, which bears date June 24, 1863.

IV. The defendant, John F. Arthur, attained the age of twenty-one years September 20, 1869, and William L., December 16, 1871; the others were older.

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*V. Robert Anderson, the younger, took possession of the land in 1863 and held possession till 1866, when he assigned or transferred the bond and surrendered possession of the land to his father, Robert Anderson, the elder, who held possession till his death, the date of which does not appear. He died leaving the defendants, Robert Anderson, the younger, Eliza Anderson and Margaret A. Meeker, his heirs-at-law and distributees of his estate.

VI. A deed bearing date July 14, 1873, at which time William L. Arthur, the youngest of the plaintiffs, was between twenty-two and twenty-three years, and John F., the next youngest, was between twenty-four and twenty-five years of age, was prepared by Mr. Bachman, the attorney of the defendants Anderson and Meeker, reciting the alleged circumstances under which the contract of sale had been made and the bond given by Mrs. Cornelia Arthur to Robert Anderson, the younger, the assignment of the bond and transfer of the premises from Robert Anderson, the younger, to Robert Anderson, the elder, the death of Robert Anderson, the elder, leaving his heirs-at-law and distributees as above stated, and further reciting that: "Whereas the heirs-at-law and distributees of John W. Arthur, deceased, are now all of full age, and desire and are willing to execute the title to the land hereinafter described, in accordance with the requirement of the bond above mentioned;" and proceeding to convey the premises in question, in consideration of the premises and of the bond and of one dollar by the heirs-at-law and distributees of John W. Arthur (naming them) to the heirs-at-law and distributees of Robert Anderson, the elder, (naming them,) in the statutory form of release of real estate of use in this State, with general warranty. This deed purports to have been "signed, sealed and delivered" by the parties executing the same, in the presence of the witnesses, (two to each signature). And it is proved to have been so "signed, sealed and delivered" by the oath of one of the witnesses to each signature, as follows: i. e., as to John F. Arthur, before a Notary Public of Richland County, July 14, 1873; as to William L. Arthur, before a Trial Justice of Kershaw County, July 23, 1873; and as to F. H. Mitchell and Mary L. Mitchell, before a Commissioner for South Carolina residing at Wilmington, North Carolina, May 11, 1874. There further appears upon the deed the certificate of a Commissioner of Deeds for South Carolina, residing at Wilmington, North Carolina, that Mrs. Mary L. Mitchell, wife of F.

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H. Mitchell, re*nounced her inheritance in the premises mentioned in the deed. This certificate bears date May 11, 1874, and is signed by Mrs. Mitchell and by the Commissioner under his official seal. The signatures of Mr. and Mrs. Mitchell, and of their witnesses, and of the Commissioner who took the probate of the deed in Wilmington and the renunciation of inheritance, are erased from the deed. The names of the witnesses in the body of the certificate of probate and the name of the Commissioner, together with the words "at least seven days," in the body of the renunciation of inheritance, are also erased; but none of these words are so much obliterated that they cannot be deciphered. The deed is not signed by Jesse Arthur.

VII. From the testimony of John F. Arthur, W. K. Bachman, William L. Arthur and J. T. Hay, I think it is clear that John F. and William L. delivered the deed for the purposes therein expressed, and according to its legal effect.

VIII. It is alleged in the complaint and controverted in the answer that John F. and William L. Arthur were surprised to learn, after they had signed the deed, that the defendants had proposed to pay to Jesse and Mitchell and wife, outside the deed, considerable sums of money, as the real consideration offered to them upon which they were to sign the deed. The only evidence to this point is that of Mr. Bachman, who says that John F. not only knew that Jesse demanded pay but expressed disapprobation of his making the claim. The facts in regard to this seem to be that the deed was presented first to John F. and William L., residents of this State, and executed by them, and afterwards communicated to the others, who demanded compensation as a consideration for their signatures; and that Jesse afterwards refused to sign the deed because his younger brothers had not been compensated, and Mitchell and wife erased their signatures at the instance of Jesse.

IX. The allegations of the ninth paragraph of the complaint denied by the answer in so far as they state facts have been already considered, and in so far as they raise a question of law will be considered hereafter.

X. The interest of Mrs. Cornelia Arthur in the property was one-third as the widow of the intestate, and one-fifth of one-fifth, or one twenty-fifth, as co-distributee with her surviving children of the share of her deceased child.

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*XI. As to rents and profits, it appears that they were extremely inconsiderable, (three dollars per month for about three years,) except the rent of the house built by

defendants; while the taxes paid by defendants from 1866 to 1875, inclusive, amounted to $416.30, and repairs $260. I shall, therefore, not entertain the question of rents and profits. The dwelling house erected on the premises by defendants was destroyed by fire in 1873. Since the fire there has been no tenant.

The plaintiffs demand judgment: 1. For partition, claiming two-thirds of the premises; and 2d. For rents and profits.

The defendants, by way of defense, allege: 1. That a full price was paid for the property, and that the same was applied by Mrs. Cornelia Arthur to the payment of the debts of her intestate and the support of the family. 2. That a conveyance of the property to the defendants was executed and delivered to defendants by John F. and William L. Arthur; and that the said Jesse Arthur agreed to execute the deed upon the payment to him of three hundred dollars, and the said Mitchell and wife upon the payment to them of two hundred dollars; and it was urged in evidence and argument, though not distinctly stated in the answer, without objection. The question of a valid contract, under the Statute of Frauds, though not raised by the pleadings, was one of the chief, if not the chief, questions considered both in evidence and argument.

The issues of law presented are:

1. Was the contract between Mrs. Cornelia Arthur and Robert Anderson, the younger, such a one as the Court of Equity would confirm?

2. Was there such an agreement in writing on the part of Jesse Arthur, under the Statute of Frauds, as the Court would enforce?

3. Was there such a contract on the part of Mitchell and wife?

4. Was there a legal execution and delivery of the deed by Mitchell and wife?

5. Are John F. and William L. bound by their execution and delivery of the deed, in the event it shall be determined that Jesse Arthur and Mitchell and wife, or either of them, are free from the obligation of executing it? In other words, whether the deed is joint, and only to be enforced against all on its execution by all, or several and binding on each one separately?

1. There is no question that Mrs. Cornelia Arthur, whether as administratrix or distributee, had no right or power to convey

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more *than her undivided interest, and that her bond to Anderson did no more than to constitute him a tenant in common with the plaintiffs to the extent of that interest. It is true that circumstances may exist under which the Court would order such a sale, and that the Court will confirm that which it would have ordered. But although the circumstances of this estate were very much embarrassed, and there might very possibly have been such a state of things as would have justified the sale, and that the Court might possibly have ordered it if the contemplated application had been made, and that such application might have been made and granted but for the events of the period, yet it is not proved that such a state of facts did actually exist. In fact, though some evidence was given on this point, yet it was not seriously urged. I therefore rule that Mrs. Arthur's agreement to convey was void, except to the extent of her undivided share.

2. As to Jesse Arthur, there appears to have been some correspondence on the subject between him and Mr. Bachman. Jesse addressed a letter, bearing date January 12th, 1873, to Mr. A. C. Moore, an attorney of this city, in which, after speaking on other subjects, he proceeds as follows: "There is another matter I would like you to attend to for me. You recollect some time since I wrote you about property which my mother sold to a man named Anderson. Since writing to you I believe all the heirs but myself have signed the deed. I desire to have my interest looked into. John can tell you all about the matter. Examine into it and let me know what can be done. I am determined to have what I am justly entitled to, and propose to put the parties in statu quo, as I would undoubtedly be required to do by a Court of Chancery. Ask John to tell you the names of the attorneys who wrote to me on the subject.—Yours, &c., Jesse Arthur." In another letter to Mr. Moore, bearing date April 2d, 1874, Jesse Arthur says: "Yours received. I have to say about the Anderson property, that you are right in supposing Court of Equity refused to order deed for property. The facts are these: At the time sale was made there was more than enough personal property belonging to my father's estate to pay all his debts, and therefore no equity Court would order sale of realty. As for filial duties, that's all bosh! I intend to claim my just dues, and if parties will not make equitable settlement I want you to bring suit. If necessary, I will come to Columbia and look after the matter. I want the matter well attended to, and, if you

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*think best, will employ additional counsel to assist you. I can't tell how much to ask Mr. Bachman for my interest, for I know nothing as to the value of the property. I will be compelled to leave that to you. I am willing to settle on this basis: take present valuation of property, then deduct amount paid by Anderson in gold at the time payment was made; let use of property be stood off against interest, and I am willing to take my share of difference and make a deed; otherwise I shall commence proceedings immediately."

The introduction of this letter was objected to by the plaintiffs and the exception taken that it was a private and confidential communication from Jesse Arthur to A. C. Moore,

his attorney; and it was argued that it was not an agreement between Moore and Bachman, much less was it a contract between Arthur and Bachman, but contained only the basis of a treaty upon which a contract was to be made.

The proposition contained in this letter was communicated by Mr. Moore to Mr. Bachman and accepted by him. In fact, the letter was either read to Mr. Bachman or read by him. Shortly thereafter Mr. Jesse Arthur came to Columbia, and, with Mr. Moore, went to Mr. Bachman's office, and, referring to the proposition contained in the letter of Arthur to Moore, made the calculation, which fixed the amount of his demand at three hundred dollars. This, I think, occurred on Saturday. The date is not on my notes of evidence; but this is my recollection, though I may be mistaken. It is, however, unimportant. It is uncertain whether Mr. Bachman then and there agreed to pay that sum and asked time for payment or asked time to determine whether he would pay it or not. In either case the time asked was accorded by Mr. Arthur, and the following Monday was fixed for payment. On that day Mr. Bachman tendered the amount (three hundred dollars) to Mr. Arthur, who then refused to receive it and withdrew from the engagement. I think his refusal came too late. If the contract can be supported in other respects, it certainly was accepted and payment tendered at the day. It is not necessary that the acceptance, under the circumstances, should have been in writing.—See Fry on Spec. Per. of Contracts, Secs. 181–186, pp. 81–83. The proposal became a contract at the moment of acceptance, and could not afterwards be receded from, but was binding on both parties.

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*The elements of a valid contract in relation to real estate, under the Statute of Frauds, are well stated by Mr. Fry at Section 341: "The object of the Statute of Frauds being to prevent the mischief arising from resort to parol evidence to prove the existence and the terms of the alleged agreement in the cases specified in it, it is obvious that the mischief is avoided wherever there exists, under the hand of the party sought to be charged, a written statement, containing either expressly or by necessary inference all the terms of the agreement; that is to say, the names of the parties, the subject-matter of the contract, the consideration and the promise, and leaving nothing open to future treaty. This, therefore, is sufficient to satisfy the statute; and provided this be found, no formality is required, nor does it signify at all what is the nature or character of the document" [and here he might have said documents, for they may be many,] "containing such written statement, whether it be a letter written by the party to be charged to the person with whom he contracted, or to any other person, or a deed or other legal instrument, or an answer to a bill, or an affidavit in chancery, in bankruptcy or in lunacy;" and it may be said, in addition, any instrument of writing whatever, signed by the party to be charged or his authorized agent or attorney.

The letters of Jesse Arthur to Moore are, taken separately, in many respects vague and indefinite; but construed together, and in connection with subsequent documents, they assume a more distinct and intelligible form. The first letter, dated January 12th, 1873, (and which I think was written in January, 1874,) speaks of "property which my mother sold to a man named Anderson;" and "since writing to you, I believe all the heirs but myself have signed the deed. I desire to have my interest looked into;" and "ask John to tell you the names of the attorneys who wrote to me on the subject." In the second letter he speaks of the "Anderson property," and calls it "realty" of the estate of his father, as opposed to personal property; speaks of "filial duties;" expresses his intention to "bring suit" if parties will not make equitable settlement; speaks of coming "to Columbia" to look after the matter. He then proceeds: "I can't tell how much to ask Mr. Bachman for my interest;" and states his proposal in these terms: "I am willing to settle on this basis: take present valuation of property, then deduct amount paid by Anderson in gold at the time payment was made; let

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use of property be stood off against *interest, and I am willing to take my share and make a deed; otherwise I shall commence proceedings immediately." And he did shortly thereafter commence proceedings; in fact, almost immediately after breaking off the treaty with Mr. Bachman, the agent of the Andersons. Now, no human mind acquainted with the circumstances could doubt for a moment what property or what parties are referred to in these letters; but I suppose that a stranger to the transaction would have to resort to evidence aliunde to determine these points. He would be satisfied on the following points: that they referred to a sale by his mother to one Anderson of some real estate in Columbia belonging to the estate of his deceased father; that he supposed a deed of this property had been made by the other heirs of his father and contained the terms upon which he would execute a deed for his interest in the property, and that Mr. Bachman was the agent or attorney with whom he was to treat. But it could not be determined from the letters alone what the particular property was or who was the man named Anderson referred to in the letters. And, if there were no more, I should be compelled at this point to decree that there was no sufficient memorandum in writing to satisfy the requirements of the statute. But the complaint in the action, signed by the

attorneys of Jesse Arthur, supply, I think, the defects of the letters and satisfy the statute; and I, therefore, adjudge and decree that there was sufficient contract between Jesse Arthur and the defendants Anderson, and that he do execute to them the proposed title on receiving the sum of three hundred dollars.

3. In July, 1873, the deed in question was, after having been executed by Mr. William L. Arthur, sent by Messrs. DePass, Hay & DePass, of Camden, to the plaintiffs Mitchell and wife, at Wilmington, North Carolina. A letter bearing date July 30, 1873, was addressed by Mr. Mitchell to Messrs. Bachman & Youmans in these words: "Yours dated 15th, also a deed from Messrs. DePass, Hay & DePass, Camden, have been received. In reply have to say that I am considering the matter, and will report our decision shortly in regard to signing the papers." Nothing further is heard of the deed till April 4th, 1874, when Mr. Mitchell writes to Messrs. Bachman & Youmans, by postal card, as follows: "Mr. A. H. Van Bokkelen delivered your message. My wife positively refuses to sign the papers unless she is compensated beforehand to the amount of $200." And again, on May 16th, as follows: "Your favor of 14th

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*instant received. In reply, must say that I respectfully decline your offer of $200, in view of facts learned and information gained recently regarding the property. Mr. Arthur (my brother-in-law) has interviewed you on the subject, and his views agree with mine and my wife's. Mr. Van Bokkelen tendered us the money to-day, and we respectfully declined to receive it." Mr. Mitchell was examined by commission as to his authority to represent his wife, and indirectly, and somewhat evasively, denies his agency. I should, however, notwithstanding this denial, or rather from the scope of his answers, taken in connection with the relation of husband and wife between the parties, and the terms of his several letters to Messrs. Bachman & Youmans, in all of which he speaks of his wife's opinion, be inclined to regard him as her agent. In the first he says he will report, not his but "our" decision, and in the postal card he says "my wife positively refuses to sign the papers unless," &c.; and in his answers to the interrogatories he admits conversations with her on the subject before writing the postal card, and the postal card itself imports consultation and concurrence. But I think the letters too indefinite to form the basis of a contract. The word "papers" is too indefinite to connect the writing with the subject-matter, and besides there does not appear to have been any acceptance of the offer until after the erasure of the names from the deed and other papers connected with it. I therefore adjudge that no contract has been proved sufficient to bind the plaintiffs, the Mitchells.

4. The question then recurs, was there a legal execution and delivery of the deed by the plaintiffs F. H. Mitchell and Mary L. Mitchell, his wife? The deed is in evidence. It purports on its face to have been delivered, and is signed and sealed by Mitchell and wife in the presence of two witnesses. It does not appear when it was executed by them, but on the 11th day of May, 1874, one of the witnesses swears, before a proper officer competent to administer an oath, that he and the other witness saw F. H. Mitchell and Mary Louisa Mitchell sign, seal, and as their act and deed deliver the deed, which oath is certified by the officer under his hand and seal. In addition to this, Mrs. Mary L. Mitchell goes before a competent officer and declares, under her hand and seal, that she did before her examination join her husband in executing the deed, "and that she did then, and still does, at this her examination, freely, voluntarily," &c., "renounce, release and forever

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relinquish unto the *within named Robert Anderson, Eliza Anderson and Margaret A. Meeker, their heirs and assigns, all her interest and estate, and also all her right and claim of inheritance of, in and to all and singular the premises within mentioned and released." And this declaration is certified by the officer under his hand and seal.—Rice Ch., 243. All this, I think, imports delivery; and delivery for a moment is delivery forever. The erasures must have been made after the signatures, as they are erasures of the signatures. The signatures were not made for the purpose of being erased, but to give a solemn attestation, not only to the execution but the delivery of the deed. There is no evidence in whose possession the deed remained between the times of execution and erasure, except the fact that it came to Messrs. Pope & Haskell, the plaintiffs' attorneys, after a telegraphic dispatch from Jesse Arthur to Mitchell and wife, desiring them not to sign the deed, or, if they had signed it, to erase their names and send the paper to Messrs. Pope & Haskell. The presumption is, therefore, that it was in the actual possession of Mr. and Mrs. Mitchell at the time of their receiving the telegram; but the stronger presumption is, that until the receipt of the telegram it was in their hands for the purpose of being sent to Messrs. Bachman & Youmans, the defendants' attorneys, as directed in the letter of Messrs. DePass & Hay, testified to by Mr. Hay, having been withdrawn after delivery from the hands of the attesting officer for that purpose. A very short time, it is true, must have elapsed between the signatures to these papers and the erasure of those signatures, inasmuch as the attestation in Wilmington bears date May 11th, 1874, and Mr. Pope testifies that the deed was in his possession in Columbia on the 13th of the same month. But a moment is sufficient for the delivery, and once made it is final. It is manifest that the erasure was an after thought, suggested by the telegram, after the

execution of the papers. I do not mean to decide that these solemn evidences of delivery might not have been rebutted, but it was surely incumbent on the parties making the erasures to show by evidence that, notwithstanding these proofs, there was in fact no delivery. Having omitted to state in its proper place, I state here that it was proved by Mr. Pope that there was in the package containing the deed a memorandum in writing, addressed to Jesse Arthur, signed according to Mr. Pope's recollection (the memorandum having been lost) by Mr. and Mrs. Mitchell,

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certainly by one of them, the contents *of which were that they had returned the paper with their names struck out.

5. The views above expressed render unnecessary the consideration of the validity of the execution of the deed by John F. and William L. Arthur, in the event of its remaining unexecuted by the other parties.

I therefore adjudge:

1. That the plaintiff, Jesse Arthur, did make a valid agreement in writing to execute the deed in question, and it is ordered that he do execute the said deed on the payment to him of the sum of three hundred dollars.

2. That the plaintiffs, F. A. Mitchell and Mary L. Mitchell, his wife, did sign, seal and deliver the said deed for the purposes therein mentioned and that it is their act and deed notwithstanding the erasures of their signatures, and of other signatures and words written upon the deed and papers annexed, all which erasures are hereby adjudged to be inoperative and void; and it is ordered that they do re-execute the deed, with proper solemnities, on the payment to them of two hundred dollars.

3. That the said deed is the act and deed, signed, sealed and delivered, of the plaintiffs, John F. Arthur and William L. Arthur.

4. That the demand of judgment by plaintiffs for partition and account is hereby refused.

The plaintiffs excepted upon the following grounds:

I. Because the complaint stated a case and prayed for a partition of real estate between tenants in common, the plaintiffs having a right to the same, as was admitted by the decree upon the facts stated in the complaint. And herein it is respectfully submitted that the alleged agreement, not set forth in the answer but introduced in the evidence by way of defense, made the defendants in fact the actors, and required of them the proof of the supposed agreement, and the establishment by them of every fact necessary to support the said supposed agreement and to override the plaintiffs' admitted legal rights; in other words, to establish as against the plaintiffs, by proof, the equity of defendants, which was set up to negative the case made by the plaintiffs.

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*II. Because the decree of the Referee, as affecting the legal rights of the plaintiffs, Mitchell and wife, in the land, is erroneous, and must be reversed upon the following assignments of error:

1. The land in question was the inheritance of the wife, and the letters of the husband could not bind the wife to any agreement for the sale of her inheritance, unless they were signed by her, or signed by some one expressly authorized by her; least of all could her husband so bind her. And upon the examination of the husband by the defendants, as their witness, he expressly stated, under oath, that she had never given him any such authority.

2. Admitting that the husband had such authority, the propositions made by his letters to Bachman were never accepted by Bachman, either in writing or by parol, and until there was such acceptance there was no contract, and the plaintiffs could at any time withdraw their proposals. And herein it is respectfully submitted that the tender of money made at Wilmington was never made, nor, indeed, was the money ever sent from Columbia to be tendered at Wilmington (the residence of Mitchell and wife) until Bachman knew that the canceled and undelivered paper was already in Columbia in the hands of Pope & Haskell, the attorneys of Mitchell and wife; the said document, in fact, being in Columbia on the 13th May, 1874, and tender not made in Wilmington until the 16th of the same month, when it was declined.

3. The Referee, admitting the force of this conclusion of fact, as well as the uncertain and vague character of the letters, as being wholly insufficient in law, erred in giving force and effect to a canceled instrument which (until otherwise proved to be valid) was to all intents and purposes without existence or as if the same had never been signed; and it is respectfully submitted that until the contrary was made to appear by the parties defendants, (who set up and claimed under the said instrument as being properly signed, sealed and delivered,) by the testimony of the witnesses thereto, or by some other evidence other than the paper itself, the same must be taken and deemed in law as non-existant, invalid and void for want of the prerequisites of an existing valid deed, under which the defendants could claim no rights whatsoever.

III. Because the decree of the Referee, as affecting the interest of Jesse Arthur as tenant in common in the land, is erroneous, and must be reversed upon the following assignments of error:

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*1. The letters of Jesse Arthur referred to in the decree as addressed to A. C. Moore were not in any sense, nor were they intended to be, a contract, as will abundantly appear from the letters themselves, their vague and uncertain language, and the ig-

norance of the writer as to the whole subject-matter to which reference is therein made, the said letters being in terms letters of inquiry and of suggestion, and not of proposal, thereby clearly not intending a sale nor an offer of sale, but authorizing merely a treaty for a sale which might be concluded by Moore if he deemed the same advisable, upon a basis suggested by Arthur as a scheme upon which a contemplated contract might be concluded: in other words, the letters of Arthur to Moore were, in fact and in contemplation of law, nothing more than a warrant of attorney to Moore authorizing him to treat with Bachman.

2. If there ever was a contract proposed between Moore, representing Arthur, and Bachman, representing Anderson, the offer of Moore, whether it contained the substance of the basis suggested in Arthur's letters, or contained some other terms, it is clear that Moore's offer was the proposed contract, which offer it is alleged was accepted by Bachman, and it is respectfully submitted that this offer, so accepted, was the thing to be evidenced by some writing signed by Moore and could not be proved by parol; in other words, if Moore's proposition embraced as its terms the suggestions of Arthur's letter, then that proposition embracing such terms must be evidenced by writing; if the proposition of Moore referred to terms that were in writing, then had the proposition itself been in writing the two writings might be read together and constitute a valid contract within the statute, but not otherwise.

3. It is respectfully submitted that the Referee is in error when he supposes and concludes by his decree that the unwritten proposal by Moore became a contract at the moment of the unwritten acceptance of the same by Bachman, which could not afterwards be receded from, but was binding on both parties; on the contrary, it is submitted that Bachman was not then, and never has been, bound by any contract. And it is further respectfully submitted that the Referee is equally in error when he resorts to evidence aliunde to determine the points of a contract that he admits to be vague and uncertain, and to this end sets up the statements of attorneys in the pleadings to satisfy the statute, in face of the fact admitted by the decree that the statute was insisted

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upon by the plaintiffs, against *whom the alleged agreement was set up by the evidence introduced by the defendants, which evidence the Referee admits was in itself, otherwise, too vague and uncertain to support a decree.

4. It is respectfully submitted that the decree of the Referee does not pretend that there was any binding agreement between Jesse Arthur and Bachman by any subsequent transactions between them personally, for the reason that none of those transactions were reduced to writing; and yet the Referee permits a parol, verbal reference to certain terms alleged to be in some written paper, and he permits this parol statement of terms (without the written paper being produced or delivered to the other party at the time) to be connected with a parol offer to sell and take a certain sum, and then permits an uncertain parol acceptance by one party (not binding on him) to be binding on the other—a parol agreement so uncertain that the Referee cannot say whether Bachman for the one party agreed to pay the sum named and asked time for payment, or asked time to determine whether he would accept the offer or not. It being hereby respectfully submitted that if time was given within which Bachman might accept or decline, that probationary time became part of the agreement of sale which must be evidenced by some writing to bind the party intended to be bound thereby; in other words, one party cannot be bound by a contract for the sale of lands to give time to the other party to make up his mind whether he should be bound or not, unless the agreement of the party alleged to be so bound thereby was in writing.

IV. Because the Referee has failed to decree upon the whole case, the question having been distinctly made that the alleged deed was a joint deed, to be signed, sealed and delivered by all of the parties thereto, and until so signed, sealed and delivered by all was in fact and in law the deed of none, was inchoate, and became by operation of law void and of none effect; by which default on the part of the Referee the Appellate Court, if deciding against him on the grounds taken in his decree, will be compelled to send the case back to the Referee for his judgment upon the points undecided by him, or proceed to hear and decide the case upon appeal without the benefit of the Referee's judgment thereon. This partial decree of the Referee, as a question of practice, it is respectfully submitted, is error, and should be corrected.

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*At the hearing of the case, His Honor ordered that the exceptions be overruled and the said report confirmed and made the decision and decree of this Court.

The plaintiffs appealed as follows:

Take notice that the plaintiffs appeal to the Supreme Court from the final decretal order of his Honor Judge Cooke, entered herein the 20th day of May, 1876, confirming the decree of Francis W. Fickling, the Referee, and overruling the exceptions to the same; the appeal being now taken to the said decretal order upon the same exceptions that were taken to the said Referee's decree at the hearing by the Court and overruled.

Pope & Haskell, for appellants.

Bachman & Youmans, contra.

February 5, 1878. The opinion of the Court was delivered by

WILLARD, C. J. The plaintiffs claim partition as tenants in common with the defendants of the premises in suit. The nature of the question is fully stated in the Referee's report.

The first question to be considered is whether the deed which is claimed to have divested all of the plaintiffs except Jesse Arthur of title in favor of the defendants, Anderson and Meeker, is valid and operative as such. If this deed was duly and completely executed and delivered by William L. and John F. Arthur, and by Mitchell and wife, then all the plaintiffs except Jesse Arthur are barred from demanding partitions, and the only question remaining would be as to Jesse Arthur. It is not disputed that the defendant Anderson had acquired and held at the commencement of this action the title of Cornelius Arthur, one of the original distributees, but these defendants claim to hold the respective shares of the plaintiffs other than Jesse by the direct terms and operation of the deed in question. The plaintiffs on the other hand deny that the deed was executed and delivered.

The deed was prepared as the deed of all the plaintiffs. It states the fact of a tenancy in common and professes to be the deed of the heirs-at-law and distributees of John W. Arthur, deceased, the ancestor of the plaintiffs. It acknowledges a joint consideration and contains a joint covenant of warranty.

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*In point of fact, it contains the signatures of William L. Arthur and John F. Arthur, and also the names of T. W. Mitchell and Mary L., his wife, but with an erasure made by the last named parties, with a view to withdraw their names from the deed. Jesse Arthur does not execute it. In order to carry out the design of this deed as manifested by its recitals, it should bear the signature of Jesse as well as those of the other plaintiffs.

Is there proof of delivery on the part of Mitchell and wife? The fact appears that they struck out their names from the deed while retaining it in their possession after signature thereto and proof and acknowledgment thereof. The Referee concludes, as matter of law, that the execution, with proof and acknowledgment, constitutes conclusive evidence of delivery that cannot be rebutted by parol. This is clearly erroneous. Execution and delivery are two distinct acts, both of which must be performed. Proving the deeds before the proper officers is part of the act of execution. It is therefore virtually holding that complete execution dispenses with not only the proof but the fact of delivery. The authorities on this point will be considered with a subsequent question. Independently of the fact of the proof and acknowledgment of the execution, there is not sufficient evidence to warrant a finding that there had been actual delivery as it regards Mitchell and wife, and in fact the Referee did so find. It is not necessary to trace the history of the deed after it left the hands of Mitchell and wife, for it bore on its face evidence of want of assent on their part to be bound, expressed by the erasure of their names.

The fact that the deed ultimately came to the hands of the grantee, by whom it was prepared, is of no significance, for he was entitled to its control in the event that Mitchell and wife refused to sign it.

The question is, then, narrowed down to an inquiry whether there was a complete and effective execution and delivery as it regards William L. and John F. Arthur.

The proposition of law on which this depends is that where a deed or other instrument is not completely executed in accordance with the intentions of the parties as expressed either in the instrument itself or in the agreement or understanding in virtue of which its execution and delivery were called for, manual delivery of the incompletely-executed instrument, even to the party entitled to the delivery of a complete in-

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strument, will not be presumed to have *intended full and effective delivery unless it appears by proof that the parties actually intended such manual delivery to be full and final.

A complete and perfect act is necessary for the inception of legal rights, although equity will sometimes take cognizance of incomplete acts and adjust the rights of the parties according to the equity of the case. This principle of law would lead to the conclusion that when the joint act of two or more is called for all must perform, otherwise the act is incomplete both in form and substance.

The authorities fully support this view.

Robertson v. Evans, 3 S. C., 330: In this case the point was directly decided.

Brackett v. Barney, 18 N. Y., 333: The question in that case was as to the validity of a bond and mortgage on the ground of usury; but it depended on the further question whether the bond and mortgage were to be considered as delivered, so far as the defendant was concerned, at a certain time. The facts with regard to this delivery were, that by the preliminary understanding defendant's wife was to join therein. Defendant executed the bond and mortgage and delivered them to plaintiff without any express understanding that such delivery should be regarded as complete without the signature of the wife. It was held that the delivery was not complete for want of the wife's signature, there being no evidence of any intent on the part of the plaintiffs to waive the signature. The proposition of

law already stated will be found fully carried out in this case.

Leaf v. Gibbs, 19 Eng. C. L. R., 475: In this case the same rule was applied to a note intended to be the joint note of two, but which was signed by but one of the parties, and delivered in that condition to the payee. Tindall, C. J., held that unless it appeared that the defendant had waived the signature of the third person the note would be void as to him. The delivery of the note executed by one to the plaintiff was not treated as evidence of an intent to waive.

Parker v. Parker, 1 Gray, 409: In this case there was not an actual nominal delivery to the vendee, but the question of what is essential to complete execution is solved in harmony with the cases already mentioned. The absence of a release of dower intended by the parties deprived the execution, otherwise full, of completeness.

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*Overmann v. Kerr, 17 Iowa, 486: In this case, relied on by the plaintiffs as in Parker v. Parker, there was not an actual manual delivery so as to place the deed beyond the control of the vendor, but the same general rules as to complete execution are recognized.

Hagood v. Harley, 8 Rich., 325: This case is in harmony with the preceding, although the execution was held complete. It was objected to a guardian's bond with one surety that it was intended to have the signatures of two sureties. The only circumstance pointed out as leading to this conclusion was that the paper as prepared for execution contained two seals opposite to the places for the names of sureties. It was held that as the law did not require more than one surety the merely clerical act of placing two seals on the paper did not indicate an agreement that it should be signed by two sureties.

Bronson v. Noyes, 7 Wen., 188: This case carries the doctrine of allowing the actual intent of the parties in the act of delivery to control the force and effect of an instrument to the furthest limit. The instrument was a bail bond, containing nothing to limit its ordinary force and effect, and yet in furtherance of the intent of the parties with reference to delivery, established by extrinsic testimony, the bail bond was held to have an effect much less than that expressed upon its face.

Chateau v. Sugdam, 21 N. Y., 179: In this case the general doctrine was recognized, but the execution was held complete. It was held that execution by a merely nominal party was not essential to an instrument executed by all having a substantial interest. The question under consideration must be distinguished from that which arises where an instrument is fully executed in form according to the intention of the parties but some condition is intended to be annexed to the delivery. In the former case the question is whether the parties have fully completed and consummated that which they intended, while in the latter case it is whether that which was done by them can have the effect that was intended for it by them. The usual mode of making a conditional delivery is by placing the instrument in escrow, although sometimes it will be held even in the hands of the direct party in interest, as charged with a condition in the nature of a trust.—Bell v. Ingeston, 12 Adol. & Ellis, 317. See Fairbanks v. Metcalf, 8 Mass., 230.

The rules controlling the effect of a conditional delivery do not interfere with those relating to the effect of incomplete execution

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*upon delivery: for whether delivery is absolute or conditional, and, when conditioned, whether the instrument is in the hands of a party in interest or a third person as an escrow, the failure of complete execution may be equally alleged in the one case as in the other so as to destroy the delivery, whether conditional or otherwise.

Applying the principles already stated to the deed in question, we find that it calls for a joint covenant of all the parties. This covenant cannot have its intended effect unless all the parties whose signatures were contemplated became parties to it. The deed carries on its face this fact, also in other respects shows that it was intended that all the parties in contemplation should unite in it. Nor does it contain any words expressing the intent to have a several operation as it regards the parties to it.

There is no evidence in the case that the parties have waived the defective execution, and accordingly it must be held inoperative for want of complete execution and delivery.

The next question to be considered is whether the case discloses a contract to convey on the part of the plaintiffs that can be specifically enforced in equity. The defendants place their demand in this regard on two grounds—first, that there was a contract to convey valid under the Statute of Frauds; and, second, that if invalidated by the Statute of Frauds there was still a part performance of the contract sufficient to take the case out of the Statute of Frauds.

It remains to be considered whether either of the plaintiffs are affected by a contract to convey upon consideration; and, if so, whether such contract is valid within the Statute of Frauds.

As it regards William L. and John F. Arthur, it appears that if any contract was made it was without consideration and merely voluntary, and as such cannot be specifically enforced in equity.

The signatures of William and John to the deed are not competent to prove an agreement to convey, inasmuch as the deed being

incomplete it cannot be admitted as proof of a contract to convey.—Parker v. Parker, 1 Gray, 409.

There is no sufficient proof that Jesse Arthur assented to be bound by any contract to convey the land in question, or that Moore, his agent, entered into any obligation in his behalf. The evidence in this respect is vague and indefinite and far from satisfying the requirements as to proof of this character, even independent of the objection under the

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Statute of Frauds that such a con*tract must be completely evidenced in writing. We are satisfied that the evidence fails to show any contract to convey on the part of Jesse. Nor is there any contract to convey made out in evidence on the part of Mitchell and wife. In order to bind Mrs. Mitchell by the contract of her husband, it was necessary to make out affirmatively authority in him to bind her. This was not done. The questions of fact just considered come properly before us, inasmuch as they involve a question of the sufficiency of the evidence as it regards its character and tendency to establish the conclusion derived from it by the Court below. There was nothing from which an intent to contract, as alleged by the defendants, could properly be inferred. It will, under these circumstances, be unnecessary to revise the rulings of the Court below as it regards compliance with the requirements of the Statute of Frauds, there being no sufficient proof of any contract whatever in the case as affecting either of the plaintiffs.

The judgment of the Circuit Court must be set aside and the cause remanded for a decree of partition and account.

McIVER, A. J., and KERSHAW, acting A. J., concurred.

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9 S. C. 253

KAMINER v. HOPE.

(Columbia. Nov. Term, 1877.)

[*Executors and Administrators* ⇐537].

An action may be maintained upon an administration bond by the distributees of the estate in their own names.

[Ed. Note.—Cited in Richardson v. Cooley, 20 S. C. 350; Johnson v. Dawkins, Id., 528, 532; McCorkle v. Williams, 43 S. C. 69, 20 S. E. 744.

For other cases, see Executors and Administrators, Cent. Dig. § 2525; Dec. Dig. ⇐537.]

[*Lost Instruments* ⇐23.]

In an action upon an administration bond which has been lost, the burden of proof is upon the plaintiff to show the amount of the penalty of the bond.

[Ed. Note.—For other cases, see Lost Instruments, Cent. Dig. §§ 51–57; Dec. Dig. ⇐23.]

[*Executors and Administrators* ⇐535.]

A recovery by distributees of an intestate in a suit against his administrator is not conclusive as the amount due in an action on an administration bond against the surety.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 2471; Dec. Dig. ⇐535.]

[*Descent and Distribution* ⇐76; *Executors and Administrators* ⇐43, 49.]

Distributees have no right to sue for and recover claims due their intestate's estate. That can only be done by an administrator of the estate.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. § 253; Dec. Dig. ⇐76; Executors and Administrators, Cent. Dig. §§ 279, 301, 629, 630; Dec. Dig. ⇐43, 49.]

[*Executors and Administrators* ⇐122.]

The office of an administrator pendente lite is provisional merely, and he has no right to sue for and collect the estate for the purpose of administration.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 495; Dec. Dig. ⇐122.]

[*Executors and Administrators* ⇐439.]

[Cited in Stevenson v. Wilcox, 16 S. C. 435; Richardson v. Cooley, 20 S. C. 350; Strickland v. Bridges, 21 S. C. 25, to the point that there can be no title in distributees except in due course of administration, and in all suits brought in that character the administrator is a necessary party.]

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1765, 1766, 1770, 1771, 1774, 1786; Dec. Dig. ⇐439.]

[This case is also cited in Richardson v. Cooley, 20 S. C. 347, and distinguished therefrom.]

Before Cooke, J., at Richland, July, 1876.

Action by Thomas L. Kaminer, as administrator of Mary Leaphart, deceased, and Polly Leaphart against John C. Hope, surety on the administration bond of Levi Gunter, administrator of Martin T. Leaphart, deceased.

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*The case is stated in the opinion of the Court.

[For subsequent opinion, see 18 S. C. 561.]

Pope & Haskell, Rice, for appellant.

Meetze, Melton & Clark, contra.

February 12, 1877. The opinion of the Court was delivered by

KERSHAW, J., Acting Associate Justice. This action was brought by the plaintiffs, one of them suing as administrator of the widow and distributee of Simon A. Leaphart, and the other the daughter of Simon, niece of Martin F. Leaphart, and distributee of both estates, against the defendant as surety upon the administration bond of one Levi Gunter, given for the administration of the estate of said Martin L. Leaphart. The appellant contends that an action on the administration bond could only be brought in the name of the Probate Judge as the successor of the Ordinary by whom the bond was taken. That in its most favored aspect the plaintiffs' action could only be regarded as a suggestion to have their damages assessed under a previous judgment upon the bonds

recorded in the name of the proper officer, in accordance with the practice formerly prevailing, as settled by the adjudicated case, of which The Treasurers v. Bates (2 Bail. L., 373.) may be considered as the leading authority.

If these propositions were correct, then the first steps in the proofs of plaintiffs must have been the judgment presupposed to have been recorded in the name of the officer, and it was not proper to resort, as was done in this case, to proof of the bond. By the General Statutes, p. 450, it is enacted that an administration bond "may be sued by any person injured by the breach of the condition," and this is in harmony with the provisions of the Code, (Sec. 134,) which declares that "every action may be prosecuted in the name of the real party in interest, except as otherwise provided in Section 136," and this case is not one of the exceptions referred to.

Mr. Pomeroy, in his Treatise on Remedies, (Sec. 138.) discussing this subject, says: "It is no longer, consistently with the provisions of the Code, possible for one person to sue to the use of another as was common in some of the States. The parties beneficially interested must themselves bring the action."

This Court also, in Greenville County v. Runion, (MS., November, 1876 [9 S. C. 1].) decided that Counties may maintain actions on

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bonds of *their public officers whenever aggrieved by their official misconduct. This action, therefore, may be regarded in part as a suit upon the bond properly brought by the plaintiffs.

This disposes of the exception taken by the appellant to the admissibility of parol evidence as to the amount of the bond, after it had been admitted at the trial "that the bond had been destroyed by fire in the office of the Ordinary." The action having been properly brought, one of the issues was as to the amount of the bond. The loss having been admitted, (which admission involved the fact of its previous existence,) the foundation was laid for parol evidence as to the amount.—Wheat. Law of Ev., 129.

The exception to the admission of such evidence is, therefore, overruled.

2. At the trial, the Court, in order to meet the objection that the action should be brought in the name of the proper officer, "ordered the complaint amended by inserting the name of the Judge of Probate as plaintiff, to which the defendant excepted."

According to the view we have taken, there was no necessity for such an amendment. If, however, the effect of the amendment was merely the insertion of the name of the Probate Judge as a party plaintiff, to have him present before the Court, the act was immaterial. What was the exact scope of the order does not fully appear, as the above quotation embraces all that is stated of it in the case, and it is not, therefore, intended to decide anything upon that point.

3. One of the chief of the issues in this action was as to the amount of the administration bond. It was affirmed by the plaintiffs to have been given in the penalty of $20,000. This was denied by the defendant, who alleged in the answer that the bond was for no more than was sufficient to cover assets valued at $150. This being the issue on this point, the presiding Judge was asked by defendant's counsel to charge the jury (among other things) that "the burden of proof of the signing of a bond for $20,000 rested upon the plaintiffs." This the Judge refused to do, though he admitted the proposition of law contained therein to be true. To this defendant's counsel excepted. This refusal to charge was error, for which a new trial must be ordered. A jury cannot intelligently discharge its functions unless informed upon whom rests the burden of proof. In general, the Court should give any instruction that counsel request, when it em-

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bodies a correct statement of *the law bearing upon the case, * * * when it is necessary to a clear understanding of his (the party's) rights or liabilities."—Proffatt on Jury Trial, § 337. "Where testimony is so equally balanced that no conclusion can be drawn from it, it is the duty of the jury to decide against the party who holds the affirmative of the issue."—Idem. § 367. There having been conflicting testimony in this case, it cannot be said that the instructions asked for might not have been material, and the omission to give them may have been of prejudice to the defendant.

Other questions are made by the appeal which it will be proper to settle in order that the new trial may be conducted in the light of a decision of the points of law involved.

4. In order to establish the amount of the recovery to which plaintiffs were entitled, the proceedings in a suit in the late Court of Equity brought by Mary and Polly Leaphart originally against Martin L. Leaphart and others, and continued after his death against Levi Gunter and others, were introduced by plaintiffs. The report of the Referee in that case ascertained certain sums of money to be due to plaintiffs by Levi Gunter, aggregating the total of $14,191.65, including interest.

The jury in this case having found the penalty of the bond of Levi Gunter, as administrator, to have been in the sum of $20,000, assessed the damages of the plaintiffs against the defendants at $15,498.58, being the whole amount of Gunter's liabilities, ascertained in the previous suit, with interest to the date of trial. For the respondent here, it is contended that the judgment in that case is conclusive against the appellant as

surety, though he was not a party to that suit, and that, therefore, the verdict was for the proper amount.

This Court does not consider that the decree is conclusive of the amount of appellant's liability. Irrespective of the amount of his administration bond, Gunter was liable for whatever assets might have come into his hands as administrator of Martin T. Leaphart, while the surety can only be held to the amount of the bond into which he had entered as surety. The amount of the bond was not in question in that suit, and as to that, certainly, the appellant is not concluded by the decree. Nor is he concluded from showing that, for other reasons, he is not liable for the full amount of the recovery against Gunter.

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*In the case of the Ordinary v. Wallace, (2 Rich., 460,) cited for the respondents as establishing the conclusive character of the decree, it is conceded that it is only prima facie as to the amount of recovery. Judge O'Neall, delivering the opinion of the court, says: "But he (the surety) has undertaken to guarantee the defendant in the very particular in which the judgment in equity condemns him, and hence it is conclusive that the administrator has failed fully to account, but not that he is in default in every particular and to the amount set out in the decree."

The appellant has, therefore, a right to look into the decree and point out in what particulars it would be improper to charge him, in this action, with the entire amount of the judgment against Gunter in the former suit. Of that amount the sum of $12,143.05 was for a liability of Gunter to the estate of Simon A. Leaphart. This arose from the sale or conversion of assets of the estate of Simon which were in the hands of Martin T. Leaphart, as administrator, and by him assigned to Gunter, together with the bulk of his own estate, upon a trust to pay certain debts of the assignor from the proceeds.

The decree against Gunter was for the residue of the fund left after performing the trust.

This residuum, it is here claimed, was an asset in the hands of Gunter, as administrator of Martin, to be accounted for by him in that capacity. He himself so treated it in his accounts. The plaintiffs, also, have so treated the funds, and thereby ratified, so far as they are concerned, the conversion by Martin of Simon's assets. The fund derived from such conversion is, therefore, for the purposes of this decision, to be treated as vested in Martin's estate, and to be accounted for by his administrator. To whom, then, assuming this view for the argument as most favorable to plaintiffs, is he to account for this fund? Evidently to the creditors of his intestate, in the first instance, and afterwards to the distributees. Of the amount decreed against Gunter, $12,143.05 was due the estate of Simon A. Leaphart for devastavit of Martin as administrator. Can this sum be recovered of the defendant in this case by the distributees of Simon A. Leaphart without an administration of the estate of Simon? Simply stated, the question is whether distributees can sue for and recover debts due their intestate's estate. Put in this form the affirmation would hardly be contended for.

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*In Easterling v. Thompson, (Rice, 350,) it was decided that creditors of a decedent could not recover for the devastavit of a deceased administrator, in an action against the surety on the administration bond, there being no administration de bonis non on the decedent's estate although the devastavit had been established by a decree of the Ordinary, to which the administrator of the first administrator and the surety were parties. That case is conclusive of this on the point under consideration, for distributees can stand on no better footing in this respect than creditors of an estate.

It was thought so plain a question, that the learned Judge, delivering the opinion of the Court in the case cited, declared that he "thought it not worth while to look for authorities" to support the principle.

There can be no title in the distributees of an intestate estate except in due course of administration, and in all suits brought in that character the administrator is a necessary party.—1 Dan. Ch., 295; Story's Eq. Pl., § 170; Bradford v. Felder, 2 McC. Eq., 169; Farley v. Farley, 1 McC. Eq., 506; Gregory v. Forrester, idem, 318; Humphreys v. Humphreys, 3 P. Wms., 349.

It has been supposed in this case that because Mary Leaphart was appointed administratrix of Simon A. Leaphart pendente lite during the progress of the equity suit, that, therefore, the personal representatives and creditors of Simon are concluded by that decree, and that the title of the plaintiffs to the assets of Simon is res judicata. This position would be sound if such administratrix represented the rights of creditors and all others interested in the estate, as would a general administrator.

But such is not the case. The office of an administrator pendente lite is merely provisional, and limited to collect and hold the goods of the intestate subject to the decision of a contest respecting the administration or touching a will pending in the spiritual or probate Court which makes the appointment. He is merely the officer of that Court. He can neither pay debts or distribute the estate, and in no sense can be said to represent creditors or distributees.—Wms. on Exrs., 338; Gallivan v. Evans, 1 Ball and Beat., 191.

Here the appointment arose in this wise: Upon the death of Martin T. Leaphart, which occurred during the pendency of the equity

suit, he being administrator of the estate of Simon A. Leaphart, application was made

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for letters of administration de bonis *non of said estate by Mary Leaphart, claiming to be entitled thereto as the widow of the deceased Simon.

The pleadings in the equity suit had raised a question as to the legality of the alleged marriage between Mary and Simon. The Ordinary for that reason refused to grant the letters, but did appoint her administratrix pendente lite.

Thereupon it seems that Levi Gunter applied for letters of administration of Simon's estate, and that application was refused. Mary Leaphart became, by virtue of her appointment, merely the collector and custodian of the assets of the estate, (such as should come in to her hands,) to be paid over to the rightful and general administrator when appointed. No such appointment was ever made, and she died without having received any portion of the estate and before the commencement of this action.

Neither has this Court, nor had the late Court of Equity, jurisdiction to distribute the estate of a decedent without the intervention of a due course of administration.

It follows that the plaintiffs cannot recover in this action the amount due the estate of Simon A. Leaphart by the late Martin T. Leaphart as administrator, in the absence of an administrator de bonis non of Simon's estate.

The motion for a new trial is granted.

WILLARD, C. J., and McIVER, A. J., concurred.

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9 S. C. 259

STATE, ex rel. BUTTZ, v. COMPTROLLER GENERAL.

(Columbia. Nov. Term, 1877.)

[*Officers* ⇐99.]

A salaried officer against whom judgment of ouster has been pronounced for having accepted an inconsistent office is not entitled to his salary from the time he accepted the inconsistent office until the judgment was pronounced.

[Ed. Note.—For other cases, see Officers, Cent. Dig. § 145; Dec. Dig. ⇐99.]

This was a petition to the Supreme Court by C. W. Buttz for a writ of mandamus to compel the Comptroller General to pay him his salary as Solicitor of the First Circuit. The case is fully stated in the judgment of the Court.

Buttz, for petitioner.

Youmans, Attorney General, contra.

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*March 1, 1878. The opinion of the Court was delivered by

WILLARD, C. J. The relator was by the judgment of this Court ousted from the office of Solicitor of the First Circuit on the ground that he had accepted an inconsistent office, namely, member of Congress, (State v. Buttz, ante pp. 156–186,) he now demands a writ of mandamus to compel payment to him of the salary of that office alleged to have accrued subsequent to the act which has been adjudged to have vacated the office and prior to the judgment of ouster.

To entitle himself to the writ he must show that what he seeks to compel is a specific duty, imposed by law, of a ministerial character, and that it has been refused on demand. It is not disputed that he is entitled to recover if the law imposes on the Comptroller General, the respondent, the absolute duty of drawing his warrant in favor of the relator for the purposes set forth in his suggestion. This depends upon the question whether the relator has a legal right to the salary or emoluments of such office subsequent to the act vacating it but before judgment of ouster. The judgment of this Court referred to determined that the office in question was wrongfully held by the relator from and after the act vacating title to the same, and consequently during the time for which the relator claims the salary attached by law to that officer. The holding, as it regards the office, being wrongful, his demand of the emoluments of the office is of the same character, for it is inconsistent that he should have a right to the emoluments and no right to the office.

The relator advances the broad proposition (citing in support High on Extraordinary Remedies, and certain Missouri cases,) that an officer de facto has the right to the salary and emoluments of the office he assumes to hold, though having no legal title. The cases cited by High do not appear to establish any such broad conclusion. They are Winston v. Moseley, 35 Mo., 146; State v. Draper, 48 Mo., 311; State v. Draper, 50 Mo., 358, and State v. Clark, 52 Mo., 508. The proposition ruled in these cases is, that when one holding a public office has an apparent right to hold such office, he is entitled to mandamus to compel the payment of his salary, notwithstanding it is alleged by the respondent that he has not rightful title to such office, placing the decision on the ground that the Court cannot try the question of title in such a collateral proceeding, and therefore must de-

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termine the question according to *the apparent right of the relator. In the last named case, State v. Clark, the Court went to the extent of allowing the mandamus even where it appeared that there was a quo warranto pending to oust the relator from the office at the suit of the Attorney General. There are remarks made by Ewing, J., in the last named case that go, as it would seem, much beyond the scope of the case that will be noticed hereafter. It is enough for the

purposes of the present case to observe that these cases do not contemplate one like the present, where the question of title has been judicially settled between the same substantial parties adversely to the claims of the relator.

We cannot, however, allow the broad statement made as to these cases and some of the positions assumed and remarks made in them to pass unnoticed, thus seeming to give apparent sanction to their authority, although we are not called upon by the necessities of the present case to affirm or disaffirm the soundness of the basis on which they have been rested.

It may well admit of doubt whether a writ of mandamus should be issued directing the payment of the salary of a public officer to one claiming to hold it where it appears that his right is undergoing contest in due course of law; where it is considered that, admitting that a question of title cannot be properly tried in this proceeding, where there is a remedy by quo warranto, yet that the writ of mandamus is not one of right but resting on sound discretion of the Court. In such a case it would seem to be more consonant with the principles governing the remedy and the general principles of the law to withhold a remedy that cannot be demanded of right and cannot, from the nature of the remedy itself, be intelligently applied. Nor is it clear that in every case where a salary is claimed by one having actual possession of an office and where the title is questioned by the respondent, even though no proceeding is pending to oust the title in a direct way, that the writ should issue. It is doubtless true that a question of title cannot ordinarily be decided in mandamus, but it does not follow that the respondent may not make a case that ought to deter the Court from interfering by mandamus where no such direct proceeding is pending. Cases can be conceived where great wrong might be done by issuing the writ, but it is not incumbent at the present time to enter into a full discussion of that matter.

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*Should the broad proposition that every de facto officer is entitled, as matter of strict legal right, to the salary of the office held by him, without regard to the rightfulness of his possession, then there might be better ground for such a conclusion as that reached by the Missouri cases referred to.

Judge Ewing says, in State v. Clark: "The commission issued to the relator invested him with title and is prima facie evidence of his right to the office. It gave him the possession and the power to exercise the functions, of which he could be deprived by due process in the manner prescribed by law. He alone is entitled to the emoluments of the office until the State, by a proper proceeding, has reached the authority with which it has invested him." It is clear that this remark is based on the idea that the person holding under a commission issued under the Constitution and laws of Missouri, though without legal title, has more than what is understood by a de facto holding, but, on the contrary, has a sort of defeasible "title" that is good against the State and all the world until terminated by due course of law. What may be the effect of a commission under the laws of Missouri need not be considered, but it is certain that a commission works no such effect upon one improperly possessing himself of it in this State.—Richardson, J., in State v. Billy, 2 N. & McC., 356.

The proposition referred to does not seem to be reconcilable with many adjudicated cases. We shall merely make a general reference to them.

Allen v. McNeel, 1 Mills' Con. R., 459: In this case one claiming prize money in virtue of his office as mate of a revenue cutter was held to strict proof of his due appointment, and could not recover on that apparent right arising from possession of the office.

Evans, J., in Kottman v. Ayer, (3 Stro., 92,) refers to this case as maintaining the proposition that one claiming the emoluments of his office must prove legal title.

In Fowler v. Beebe (9 Mass., 231,) it is said that when a public officer is a party to a suit his right to office may be inquired into. No reference was made in this remark to mandamus, but to ordinary actions. Although the case, in the mind of the Court, was that of one attempting to justify under authority derived as a public officer, still it is clearly applicable to a case where a public officer seeks to enforce in his own behalf a right dependent upon his exercising a public office.

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*In Rex v. Lish (2 Stra., 1090,) a conclusion was reached that can be best explained upon the idea that, although the acts of officers de facto are usually valid as against themselves and as between third persons, they are not valid as against the King.

Possibly the cases of Rex v. Voulst (3 Camp., 432,) and our own case of State v. Hayward (1 N. & McC., 546,) can be best understood by reference to that principle.

All the authority validating the acts of de facto officers without legal right to their offices place the reason of such validation on grounds of public policy, and in no instance that has been found is it placed on the ground of any right arising from the mere fact of the possession of the office; unless the Missouri cases are to be considered as supporting that doctrine.

The motion for the mandamus must be denied.

McIVER, A. J., and HASKELL, A. J., concurred.

9 S. C. 263

WILLIAMS v. KIBLER.

(Columbia. Nov. Term, 1877.)

[*Bankruptcy* ⇐279.]

An independent action cannot be maintained by the assignee of a bankrupt to set aside a report of sales and an order confirming the same made in a foreclosure suit against the bankrupt previous to his bankruptcy. The assignee's remedy, if he had any, was to intervene in the foreclosure suit.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 424; Dec. Dig. ⇐279.]

Before Mackey, J., at Lancaster, May Term, 1875.

This was an action by David A. Williams, assignee in bankruptcy of James D. McIlwaine, against Andrew J. Kibler.

James D. McIlwaine had given a mortgage of land in 1866 to the defendant, which was foreclosed by a decree of Court in 1867. The land was sold by the Commissioner under the decree, and the defendant was the purchaser. McIlwaine was afterwards adjudged a bankrupt and the plaintiff was appointed his assignee.

The object of this action was to set aside the report of the sale under the decree of foreclosure by the Commissioner of the Court, and the order confirming the same, on certain alleged grounds of irregularity in the sale and fraud.

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*His Honor the Circuit Judge made a decree setting aside the report of the sale in the foreclosure suit and the order confirming the same.

The defendant appealed.

Moore, for appellant.

DePass & Clyburn, contra.

March 1, 1878. The opinion of the Court was delivered by

WILLARD, C. J. The defendant Kibler foreclosed a mortgage made by J. D. McIlwaine, making McIlwaine a party, and obtained a decree of foreclosure, under which a tract of land, including that claimed by the plaintiff, is alleged by the report of sale to have been sold. The sale was confirmed. Now the plaintiff, as the assignee in bankruptcy of McIlwaine, brings suit to falsify and set aside the report of sale and order of confirmation, alleging that in fact twenty acres of said tract were reserved on such sale to the mortgagor, McIlwaine, as a homestead, under military orders, which he claims as assignee of McIlwaine, and asking that the sale be set aside.

The Circuit Court decreed accordingly. The decree is clearly erroneous. If the sale was improperly reported and confirmed, the plaintiff, as the assignee of McIlwaine, bound by the order of confirmation, should have intervened in the foreclosure suit and sought to set that order aside. We cannot in an independent action question the order of confirmation, which can be attacked only in a direct proceeding and not collaterally. It is an estoppel that cannot be overcome in this action.

The judgment must be set aside and the complaint dismissed.

An appeal was also taken from an order made for the purpose of carrying into effect the judgment first set aside. It follows that such order must be vacated with the judgment on which it was based.

McIVER, A. J., and HASKELL, A. J., concurred.

9 S. C. *265

*LYLES v. KIRKPATRICK.

(Columbia. Nov. Term, 1877.)

[*Specific Performance* ⇐95, 105.]

Specific performance of a contract for the sale of land decreed against objections that the plaintiff was guilty of unreasonable delay in commencing his action and that his title was not marketable.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 257–277, 325–341; Dec. Dig. ⇐95, 105.]

[*Adverse Possession* ⇐71; *Deeds*, ⇐51.]

The defect in a deed of conveyance of real estate having but one subscribing witness is cured by an adverse possession thereunder of ten years.

[Ed. Note.—Cited in Gregory v. Rhoden, 24 S. C. 99; Fore v. Berry, 94 S. C. 78, 78 S. E. 706.

For other cases, see Adverse Possession, Cent. Dig. § 417; Dec. Dig. ⇐71; Deeds, Cent. Dig. § 97; Dec. Dig. ⇐51.]

[*Specific Performance* ⇐92.]

Where a vendor sues for specific performance he may perfect his title at any time before decree, but in such case he must pay costs.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 243; Dec. Dig. ⇐92.]

[This case is also cited in Harrelson v. Sarvis, 39 S. C. 19, 17 S. E. 368, as to the doctrine of adverse possession.]

Before Mackey, J., at Fairfield, August, 1877.

This was an action by W. H. Lyles against George W. Kirkpatrick for specific performance of a contract for the sale of land.

The decree of the Circuit Court is as follows:

The above case was commenced in this Court by the service of a summons and complaint upon the defendant to obtain the specific performance of a contract on the part of the defendant with the plaintiff to purchase from the plaintiff a certain tract of land situate in Fairfield County and described in the pleadings, and to enforce the payment of the money agreed to be paid for the purchase of said land. Having come to issue at the November Term, 1875, of the Court of Common Pleas for said County, it was by mutual consent referred to H. A. Gaillard, Esq., counselor-at-law, as Referee of the whole issue, to

hear and determine all questions of law and fact arising upon the pleadings. And the said Referee having reported in favor of the contract alleged in said complaint, and that the plaintiff had shown a good and sufficient title to the premises agreed to be sold, after having removed certain objections to the title, upon the trial before him, on the 28th day of November, 1875, then for the first time raised, and recommended that the plaintiff have the relief demanded in his complaint, the said report was excepted to by the defendant, and the exceptions, after full argument before me, at Chambers, were overruled.

It is therefore adjudged—

I. That the agreement set forth in the complaint and proven in this cause be specifically performed, and that the plaintiff execute and deliver to the defendant a good and sufficient conveyance in fee, after the form prescribed in the statute law of the State, with full covenants, except the covenant of warranty against the balance of the mortgage debt due by G. M. Chapman to the estate of

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E. F. *Lyles, and the judgment recovered by Thomas M. Lyles against G. M. Chapman, both of which being liens upon said land and being provided for in the contract of the defendant herein to purchase said land.

II. And it is further adjudged that if the defendant refuse to receive said conveyance the plaintiff file the same with the Clerk of the Court, and upon such delivery or filing of said conveyance the defendant pay to the plaintiff four hundred and fifty dollars, the purchase money named in the contract, set forth in the complaint, the period for the payment of the credit portion of said purchase money having expired pending the suit, together with interest thereon from the 28th day of November, 1875, the date when a good title to the premises was first shown.

III. And it is further adjudged that if the defendant, upon a tender of said conveyance, refuse to pay the sum so found to be due, the premises described in the complaint as hereinafter set forth, or so much thereof as may be sufficient to raise the amount so adjudged to be due to the plaintiff as the purchase money of said tract of land, principal and interest, as well as the taxed costs of this action, and which may be sold separately without material injury to the parties interested, be sold at public auction before the door of the court house for Fairfield County, by or under the direction of the Sheriff of said County, on some convenient sales day hereafter, after due and public notice given by said Sheriff of the time and place of said sale, according to law and the practice of this Court; that said premises be sold subject to the balance of the mortgage debt due by G. M. Chapman to the estate of E. F. Lyles, and to the judgment of Thomas M. Lyles against G. M. Chapman, both of which are hereinbefore mentioned; that either of the parties to this action may become a purchaser on such sale; that the said Sheriff execute to the purchaser or purchasers a deed or deeds of the premises sold; that out of the proceeds of the sale, after deducting the amount of his fees and expenses on such sale, and any lien or liens upon said premises so sold, at the time of such sale, for taxes or assessments, he pay to the plaintiff such amount as may be adjudged to be due him for his taxable costs and disbursements in this action, and also the amount heretofore adjudged to be due plaintiff as the purchase money of said land, together with interest thereon from said 28th day of November, 1875, or so much thereof as the proceeds of the sale of said premises will pay of the

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same; *and that he take a receipt of the plaintiff for the amount so paid and file the same with his report of sale; and that the purchaser or purchasers at said sale be let into possession of the premises upon the production of the deed by the Sheriff; that the said Sheriff pay the surplus money, if any, into this Court, subject to the further order of this Court, and that he make a report of such sale to this Court with all convenient speed.

IV. And it is further adjudged that if the proceeds of such sale be insufficient to pay the amount so adjudged due to the plaintiff, with interest and costs as aforesaid, the said Sheriff specify the amount of such deficiency in his report of sale; and that the defendant, George W. Kirkpatrick, pay the same to the plaintiff, with interest from the date of such report, and the plaintiff have execution therefor.

The defendant excepted to the decree on a number of grounds, which are stated in the opinion of the Court.

Hamilton, for appellant.

Barnwell, contra.

March 1, 1878. The opinion of the Court was delivered by

WILLARD, C. J. The proposition involved in the first exception to the decree is one of law—that the contract being by parol is void under the Statute of Frauds. Unless the case made is one of part performance such as to authorize a Court of equity to decree specific performance, the action must fail on the ground just stated. The plaintiff, however, shows that the defendant took possession of the land sold under the contract of sale.

The second exception involves the proposition that such possession by the vendee was "temporary and not such as would take the case without the Statute of Frauds." This is a question of fact that has been determined in favor of the plaintiff, and we cannot say that it is without evidence to support it, or that there is testimony of overbearing weight to contradict it. It must, therefore, stand as the proper determination of such

questions of fact. It is, therefore, a case of part performance of a parol contract for the sale of lands by the transfer of possession of the land bargained to the vendee under the agreement of sale, and in such cases it is the

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*estal lished doctrine of the Courts of equity to specifically enforce the contract of sale, when it is made out clearly, is definite in its terms, and if the vendor can make good and marketable title and has been guilty of no laches or misconduct tending to impair the value of the contract to the vendees.

In Thomson v. Scott, (1 McC. Eq. 33,) the essentials of a case for specific performance of a parol contract for the sale of lands on the ground of part performance are stated by Nott, J., as follows: 1st. That it must be clearly shown what the agreement was. 2d. That it has been partly carried into execution on one side with the approbation of the other: and, 3d. That the party who comes to compel a performance must show that he has performed on his part and that he has been and still is able to perform his part of the contract. The terms of the contract are definite in the present case and distinctly proved. It has been carried into part performance by the mutual act of the parties tendering and accepting possession. It remains to inquire whether the remaining requisite of a case of this character is present.

The next exception advances the proposition that time was of the essence of the contract and that performance cannot be decreed now. No time was definitely fixed by the agreement for the delivery of title, but it is inferable, from the fact that the time of final payment was fixed, that the title was to be completed before that time. If delay has occurred it must be ascribed to the default of the defendant, who refused to take title and complete the purchase while the contract was still executing. The terms of the refusal warrant the conclusion that the defendant would not have completed the purchase had the title of plaintiff appeared to be perfect. After the refusal of the defendant the plaintiff was not bound to proceed to put his title in a condition, by paying off encumbrances, to be available to the defendant. He had a right to wait until he was sure of some means of enforcing his contract before reducing the encumbrances. If delay occurred it was attributable to the fault of the defendant. The contract was made in January, 1875, the final payment was to be made in January, 1876, and the action was commenced in September, 1875. No unreasonable delay in bringing suit can be charged to the plaintiff.

In Prothro v. Smith, (6 Rich. Eq., 324,) Chancellor Wardlaw says: "In this Court time is not usually of the essence of the contract, although it may be made so by the ex-

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press stipulations of the *parties in the contract itself," * * * "or by the act of one of the parties fixing a reasonable time for the completing of the contract and giving notice to the other party of intention to abandon the contract unless it be complied with in the time fixed."

The cases in which the complainant has been held prejudiced by delay in bringing his suit are considered in the case just cited, which afford no warrant for so stringent a rule as that insisted upon by the appellant. The same general views were expressed by this Court in Lesesne v. Witte, (5 S. C., 462,) as it regards the effect of reasonable delay in the commencement of the suit.—See Doar v. Gibbes, Bail. Eq. 371. The plaintiff is not chargeable with unreasonable delay, nor does it appear that he has failed to comply with any stipulations as to time contained in the contract. The defendant being in default was not in a position to fix a time for performance, nor does he appear to have done so, but, on the contrary must be regarded as having refused absolutely to complete the purchase, although the plaintiff might in due time tender him a good title discharged from all encumbrances other than those excepted by the contract.

The fifth exception, to the effect that the circuit decree makes a new contract between the parties, is without force. The circuit decree properly embodies the terms of the contract, having regard to the fact that the whole purchase money had become due at the date of the decree, and then proceeds to enforce these terms, and provides that in the event of the failure of the defendant to pay the purchase money the land should be sold for its payment, thus enforcing by way of alternate relief the lien of a vendor of lands having title against a vendee in possession for the payment of the purchase money.

The sixth exception affirms that the plaintiff has not actually perfected his title. Two questions are involved in this exception, one affecting the plaintiff's title, properly considered, and the other relating to alleged encumbrances. The last named has been disposed of by the decree, mainly as a question of fact, and no ground is presented for disturbing its conclusions. The first named will be considered. As it regards the alleged defect of title, the facts are that plaintiff's title is held under a deed witnessed by a single subscribing witness. In itself this deed is deficient in point of proof for want of two subscribing witnesses; but, inasmuch as a possession of upwards of ten years had been had

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under it, of an adverse char*acter, without the assertion of claim of title on the part of the vendor, or those claiming under him, the validity of the deed cannot be disputed at this time. If after a possession of ten years, the full statute period at the time, and adverse in its character, as was found by the Referee, a technical defect merely, such as the

absence of a subscribing witness, can compel the title to be regarded as not marketable, the same conclusion would be inevitable had that possession been of a hundred years' duration. Such a doctrine would be equivalent to holding that a mere formal defect in a deed is incurable, so far as it regards the power of enforcing a contract for the sale of the land. Such a conclusion is at variance with the principles of law. If a party can, by the operation of law, be deprived by ten years' adverse possession of a clear title, much more should he be deprived by such a possession of the power of disputing his own deed on purely technical and formal grounds.

No misrepresentation or concealment of the character alleged in the seventh and eighth exceptions were alleged in the defendant's answer, or proved, consequently these exceptions must fail.

The ninth exception involves the proposition that in an action for specific performance it is not sufficient that the title of the plaintiff is made good after suit brought and before decree. No question of a defective title, as such, is presented by the present case, for the title of the plaintiff appears to have been perfect before the action commenced. The real objection is that the title was not marketable at the time of suit brought, by reason of encumbrances on the land not intended to be assumed by the vendee.

As has been already said, the plaintiff was not bound to remove such encumbrances until assured of an opportunity of completing the sale of the land. In point of fact the encumbrances were removed, with the exception of those that were to remain according to the contract of sale, before the Referee's report.

The authorities warrant the conclusion that even had there been a defect of title that defect might have been cured at any time before decree.—Lesesne v. Witte, 5 S. C., 462, and cases there cited.

The tenth exception alleges error in costs being allowed to the plaintiff. Had it appeared that the defendant had refused to perform his part of the contract solely on the ground that the title was not good and marketable, and had the action been commenced while the plaintiff's title was subject to that defect, it is obvious that should the plaintiff,

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before decree, succeed in removing that *defect, he should not have costs, for in that case the equity at the commencement of the suit was with the defendant and not with the plaintiff.—Lesesne v. Witte, 464; Bates v. Lyons, 7 Paige, 85.

In the present case it appears that the defendant at the time of action commenced was unwilling to carry into effect the contract of sale, even had the plaintiff, at that time, been able to make a good and marketable title. The plaintiff was therefore compelled to resort to this action as the only means of enforcing his rights, and he was properly allowed his costs.

The eleventh and twelfth exceptions set forth matters entirely foreign to the matters at issue and need not be considered.

The appeal must be dismissed and the judgment below affirmed and the cause remanded for its enforcement.

McIVER, A. J., and HASKELL, A. J., concurred.

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9 S. C. 271

SHAW v. CUNNINGHAM.

(Columbia. Nov. Term, 1877.)

[*Appeal and Error* ⇐899; *Jury* ⇐17.]

The Supreme Court has jurisdiction, on the hearing of an appeal in a case transferred from the Probate to the Circuit Court, to order an issue to be made up to determine a question of fact by the verdict of a jury.

[Ed. Note.—Cited in McLaurin v. Rion, 24 S. C. 409, 410, 411; Du Pont v. Du Bos, 33 S. C. 399, 11 S. E. 1073; Huntley v. Welsh, 61 S. C. 569, 39 S. E. 767; Id., 64 S. C. 235, 41 S. E. 980.

For other cases, see Appeal and Error, Cent. Dig. § 3665½; Dec. Dig. ⇐899; Jury, Cent. Dig. § 97; Dec. Dig. ⇐17.]

Before Carpenter, J., at Kershaw, August Term, 1876.

This was an action brought in the Probate Court for Kershaw County by Mary E. Shaw against Rebecca M. Cunningham and others for partition of lands. The action was transferred by consent to the Circuit Court, in which a decree was rendered and an appeal therefrom taken.

The case is fully stated in the opinion of the Court.

[For subsequent opinion, see 16 S. C. 631.]

Kershaw, for appellant.

DePass, contra.

March 1, 1878. The opinion of the Court was delivered by

McIVER, A. J. This case was originally commenced in the Court of Probate for the

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purpose of having a certain tract of land *in Kershaw County, known as "Buck Hill," claimed to have been the property of plaintiff's intestate, sold, and the proceeds applied to the payment of the debts of said intestate. The defendants, who were in possession of the land, having denied the title of James G. Jones, the case was transferred to the Court of Common Pleas, where "the issues of law and fact were submitted by consent of all parties to the Court," though the counsel for the defendants did afterwards contend "that the case, as developed by the testimony, was one that rendered it proper to submit to a jury to determine whether or not the alleged deed from A. D. Jones, Sr., had ever, in fact, been delivered so as to take effect as a deed,

and the Court was asked to submit that issue to a jury." This request, however, seems to have been refused. One of the main issues in this case, which, indeed, may prove decisive of it, was as to the delivery of a certain paper, purporting to be a deed from A. D. Jones, Sr., the ancestor of the defendants, to James G. Jones, the plaintiff's intestate, for the land in question. The Circuit Judge has, without entering into any discussion of the testimony, or giving any reasons in support of his conclusion, determined this issue in favor of the plaintiff upon evidence which we must regard as insufficient. But as this issue must undergo another trial we are not disposed to prejudice either party by entering upon any discussion of the testimony; for while we will not undertake to say that the decision of the Circuit Judge was so manifestly erroneous as to warrant us in reversing his decision, yet, as we are not satisfied of the sufficiency of the evidence adduced to support his conclusion, we desire to have the benefit of the verdict of a jury. An issue must therefore be ordered to try the question as to the delivery of the deed.

It was at one time doubted whether this Court, in a case like the present, had the power to order such an issue; but an examination of the authorities leaves us without doubt on this point. In the case of Sullivan v. Thomas, (3 S. C., 545,) where the powers of the present Supreme Court, as conferred by the Constitution of 1868, "in cases of chancery" were discussed and defined, the following language is used: "The jurisdiction and powers of this Court are as full as those of the late Court of Appeals and Court of Errors as it regards cases of chancery." Hence, if it can be made to appear that the power in question was possessed by the late Court of Appeals, all doubt must be removed. In Sinclair and Kiddle v. Administrators of

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Price, (1 Hill Eq., 431,) the ques*tion was directly presented and distinctly decided in favor of such power. O'Neall, J., in delivering the opinion of the Court, after declaring that such power had been constantly exercised ever since the case of Taylor v. Mayrant, (4 DeS., 505,) uses this language: "If we do not perceive manifest error in the Chancellor's judgment upon the facts, we may be justified in solving our doubts by the arbitrio boni viri; but if we do perceive error and yet are not satisfied to say that the Chancellor's decision is so manifestly wrong that we will reverse his decree, we surely have the right to inform our consciences by the verdict of a jury before we give a final judgment in the place of the Chancellor." This power is recognized by Wardlaw, Ch., in Thomasson v. Kennedy, (3 Rich. Eq., 448,) and was acted upon by the late Court of Appeals in equity in Gibbes v. Holmes, (10 Rich. Eq., 484,) and was again expressly recognized by this Court in Leaphart v. Leaphart, (1 S. C., 208.)

It is, therefore, ordered that the judgment of the Circuit Court be set aside and that this case be remanded to the Circuit Court for Kershaw County in order that an issue may be framed and submitted to a jury to try the question as to the delivery of the paper purporting to be a deed conveying the land in question from A. D. Jones, Sr., to James G. Jones, and that all motions or questions arising upon the verdict be originally heard in the Circuit Court.

WILLARD, C. J., and HASKELL, A. J., concurred.

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9 S. C. 273

STATE v. POPE.

(Columbia. Nov. Term, 1877.)

[*Jury* ⇐136.]

A prisoner indicted for "maliciously, unlawfully and willfully setting fire to, burning and destroying in the night time, stacks of hay and ricks of corn fodder" is not entitled to twenty peremptory challenges, as allowed by the 3d Section of the sta'ute, (Rev. Stat., p. 747), but only to five, as allowed by the same Section.

[Ed. Note.—Cited in State v. Workman, 15 S. C. 544.

For other cases, see Jury, Cent. Dig. §§ 607–618; Dec. Dig. ⇐136.]

[*Fires* ⇐3.]

The offense of "maliciously, unlawfully and willfully setting fire to, burning and destroying, in the night time, stacks of hay and ricks of corn fodder," mentioned in Revised Statutes, p. 714, § 2, is not arson within the meaning of the statute.

[Ed. Note.—For other cases, see Fires, Cent. Dig. § 1; Dec. Dig. ⇐3.]

Before Reed, J., at Aiken, September Term, 1877.

This was an indictment against F. Pope for "maliciously, unlawfully and willfully setting fire to, burning and destroying, in the

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*night time, stacks of hay and ricks of corn fodder." At the trial he demanded twenty peremptory challenges, but was allowed only five. He was convicted, and appealed on the ground of error in the refusal of the Court to allow him twenty peremptory challenges.

Lee, for appellant.

Henderson, contra.

March 1, 1878. The opinion of the Court was delivered by

WILLARD, C. J. The defendant was indicted and convicted for "maliciously, unlawfully and willfully setting fire to, burning and destroying, in the night time, stacks of hay and ricks of corn fodder." The only exception properly before the Court arises on the fact that the defendant on the trial demanded twenty peremptory challenges, which demand was refused. He was allowed

and exercised the right of making five peremptory challenges.

Was he entitled to twenty? The statute is as follows (Rev. Stat., 747, § 3,): "Any person who shall hereafter be arraigned for the crime of murder, manslaughter, burglary, arson or rape, or grand larceny, shall be entitled to all the incidents of an arraignment and to peremptory challenges, not exceeding twenty, and the State in such cases shall be entitled to peremptory challenges, not exceeding two, in the manner heretofore prescribed by law. And any person who shall be indicted for any crime or offense other than those above enumerated shall have the right to peremptory challenges of five, and the State in such cases shall be entitled to peremptory challenges not exceeding two."

The defendant contends that the crime for which he was indicted was arson, and consequently that he was entitled to twenty peremptory challenges under the terms of the statute.

Arson is defined by the Revised Statutes, and what shall be deemed arson is there declared.—Rev. Stat., 714, § 1. It is not contended that the offense in the present case is within the terms of the Section last referred to defining the crime of arson, but that the offense set forth in the Section of the statute next succeeding that which in terms defines arson is also to be considered as arson.

The last mentioned Section is as follows:

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"Whoever shall, in the *night time, maliciously, unlawfully and willfully burn, or cause to be burned or destroyed, any ricks or stacks of corn, hay or grain, or kilns, shall, for every offense, be punished by hard labor in the Penitentiary for life, or for a period not less than ten years, according to the aggravation of the offense.—Rev. Stat., 714, § 2.

It is observable that while Section 1 in terms denominates the offenses described by it as arson, Section 2 omits such designation, thus giving rise to the inference that the offense made punishable by the last named Section was not to be regarded as arson. This inference becomes conclusive when the objects of the two Sections are compared. The crime of arson has relation to the habitation habitually or occasionally occupied as such, and the protection of life enters more or less into its consideration. Stacks of hay and other agricultural products are the subjects protected in the second Section.

These may be located so as to endanger by their burning buildings of the class contemplated by the Section defining arson, or they may stand apart from any building whatever, so that their destruction by fire would involve nothing beyond the loss of personal property. To extend the idea of arson to such a case would destroy its known legal character and leave it without any defined legal idea to support and explain it.

It is clear that the crime of which the defendant has been convicted is not arson in the sense of the Section allowing twenty peremptory challenges, and the exception must be overruled, together with the second exception, that depends upon the same construction.

The exceptions that the jury was not properly sworn are not supported by the record and must be overruled.

The appeal must be dismissed.

McIVER, A. J., concurred.

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9 S. C. *276

*LEBESCHULTZ v. MAGRATH.

(Columbia. Nov. Term, 1877.)

[*Venue* ⇐77.]

Where the action is brought in a wrong County, the defendant must, before the time for answering expires, demand in writing that the place of trial be changed to the proper County, as directed by Section 149 of the Code, or otherwise he will be held to have waived his right.

[Ed. Note.—Cited in Ware v. Henderson, 25 S. C. 388.

For other cases, see Venue, Cent. Dig. § 59; Dec. Dig. ⇐77.]

[*Venue* ⇐77.]

The question under Section 149 of the Code is not one of jurisdiction but of practice merely.

[Ed. Note.—Cited in Trapier v. Waldo, 16 S. C. 284; Utsey v. Charleston, S. & N. R. Co., 38 S. C. 405, 17 S. E. 141; Nixon & Danforth v. Piedmont Mut. Ins. Co., 74 S. C. 442, 54 S. E. 657.

For other cases, see Venue, Cent. Dig. §§ 59, 134, 138; Dec. Dig. ⇐77.]

Before Carpenter, J., at Edgefield, April Term, 1876.

Action by M. Lebeschultz against Thomas P. Magrath to recover the amount of a sealed note given by defendant to the plaintiff.

The defendant, by his answer, alleged that he was a resident of Charleston County, but he made no demand in writing before the time for answering expired, as directed by Section 149 of the Code, that the place of trial be changed from Edgefield County to Charleston. The jury, under the instructions of the Circuit Judge, found for the plaintiff, and the defendant appealed on the grounds that the Circuit Court for Edgefield had no jurisdiction in the action.

Abney, with whom was Youmans, for appellant.

Bonham & Sheppard, contra.

March 8, 1878. The opinion of the Court was delivered by

HASKELL, A. J. The appeal in this case is conclusively met by Section 149 of the Code of Procedure, Revised Statutes, p. 598. It is an entire mistake to make this a question of jurisdiction. Section 149 specifically

sustains the jurisdiction in this case—"unless the defendant, before the time for answering expire, demand in writing that the trial be had" in the County in which he claimed to reside. On the contrary, it is a question of practice, and when the defendant waived the remedy which Section 149 provides he waived any objection to the place of trial.

The motion for a new trial is refused.

WILLARD, C. J., and McIVER, A. J., concurred.

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9 S. C. *277

*FIELD v. HURST.

(Columbia. Nov. Term, 1877.)

[*Pleading* ⟸369.]

An objection apparent on the face of the complaint that various causes of action have been improperly joined in the complaint can only be taken by demurrer under § 170, Subdiv. 5, of the Code of Procedure.

[Ed. Note.—Cited in Seibels v. Northern Cent. Ry. Co., 80 S. C. 139, 61 S. E. 435, 16 L. R. A. (N. S.) 1026.

For other cases, see Pleading, Cent. Dig. § 1199; Dec. Dig. ⟸369.]

Before Townsend, J., at Darlington, February, 1877.

This was an action by Matchet Field against Samuel F. Hurst and others.

The case is as follows:

The defendant answered the complaint but filed no demurrer. At the trial the defendant's counsel contended that the complaint contained several causes of action; that they could not be united in one complaint, and that therefore the plaintiff must elect his cause of action in advance of the trial. His Honor so ruled, and the plaintiff, by his counsel, excepted.

Edwards, for appellant.

Dargan, Spain, contra.

March 8, 1878. The opinion of the Court was delivered by

HASKELL, A. J. The defendants answered in this case and went to trial, but at the opening of the trial they "insisted that such various causes of action could not be joined in one complaint, and that therefore the plaintiff must elect his jurisdiction and cause of action in advance of the trial."

The presiding Judge so ruled, and compelled the plaintiff to sever the pleadings in his case, and allowed the defendants to plead anew.

By the Code of Procedure, Section 167, Revised Statutes, p. 605, it is provided "* * * The defendant may demur to the complaint when it shall appear upon the face thereof * * * 5. That several causes of action have been improperly united."

Sec. 170. "When any of the matters enumerated in Section 167 do not appear upon the face of the complaint the objection may be taken by answer."

Sec. 171. If no such objection be taken, "either by demurrer or answer, the defendant shall be deemed to have waived the same, excepting only the objection to the jurisdiction of the Court, and the objection that the complaint does not state facts sufficient to constitute a cause of action."

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*Certainly neither of the two latter exceptions were charged in this case, for the defendants allege jurisdiction both in law and equity, and that the complaint states facts sufficient to constitute several causes of action.

The defendants seem to base their motion on Section 167: "5. That several causes of action have been improperly united." And on that the presiding Judge seems to have ruled, for he held "that the plaintiff must notify defendants what cause of action he relied on." That can only mean on which of the several causes of action in the complaint he relied.

This precludes the idea that this ruling may have rested upon Section 183, page 608, Revised Statutes, which relates to the treatment of instances of irrelevancy, redundancy, indefiniteness and uncertainty in the pleadings.

The defendants, not having demurred to the complaint, had waived any objection, and the case should have proceeded to trial.

It is difficult to perceive why the Court allowed a new answer to be filed when the amendment which was ordered added no new matter of fact or of law to the complaint. The whole proceeding was wrong and irregular.

By Section 190, page 609, Revised Statutes, "the plaintiff may unite in the same complaint several causes of action, whether they be such as have been heretofore denominated legal or equitable, or both, where they all arise out of." Then follows a recital of several classes of causes.

If the complaint exceed the limits herein prescribed, the only objection must, by Subdivision 5 of Section 167, be made by demurrer.

By Section 171, if no such objection be taken by demurrer, the defendant shall be deemed to have waived the same. The Court must proceed to hear the case and decide according to the pleadings and the evidence, exercising its discretionary power by amending the pleadings to conformity with the evidence where that may be proper.

The consideration of other questions is unimportant, as the Court deems the one already considered good ground for a new trial.

The motion for a new trial is granted.

WILLARD, C. J., and McIVER, A. J., concurred.

9 S. C. *279

*ROE v. HARRISON.

(Columbia. Nov. Term, 1877.)

[*Witnesses* ⟸98.]

In an action by a junior judgment creditor to set aside a senior judgment by confession as fraudulent and void, brought by the administrators of the junior judgment creditor against the administratrix of the senior judgment creditor and the administrator of the judgment debtor, conversations and transactions which led to the confession of the senior judgment between the judgment debtor and the senior judgment creditor may be proved by a distributee of the judgment debtor.

[Ed. Note.—Cited in Hughey v. Eichelberger, 11 S. C. 36; McLaurin v. Wilson, 16 S. C. 411; Colvin v. Phillips, 25 S. C. 232; Moore v. Trimmier, 32 S. C. 525, 11 S. E. 548, 552; Griffin v. Earle, 34 S. C. 252, 13 S. E. 473; Merck v. Merck, 89 S. C. 349, 71 S. E. 969, Ann. Cas. 1913A, 937.

For other cases, see Witnesses, Cent. Dig. § 362; Dec. Dig. ⟸98.]

Before Cooke, J., at Greenville, April, 1877.

This was an action by Thomas H. Roe and James Roe, administrators of Thomas Roe, deceased, against Mary Harrison, administratrix of William H. Harrison, deceased, and James Harrison, administrator of the estate of Thomas E. Harrison, deceased.

The following is the case on which the appeal was heard:

This was an action brought by the administrator of a junior judgment creditor against the administratrix of a senior judgment creditor and the administrator of their mutual debtor to set aside the senior judgment on an allegation of fraud. The plaintiffs offered as a witness a son, heir-at-law and distributee of the estate of the deceased judgment debtor, to prove certain conversations alleged to have taken place in his presence between the senior judgment creditor and the judgment debtor. This testimony was objected to on the ground that he was an interested witness and incompetent under Section 415 of the Code. The objection was sustained and the plaintiff appealed.

[For subsequent opinion, see 14 S. C. 625.]

Whitner & Symmes, Cothran, for appellants.

Earle & Wells, Vance, contra.

March 9, 1878. The opinion of the Court was delivered by

WILLARD, C. J. The testimony of John Harrison was improperly excluded. The action is brought by a judgment creditor of the intestate against his administrator and a senior judgment creditor to set aside such senior judgment as fraudulent and void, so as to let in the junior judgment to a priority. The witness, John Harrison, was a distributee of the intestate, and, therefore, has, in legal contemplation, an interest in the event of the suit; for if the judgment is set aside, assets to a corresponding amount will be liberated and become disposable for payment

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of debts or distribu*tion. He was called by the plaintiff for the purpose of invalidating the judgment. It is alleged, however, that the estate was insolvent, and contended that for that reason he was destitute of interest. Had the insolvency been judicially ascertained, as between the parties, so as to estop them from inquiry into the fact, a different question from the present one would have been presented, which we need not consider. It is enough to hold that, as a question of fact, insolvency could not be determined as an incident merely to the question of the interest of the witness in the event of the suit. Such a proceeding would be without precedent and incompatible with orderly procedure in trials of issues of fact, and it is not to be assumed that the Legislature intended such a qualification of its language.

The language of the statute excludes "any person who has a legal interest which may be affected by the event of the action." It need not appear that such interest will be so affected. It is the possibility of such an effect to which the law looks, and not to what will ultimately prove to be the effect on such interest. This language is substantially repeated in the same Section and with the same effect.

The subject of the testimony was "conversations and transactions" between the deceased and the third party, and the objection to the testimony came from the administratrix of the deceased, whose conversations and transactions were the subject of the testimony offered.

The testimony offered was as to "conversations and transactions between his brother, [witness's brother] William H. Harrison, and his father, the said Thomas E. Harrison, relative to the causes which led to the confession of judgment made by Thomas E. Harrison to William H. Harrison." The statute excludes "any transactions or communications between such witness and a person at the time of such examination, deceased, &c."

We have only the bare offer of proof and must act on it as it stands. It does not necessarily follow, from the statement of the proof offered that the subject-matter was a transaction or communication between the witness and the deceased. For all that appears, the presence of the witness at the time and place of the conversation may have been unknown to the parties between whom the transactions or conversations took place, so that he cannot be regarded as having necessarily taken any part in such conversation with the deceased.

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*While we cannot determine whether in point of fact the witness was competent as it regards the undisclosed testimony he had to give, we are satisfied that the offer of tes-

timony was not sufficient to raise a question of his competency.

There must be a new trial.

McIVER, A. J., and HASKELL, A. J., concurred.

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9 S. C. 281

RICE v. MAHAFFEY.

(Columbia. Nov. Term, 1877.)

[*Mortgages* ⇐504.]

In an action for foreclosure a final judgment was entered for plaintiff by consent, and shortly thereafter defendant commenced an action against plaintiff to enjoin the sale, alleging equitable grounds of relief, and the Circuit Judge, without notice to plaintiff, granted an order to enjoin the sale. On appeal, the action to enjoin the sale and all proceedings therein were set aside, the Court holding that they were unauthorized, irregular and void.

[Ed. Note.—Cited in State v. Port Royal & A. R. Co., 45 S. C. 468, 23 S. E. 380.

For other cases, see Mortgages, Cent. Dig. §§ 1470, 1490–1500; Dec. Dig. ⇐504.]

[*Judgment* ⇐619.]

A defendant in an action must plead all his defenses, whether legal or equitable. He cannot allow judgment to be entered against him and then commence a separate action against plaintiff alleging an equitable defense and praying for an injunction. The judgment estops him from setting up any matter which could have been pleaded in the first action.

[Ed. Note.—Cited in Fraser & Dill v. Charleston, 13 S. C. 543; Kirven v. Virginia-Carolina Chemical Co., 77 S. C. 507, 58 S. E. 424; Sovereign Camp of the Woodmen of the World v. Means, 87 S. C. 132, 69 S. E. 85.

For other cases, see Judgment, Cent. Dig. § 1132; Dec. Dig. ⇐619.]

[*Mortgages* ⇐504.]

An order to enjoin a decree for sale of mortgaged premises cannot be made without four days' notice, as the 78th rule of the Circuit Court requires.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1470, 1490–1500; Dec. Dig. ⇐504.]

[This case is also cited in Fraser & Dill v. Charleston, 13 S. C. 533, and distinguished therefrom.]

Before Northrop, J., at Laurens, November, 1876.

The case is as follows:

In December, 1869, Sanford B. Mahaffey became the purchaser of a tract of land lying in the County of Laurens, which was sold by Ira W. Rice, as Clerk of the Court, for partition between the heirs of William Hunter, and gave bond and mortgage to secure the payment of the purchase money. In May, 1875, suit was brought in the name of Rice, as plaintiff, against Mahaffey to foreclose the mortgage. Mahaffey answered the complaint, and alleged, amongst other defenses, that the question of title to the land was in litigation in the United States District Court in a case there pending between the creditors of Willis Cheek, a bankrupt. The issues in the cause were then referred to a Referee, and upon the coming in of his report a decree for foreclosure and sale of the mortgaged premises was made, with the consent of Mahaffey's attorney. A few days afterwards Mahaffey commenced

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this action *against Rice, setting forth in his complaint the pendency of the suit in the United States District Court for recovery of the possession of the mortgaged premises and praying for an injunction to restrain the sale and for a review of the facts of the case. And thereupon, without notice to the plaintiff, Rice, His Honor Judge Northrop made an order to restrain the sale under the decree for foreclosure.

The plaintiff, Rice, appealed on the grounds, amongst others: 1st. That the Circuit Judge erred in enjoining a decree made by consent. 2d. That there was error in enjoining the decree of foreclosure without four days' notice, as directed by the 75th rule of the Court.

Pope & Watts, for appellant.

Ball, contra.

March 9, 1878. The opinion of the Court was delivered by

HASKELL, A. J. When the Courts of law and equity were separate and distinct it was sometimes allowable for a bill to be filed in chancery by the defendant in an action at law against the plaintiff to dispose of some equitable question arising in the matter between them,—and ad interim to restrain the proceeding at law.

By the Constitution, Article IV, Section 16, the Court of Common Pleas now has jurisdiction in all matters of equity, and by Section 92 of the Code of Procedure, Revised Statutes, page 586, "the distinction between actions at law and suits in equity, and the forms of all such actions and suits, are abolished." The Court is, therefore, now competent to administer equitable and legal relief in a single action, and in every action in every manner, and more than formerly the two Courts could do when acting separately and sometimes in antagonism. The defendant is, therefore, bound to plead his defenses, legal and equitable, in the action brought, and is estopped from instituting a separate proceeding in the same cause with the same party. If by any mistake he may have suffered injury, the Court has extensive power, and, upon motion, can grant relief by leave to amend or otherwise, according to the nature of the case. Such proceedings are not separate, but are in their nature supplemental, and are part of the original action. The respondent in this case has not pursued the course which the law so clearly

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*directs, and if he lose any relief to which he may have been entitled, it is his own fault. The complaint on which the motion for order of injunction rests is, on its face,

a distinct proceeding, but in fact, it is this: The plaintiff is the defendant in the original case; the case made out by his complaint is the defense set up in his answer in the case already existing; the Court is the same whose judgment determined the identical question raised in this effort at a new proceeding. The order appealed from enjoins the judgment. The Court enjoins its own judgment, not only without cause, but without notice to the adverse party.

The judgment in this case is not, as counsel seeks to argue, analogous to a judgment at law under the old practice, but is in the nature of a decree in equity, and the effect is that the Court enjoins itself. "A judgment is the final determination of the rights of the parties in the action."—Revised Statutes, page 630. And the judgment must stand until reversed by appeal or some mode which the law provides. The Court would stultify itself were it to pursue the practice of enjoining the execution of its judgments on ex parte motions. In this case it is obviously rendered more erroneous by the fact that the grounds on which the motion rests had just been determined in the case, and the judgment was rendered with the consent of the defendant—the respondent. The equitable powers of the Court should not be extended to grant relief in such a proceeding where the party moves, ex parte, to set aside, in effect, his own agreement. The Circuit Judge was further in error to grant an order enjoining an order of sale without four days' notice to the adverse party as required by the seventy-fifth rule of the Circuit Court. Rules do not make law, but they regulate practice and should be enforced.

It is therefore ordered that the order appealed from be set aside, and that the complaint and entire proceeding on which the motion for the order was based be dismissed.

WILLARD, C. J., and McIVER, A. J., concurred.

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9 S. C. *284

*PARKER & CO. v. GRIMES & CO.

(Columbia. Nov. Term, 1877.)

[*Judgment* ⇐16.]

A judgment rendered against a defendant residing in another County is not void for want of jurisdiction.

[Ed. Note.—Cited in Trapier v. Waldo, 16 S. C. 284; Ware v. Henderson, 25 S. C. 388; Nixon & Danforth v. Piedmont Mut. Ins. Co., 74 S. C. 442, 54 S. E. 657.

For other cases, see Judgment, Cent. Dig. §§ 22, 24; Dec. Dig. ⇐16.]

[*Venue* ⇐40.]

The defendant should resort to the remedy prescribed by Section 149 of the Code.

[Ed. Note.—For other cases, see Venue, Cent. Dig. § 61; Dec. Dig. ⇐40.]

[*Appeal and Error* ⇐106.]

A motion to change the venue is ordinarily within the discretion of the Circuit Court, but where a question of jurisdiction is involved the decision is appealable.

[Ed. Note.—Cited in Willoughby v. Northeastern R. R. Co., 46 S. C. 321, 24 S. E. 308.

For other cases, see Appeal and Error, Cent. Dig. § 726; Dec. Dig. ⇐106.]

[*Venue* ⇐34.]

Section 149 of the Code is not repealed by the Act of March 17, 1875.

[Ed. Note.—Cited in Utsey v. Charleston, etc., R. R. Co., 38 S. C. 409, 17 S. E. 141.

For other cases, see Venue, Cent. Dig. § 52; Dec. Dig. ⇐34.]

Before Reed, J., at Charleston, June Term, 1877.

This was an action by James H. Parker & Co. against P. C. Grimes & Co. The case is fully stated in the opinion of the Court.

Mordecai, for appellant.

Todd & Ferguson, contra.

March 9, 1878. The opinion of the Court was delivered by

McIVER, A. J. In this case the plaintiffs, who are residents of the County of Charleston, duly recovered a judgment by default in the Court of Common Pleas for that County against the defendants, who are alleged to be residents of Laurens County. After the judgment had been entered and transcript thereof sent to Laurens County and execution issued thereon, a motion was made before the Judge who rendered it to set it aside "on the ground of want of jurisdiction for non-residence of defendants in Charleston County." The motion was based upon the affidavit of one of the attorneys for the defendants, and was resisted upon an affidavit of the attorney for the plaintiffs and the certificate of the Clerk of the Court for Charleston County. The affidavit of the attorney for the defendants was to the effect that within twenty days after the service of the complaint he notified the attorney for the plaintiffs that the firm to which he belonged had been retained for the defense, and at the same time demanded that the venue be changed from the County of Charleston to the County of Laurens, where the defendants resided, such notification and demand having been forwarded by mail to the plaintiffs' attorney. The affidavit of the attorney for the plaintiffs was to the effect that no such demand was ever received by him, and the certificate of the Clerk was to the effect that no demand to change the venue

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had ever been filed *in his office, and that no order of Court changing the venue had ever been made.

The Circuit Judge granted the motion, and, although no reasons are given, we are bound to assume that it was granted solely upon the ground of a want of jurisdiction, inasmuch as the notice of the motion is based

solely upon that ground, and the affidavit of the defendants' attorney discloses no other basis for the motion than the fact that the defendants were not residents of the County in which the judgment was rendered. It cannot be regarded as a motion, under Section 197 of the Code of Procedure, to be relieved from a judgment taken against a party through "his mistake, inadvertence, surprise or excusable neglect," for nothing of the kind is suggested, and there is no affidavit of merits in the defense, which would be not only proper but necessary in such a case. While it may be true that the decision of the Circuit Court upon a motion to change the place of trial is not, ordinarily, appealable, (Gower v. Thomson, 6 S. C., 313,) yet where a jurisdictional question is involved it would seem from that case that such a decision is a proper subject for review in this Court. So that even if this were a motion to change the place of trial involving solely a question of jurisdiction, this Court would have jurisdiction to review it. Much more, then, is it reviewable here when the motion is not to change the place of trial but to set aside the judgment of the Court of Common Pleas upon the ground of a want of jurisdiction in that Court.

The question, then, whether the decision of the Circuit Judge, that the judgment in this case should be set aside for want of jurisdiction in the Court which rendered it, is correct, is open for us to consider. Section 149 of the Code of Procedure distinctly provides that "if the County designated in the complaint be not the proper County the action may, notwithstanding, be tried therein, unless the defendant, before the time for answering expires, demand in writing that the trial be had in the proper County, and the place of trial be, therefore, changed by consent of parties or by order of the Court, as is provided in this Section," &c. From the terms of this Section it is very clear that the Court had jurisdiction, (for the terms "the action may, notwithstanding, be tried therein," can mean nothing else,) unless the defendant, within the time specified, had not only made the demand in writing for the change of the

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place of *trial, but also obtained either the consent of the parties or an order of the Court for such change. A mere demand by itself was not sufficient, but it must be followed up either by obtaining the consent of the parties or the order of the Court; otherwise a party who was not entitled to have the place of trial changed might, by merely making the demand, obtain that to which he was not entitled; hence the necessity of a compliance with all the requirements of the statute. In this case it is manifest that this was not done, for, even granting that a proper demand was made, there is no pretense that any consent of parties was obtained, and, so far from there being any evidence that there was any order of Court to change the place of trial, the evidence shows distinctly that there was no such order. It is suggested, however, that Section 149 of the Code has been repealed by the Act of 17th March, 1875.—15 Stat., 913. It is very certain that this Act does not expressly repeal that Section, for it makes no allusion to it whatever. On the contrary, by its title, as well as by the language used in the body of the Act, it refers solely to Section 148, and purports to change that and nothing else. We are unable to see any ground whatever for supposing that it repeals or in any way alters the provisions of Section 149, as it is no more inconsistent with the provisions of that Section than Section 148 as it originally stood was. The Court, therefore, which rendered the judgment in question unquestionably had jurisdiction, and the Circuit Judge erred in deciding otherwise. It will be observed that we have been careful to confine our decision to the jurisdictional question, because in granting the motion in this case we desire to do so without prejudice to the right of the defendants, if they can make it appear that they have a meritorious defense to apply to the Circuit Court on a proper showing, to be relieved from the judgment, either under the provisions of Section 197 of the Code of Procedure or under Sections 2 and 3 of Chapter CV of the General Statutes, as they may be advised.

Motion granted.

WILLARD, C. J., and HASKELL, A. J., concurred.

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*BOLIVAR v. ZEIGLER.

(Columbia. Nov. Term, 1877.)

[*Partition* ⇦109.]

In an action against a purchaser of lands on a bond given to the Sheriff under a sale made under a decree for partition, it is a valid defense that the parties to the action for partition had no title.

[Ed. Note.—Cited in Latimer v. Wharton, 41 S. C. 511, 515, 516, 19 S. E. 855, 44 Am. St. Rep. 739; Godfrey v. E. P. Burton Lumber Co., 88 S. C. 145, 70 S. E. 396.

For other cases, see Partition, Cent. Dig. §§ 375–397; Dec. Dig. ⇦109.]

[*Partition* ⇦109.]

The rule caveat emptor does not apply to sales by the Sheriff under a decree for partition.

[Ed. Note.—Cited in City of Charleston v. Blohme, 15 S. C. 125, 40 Am. Rep. 690; McMichael v. McMichael, 51 S. C. 559, 29 S. E. 403; People's Bank of Greenville v. Bramlett, 58 S. C. 485, 36 S. E. 912, 79 Am. St. Rep. 855; Rice v. Bamberg, 59 S. C. 509, 38 S. E. 209.

For other cases, see Partition, Cent. Dig. § 380; Dec. Dig. ⇦109.]

Before Cooke, J., at Orangeburg, May Term, 1877.

George Bolivar, Clerk, and assignee of the Sheriff, against Jane M. Zeigler, defendant.

Action on a bond given to the Sheriff by the defendant for the purchase money of land sold under a decree for partition. The defendant, by her answer to the complaint, alleged that she purchased the lands from the Sheriff at a sale for partition made under a decree of the Court, and that the bond sued on was given for the purchase money, and that the parties to the action for partition had no title to the land sold. The plaintiff demurred on the ground that the answer set forth no defense to the action. His Honor sustained the demurrer and the defendant appealed.

Whaley, for appellant.

De Treville, contra.

March 9, 1878. The opinion of the Court was delivered by

McIVER, A. J. This was an action upon a bond given for the balance of the purchase money of land sold for partition under an order of the Court of Common Pleas. The defense set up by the answer was a failure of consideration, the allegation being that, by proper proceedings in the Court of Common Pleas, to which the plaintiff was a party, it had been adjudged that the persons as whose property the land had been sold for partition had no title, and the land had been ordered to be resold and the proceeds paid over to the Receiver of the estate to which the land was adjudged to have belonged. The plaintiff demurred upon the ground that the answer does not state facts sufficient to constitute a defense, and the Circuit Judge having sustained the demurrer and given judgment for the plaintiff the defendant now moves to set aside that judgment. Whatever doubts may have been once entertained as

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*to whether the doctrine of caveat emptor applied to sales made by the Commissioner in Equity, those doubts were finally settled by the principles established by the case of The Commissioner v. Smith, (9 Rich., 515,) and there can be now no doubt that this maxim does not apply to such sales, and, therefore, that the defense here set up, if established on the trial, will be a sufficient defense to the action. For although the sale in this case was made by the Sheriff, yet it was not a compulsory sale, under process of execution, where the rule of caveat emptor does apply, but a sale for partition, at the instance of the parties, and must be governed by the same principles as applied to such sales when made by the Commissioner in Equity. The Circuit Judge therefore erred in sustaining the demurrer, and his order and judgment must be set aside and the case remanded to the Circuit Court for trial. The motion is granted.

WILLARD, C. J., and HASKELL, A. J., concurred.

9 S. C. 288

WARREN, WALLACE & CO. v. JONES.

(Columbia, Nov. Term, 1877.)

[*Execution* ⇐116.]

An execution issued and lodged with the Sheriff prior to the adoption of the Code does not lose its lien upon personal property because of the provisions of the Code in reference to executions.

[Ed. Note.—Cited in Carrier v. Thompson, 11 S. C. 79, 82; Kennedy v. Kennedy, 86 S. C. 498, 68 S. E. 669.

For other cases, see Execution, Cent. Dig. § 266; Dec. Dig. ⇐116.]

[*Execution* ⇐3.]

The Sections of the Code relating to executions apply only to executions issued after its adoption.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 3; Dec. Dig. ⇐3.]

[*Constitutional Law*, ⇐110; *Statutes* ⇐263.]

Statutes are never to be construed as intended as act retrospectively, if such construction can possibly be avoided, and never when such construction would make them interfere with vested rights.

[Ed. Note.—Cited in Alexander v. Alexander, 16 S. C. 131; Mutual Aid, Loan & Investment Co. v. Logan, 55 S. C. 302, 33 S. E. 372.

For other cases, see Constitutional Law, Cent. Dig. § 265; Dec. Dig. ⇐110; Statutes, Cent. Dig. § 344; Dec. Dig. ⇐263.]

Before Northrop, J., at Abbeville, September, 1877.

This was an action by Warren, Wallace & Co. against Joshua Y. Jones, as Sheriff of Abbeville County.

The case is fully stated in the opinion of the Court.

Gary, for appellant:

"When levied on personal property they [executions] shall be a lien on such property for the period of four months from the period of such levy." * * * "And whenever renewed shall be subject to the rules herein provided."—Acts 1874–75, p. 872, § 15.

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*"All statutory provisions inconsistent with the Code of Procedure are repealed."—§ 471, Code.

"Writs of execution for the enforcement of judgments, as now used, are modified in conformity to this title." * * *—§ 306, Code.

"The remedy heretofore given by scire facias to obtain execution of a judgment is superseded by the provisions of the Code which give an action therefor."—Cameron v. Young, 6 How., 372; Alden v. Clark, 11 How., 209.

"Sections 283 and 284 [306 and 307 of our Code] of the amended Code of Procedure are applicable as well to judgments rendered before the Code took effect as to judgments rendered in actions brought under the Code."—The Catskill Bank v. Sandford, 4 How., 100, 101.

Under the law as it stood before the Code went into effect an execution bound the personal property of the judgment debtor but

from the time such writ was delivered to the Sheriff or other officer.—7 Stat., 229.

"The distinction between the obligation of a contract and the remedy given by the Legislature for to enforce that obligation has been taken at the bar and exists in the nature of things. Without impairing the obligation of the contract the remedy may certainly be modified as the wisdom of the nation shall direct."—Sturges v. Crowninshield, 4 Wheat.

"For undoubtedly a State may regulate at pleasure the modes of proceeding in its Courts in relation to past contracts as well as future. * * * Regulations of this description have always been considered in every civilized community as properly belonging to the remedy, to be exercised or not by every sovereignty, according to its own views of policy and humanity. It must reside in every State to enable it to secure its citizens from unjust and harassing litigation and to protect them in those pursuits which are necessary to the existence and well-being of every community; and although a new remedy may be deemed less convenient than the old one, and may in some degree render the recovery of debts more tardy and difficult, yet it will not follow that the law is unconstitutional. Whatever belongs merely to the remedy may be altered according to the will of the State, provided the alteration does not impair the obligation of the contract." —Bronson v. Kensie, 1 How., 311.

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*"A law which regulates the issuing of executions previously rendered affects the remedy merely and does not impair the obligation of the contract."—McLean, 35.

"It is clear that this Court has no right to pronounce an Act of the State Legislature void as contrary to the Constitution of the United States, from the mere fact that it divests antecedent vested rights of property. The Constitution of the United States does not prohibit the States from passing retrospective laws generally, but only ex post facto laws."—Watson v. Mercer, 8 Pet., 88.

"The vested right must be in the nature of a contract in order to be brought within the protection thus afforded. The lien of a judgment is a mere right of preference as among purchasers and creditors. It is to be regarded as an incident of the remedy not in the contemplation of the contracting parties." —In re Kennedy, 2 S. C., 226.

"The judgment is not in itself a contract," (Biddeson v. Whytel, 3 Burr., 1545,) "and it cannot originate rights of the class protected under the United States Constitution."—In re Kennedy, 2 S. C., 226.

"The constitutional provision in relation to laws impairing the obligation of contracts was designed to operate only on some of the undertakings contained in the contract and was not intended to interfere with the internal regulations which a State may think proper to adopt for the government of its citizens."—Barlow v. Gregory, 31 Conn., 264.

"The distinction between the obligation of a contract and the remedy for its enforcement is well established by the authorities; and while the Legislature has no right to impair the obligation of the contract, it has the undoubted right to change, modify or vary the nature and extent of the remedy, provided a substantial remedy is left the creditor. Under the United States Constitution the former power is denied to the several States, but the latter exists in full force." —Hoffman v. Quincy, 4 Wall., 553; State v. County Treasurer, 4 S. C., 520.

Noble & Noble, contra:

The execution binds personal property from the time the fi. fa. is delivered to the Sheriff, who shall endorse on it the day and year he received it.—2 Stat., 528, § 16, A. D. 1712, (1672); 7 Stat. at Large, 229, § 37. Ex-

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ecution from a Court of general *jurisdiction binds the goods of defendant from the day on which it was lodged in the Sheriff's office. —Robinson v. Cooper, 1 Hill, 287.

The judgment of Hodges, trustee, v. John G. Boozer was docketed 10th January, 1867, and execution lodged in the Sheriff's office the same day.

The record of the case was burnt November, 1872, and was renewed and revived 3d July, 1875, and the judgment docketed, and the execution lodged in the Sheriff's office the same day.—See Acts of Assembly, 1872–3, p. 452, §§ 2 and 15.

Alterations in the law in regard to liens do not apply to judgments and executions prior to 1st March, 1870.—Rev. Stat., 644.

Code, § 316: "The lodgment of executions hereafter issued with the sheriff shall not bind the personal property of the debtor," etc. It would have been unconstitutional to have violated the obligation of existing liens. Hodges v. Boozer bound all the personal property of defendant from the day the fi. fa. was lodged with the Sheriff, on the 10th January, 1867, and renewed 3d July, 1875, and was at all times superior to appellant's agricultural lien, except as to the crop of 1876. The lien of the fi. fa. never ceased to bind defendant's goods at the time in his possession, or at any time afterwards in his possession, excepting only crops under agricultural liens.

The appellant should have taken the crops, cotton, corn, etc. His lien was due 1st November, 1876.

The charge of the Circuit Judge, therefore, was right, and the verdict of the jury was right, and must stand.

March 9, 1878. The opinion of the Court was delivered by

McIVER, A. J. This was an action brought by the plaintiffs to recover the net proceeds of the sale of two mules, two steers and two

wagons, sold as the property of one J. G. Boozer by the defendant, as Sheriff, under an execution in favor of one G. W. Hodges, as trustee, against said Boozer. The plaintiffs claim that these articles were covered by a mortgage given to them by said Boozer, duly recorded and dated the 25th of March, 1876, given to secure a debt which became payable on the 1st of November, 1876, while the defendant insisted that they were first liable to the lien of the above mentioned execution. This execution was originally issued on a judgment recovered by G. W. Hodges,

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as trustee, *against J. G. Boozer, in which Mrs. C. M. Wilson had an interest, and which was entered in the proper office on the 10th of January, 1867, on which day the original execution was lodged in the Sheriff's office. The record of this judgment having been destroyed by fire, "it was renewed and revived on the 3d of July, 1875, to the extent of Mrs. C. M. Wilson's interest" therein, and a new execution was issued thereon and lodged in the Sheriff's office that day, under which the property above mentioned was levied upon by the defendant on the 6th of January, 1877, and by him sold on the following sale day.

The Circuit Judge charged the jury that the execution creditor was entitled to the proceeds of the sale by reason of the priority of the lien of the execution to that of the mortgage. To this charge the plaintiffs excepted, and, the facts being all conceded, the only question is one of law—whether the execution creditor or the mortgagees were entitled to the proceeds of the sale. On the part of the plaintiffs it was argued that by the Code of Procedure, which it was claimed applied to all executions issued after its adoption, an execution had no lien on personal property until it was levied, and that as this execution was not levied until after the execution of the mortgage to the plaintiffs the mortgage had the superior lien. Passing by the question suggested by Inglis, J., in McKnight v. Gordon, (13 Rich. Eq., 247 [94 Am. Dec. 164],) whether there is not under our law such a legal estate still remaining in the mortgagor of a chattel, as well after as before condition broken, as may be the subject of levy and sale under an execution against him, and, consequently, whether the proceeds of sale in this case represented anything more than such legal estate, or equity of redemption as it may be called, to which the execution creditor would be entitled, leaving the mortgagees to their remedy against the specific property in the hands of the purchaser, we prefer to rest our decision upon other grounds.

There can be no doubt but that, prior to the Code, executions were liens upon personal property from the date of their lodgment in the Sheriff's office, even after they had lost their active energy.—Snipes v. Sheriff of Charleston, 1 Bay, 293; Brown v. Gilliland, 3 DeS., 539; Greenwood v. Naylor, 1 McC., 414. Indeed, Nott, J., in State v. Laval, (4 McC., 342,) in speaking of this doctrine, says: "It is peculiar to this State, but it is too well established now by a series of decisions to

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be controverted." And Harper, J., in *Mitchell v. Anderson, (1 Hill, 73 [26 Am. Dec. 158],) in reference to these decisions, uses this language: "The doctrine established by them has been too long and too firmly settled to be shaken now."

Has, then, the Code made any alterations in this respect in regard to executions issued upon judgments recorded prior to its adoption? Section 316 of the Code, as originally adopted reads as follows: "The lodgment of executions hereafter issued with the Sheriff shall not bind the personal property of the debtor, but personal property of the debtor shall only be bound by actual attachment or levy thereon." This Section was, however, stricken out by the 15th Section of the Act of 25th of November, 1873, (15 Stat., 499,) and another inserted, which provides among other things that "Executions * * * when levied on personal property shall be a lien on such property for the period of four months from the date of such levy, * * * and whenever renewed shall be subject to the rules herein provided." The question is, do these statutory provisions operate to deprive an execution issued after the adoption of the Code, upon a judgment recovered before, of the lien which it would have had under the previous provisions of the law upon this subject? To give these provisions of the Code such a construction would be not only to give them a retrospective operation but would have the effect of divesting vested rights; for, as it has been shown, Hodges unquestionably had, under the law as it stood prior to the Code, a lien which is a vested right upon all the personal property of Boozer.

Now, we are admonished in the case of Ex parte Graham (13 Rich., 277,) that Courts, in construing statutes, should be very careful if possible, to give them such a construction as will avoid such a result. The following language from Smith's Commentaries on Statute and Constitutional Law is there quoted with approval: "It is a general rule that statutes are not to be construed retrospectively, or so as to have a retrospective effect, unless it shall clearly appear that it was so intended by the Legislature, and not even then, if, by such construction, the act would divest vested rights." And Cooley, in his work on Constitutional Limitations, says at page 370: "It is a sound rule of construction that a statute should have a prospective operation only, unless its terms show clearly a legislative intention that it should operate retrospectively." Looking at the provisions of the Code in the light of these principles, it

is very clear that they can and must be con-
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strued so as to *avoid giving them the retrospective operation claimed for them in this case. Even if Section 316 had remained as it was originally written, we would be bound to construe it as relating only to executions issued on judgments obtained after the Code; but as the original Section has been expressly repealed, there is certainly nothing in the Section substituted for it which requires or even warrants us in applying its provisions, so far as the question of lien is concerned, to executions issued to enforce judgments obtained prior to the Code. For it would be by implication only that its provisions could be extended to such executions; and certainly no one will contend, in the face of the above cited authorities, that a statute should be given a retrospective operation merely by implication, especially when the effect would be to divest rights already vested. Indeed we might, if necessary, go further and say that even if the Code had, in the most express terms, declared that the lien which had been acquired by the lodgment of an execution, obtained prior to the adoption of the Code, should be divested, such an Act would be beyond the competency of the Legislature. For, while it may be true, as a general proposition, that a law which regulates the issuing and effect of an execution relates to the remedy merely, and that whatever belongs to the remedy merely may be altered according to the will of the Legislature, yet this, like most general propositions, is subject to the qualification that such alteration must not impair the obligation of the contract.—State v. Carew, 13 Rich., 498 [91 Am. Dec. 245], and the cases therein cited and commented on. To use the language of the Supreme Court of the United States in Gunn v. Barry, (15 Wall., 610 [21 L. Ed. 212],) adopted by this Court in Cochran v. Darcy, (5 S. C., 127,) "the legal remedies for the enforcement of a contract which belong to it at the time and place where it is made are a part of its obligation. A State may change them, provided the change involves no impairment of a substantial right. If the provisions of the Constitution or the legislative Act of the State fall within the category last mentioned, they are, to that extent, utterly void." Certainly, then, if the Legislature of this State had undertaken by the Code of Procedure (which, however, we do not think it did,) to deprive the execution creditor in this case, of the lien which he had acquired by the lodgment of his execution on the 10th January, 1867, it would have involved the "impairment of a substantial right," and, consequently, would have been "utterly void."

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*Again it may well be doubted whether the execution under which the sale was made in this case can be regarded as the renewal of an execution in the proper sense of those terms, as used in the Act amending the Code, hereinbefore cited, or whether it should not rather be regarded as a mere substitute for the original execution, issued under the provisions of the "Act to remedy and supply the loss of public records and to perpetuate testimony in regard to deeds, mortgages, settlements and other papers lost by fire at Abbeville," approved 27th February, 1873, (15 Stat., 452,) which by its express terms gave to the papers so substituted the same efficacy which the original records had. The mere accidental burning of the books and papers which evidenced this judgment and the execution issued to enforce it, certainly could not have the effect of destroying any of the incidents or attributes of such judgment and execution, and the papers substituted stand in the place of the originals, furnishing all the evidence, conferring all the authority and securing all the rights which the originals would have done.

We are, therefore, unable to perceive any error in the charge of the Circuit Judge, and the motion must be dismissed.

WILLARD, C. J., and HASKELL, A. J., concurred.

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9 S. C. 295

CHARLES v. JACOBS.

(Columbia. Nov. Term, 1877.)

[*Executors and Administrators* ⇨88.]

The general rule is, that where a judgment debtor becomes the personal representative of the judgment creditor, the judgment is extinguished and the debt becomes a realized asset in his hands, to be accounted for in the Probate Court. But this rule is subject to many exceptions; and where an executor did not treat the judgment debt against himself as paid, and died leaving it open and some land subject to its lien, and an administrator de bonis non cum testamento annexo of the estate assigned the judgment to a third party, it was held that the assignee had the right to enforce the judgment against the estate of the testator.

[Ed. Note.—Cited in Murray v. Witte, 16 S. C. 511, 512, 513; Chick v. Farr, 31 S. C. 472, 474, 10 S. E. 176, 390; Newman v. Clyburn, 41 S. C. 539, 19 S. E. 913.

For other cases, see Executors and Administrators, Cent. Dig. § 393; Dec. Dig. ⇨88.]

Before Cooke, J., at Greenville, June Term, 1876.

This was a petition by William B. Charles, trustee, against Richard H. Jacobs, administrator with the will annexed of Ed. O. Jacobs, deceased, and also administrator de bonis non cum testamento annexo of William Jacobs, deceased, to renew an execution on a judgment by confession for $2,485.57, which William Jacobs in his lifetime held against Ed. O. Jacobs.

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*The facts on which the appeal was heard

are contained in a statement prepared by counsel as follows:

On September 23d, 1859, Edward O. Jacobs confessed judgment to his father, William Jacobs. Subsequently William Jacobs died, leaving a will, in which he nominated Edward O. Jacobs executor, who qualified and shortly after died. R. H. Jacobs, who owns a tract of land bound by the lien of this judgment, took out letters of administration de bonis non cum testamento annexo upon the estate of Edward O. Jacobs. R. H. Jacobs then, as administrator de bonis non cum testamento annexo, transferred the judgment of Edward O. Jacobs to William B. Charles, the plaintiff, as trustee for Martha Charles, in part payment of a legacy to him as such under the will of William Jacobs, his maternal grandfather, and credited himself with the payment pro tanto in his return. Subsequently John Charles was removed as administrator cum testamento annexo of Edward O. Jacobs and R. H. Jacobs was appointed de bonis non. The present action was brought to renew this judgment. The first appeal was from an order vacating a judgment on account of errors in the calculation; the second was by the defendant for the rejection of evidence in a trial upon the merits; and the present one is upon the proposition that this judgment became cash in the hands of Edward O. Jacobs.

[For prior opinions, see Charles v. Jacobs, 5 S. C. 348; Id., 6 S. C. 69. For subsequent opinion, see Goldsmith v. Jacobs, 14 S. C. 624.]

Simpson & Moore, Cothran & Wells, for appellants.

Sullivan & Stokes, Earle, contra.

November , 1877. The opinion of the Court was delivered by

WILLARD, C. J. This is an application for leave to issue execution on a judgment held by the plaintiff, as trustee, as against the defendant, the administrator de bonis non cum testamento annexo of the judgment debtor. The defendant claims that the judgment has become extinguished by the fact that while it was in force E. O. Jacobs, the judgment debtor, became the executor of William Jacobs, the judgment creditor, and that, by operation of law, the judgment became paid and satisfied through the union in E. O. Jacobs of the right, as executor, to enforce such judgment and the obligation in such judgment. He, therefore, as the personal representative of E. O. Jacobs, denies the existence of such judgment. On the other hand, it is alleged by the plaintiff that the

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defendant, *in the character of administrator cum testamento annexo of William Jacobs, the judgment creditor, transferred to him as trustee of certain persons, distributees of William Jacobs, such judgment or a distributable portion of said estate, and he claims that what was done by defendant, as representing the estate of William Jacobs, estops him from impairing its force and validity by denying the existence of the judgment as the representative of E. O. Jacobs, the judgment debtor. It appears that J. Charles preceded the defendant as representative of the estate of E. O. Jacobs, and that defendant did not succeed as representative of that estate until long after the judgment had been transferred by him as representing the estate of William Jacobs.

The first question to be considered is, whether the judgment debtor having become the executor of the judgment creditor the judgment thereby became extinguished by operation of law. The true rule to be drawn from the authorities appears to be that where a debtor becomes the executor or administrator of his creditor the debt is presumed to be paid from the time of its maturity, and the executor or administrator is chargeable with the amount as realized assets, and when there is an official bond the sureties are likewise responsible. That parties interested in the administration, such as creditors and distributees, not having assented to such extinguishment are not bound by such rule of presumption, but may elect to treat the debt as unpaid if not actually paid, so as to reach any securities by way of mortgage, pledge or lien taken by the creditor for its payment. So the executor or administrator may prevent the extinguishment of the original debt by treating and dealing with it as an outstanding obligation, as by transferring it to creditors of the estate as assets of the estate but that such right cannot be exercised as against sureties to the obligation of the debtor, who are discharged if their principal, uniting the character of payer and payee, thus deals with their obligation. That if the executor or administrator actually treats the debt as paid, and accounts for it as such, it becomes legally extinguished as to such executor or administrator and those claiming under him, and cannot be revived by any act of the executor or administrator, such as transferring it in payment of debts of the estate; and if payment is accepted by the distributees on such account, they too are precluded from setting up the debt. The authorities from which these conclusions are deduced are the following:

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*Griffin v. Bonham, 9 Rich. Eq., 77: This was a case between a surviving executor and the representative of a deceased executor. It was alleged that the deceased executor was a debtor of the testator when the executorship was cast upon him, and that he had not paid the debt. There was a demand that the representative of the deceased executor should surrender to the surviving executor the evidence of such indebtedness, as of a valid obligation, and there was also a question of commissions for the amount of such

indebtedness that depended on the question whether it was considered as paid. It was held that the debt was paid under the operation of the rule laid down as follows: "Whenever an executor or administrator is indebted to his testator or intestate, the amount for which he is indebted, and then due, will be considered cash in hand at the moment when he assumes upon himself the administration. If the debt is not due at the commencement of the administration, it will be cash on account to the credit of the estate whenever it falls due in course of administration." This is a correct statement of the rule in its application between the parties then before the Court, namely, an executor and the representative of a deceased co-executor. That it is subject to limitations and exceptions, when considered with reference to other parties interested, appears by the cases which will be hereafter referred to. As this statement of the rule takes no notice of any limitations whatever, it must be considered that it was intended to be laid down with strict reference to the case in hand. In that case nothing appears to have been done by the deceased, while executor, to evince an intent to uphold the debt as existing, as such, and accordingly it was presumed paid. This case is clear authority that as against a co-executor the debt is presumed paid by the fact of co-executorship falling on a debtor to the testator. But it is not determined by whom and under what circumstances such presumption may be rebutted, nor could that determination have been made, for no facts raising such a question were before the Court.

Schnell v. Schroder (Bail. Eq. 334.) leaves the question in the same situation in which Griffin v. Bonham left it.

Clowney v. Cathcart, 2 S. C., 395: In this case the administrator had assigned a mortgage, made by himself to the intestate and held by him as administrator, to a creditor of his intestate, as an asset of the intestate's estate, and it was now sought to foreclose for the benefit of such creditor. It was held

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that the mortgage was *not extinguished by the fact that the mortgagor and holder of the land became the administrator of the mortgagee, but that the transfer was effectual in vesting the creditor with the mortgage, as a valid security, which could be enforced against the lands in the defendant's hands. The case places the question of extinguishment, as affecting the administrator, upon his intention as to whether the debt should subsist in specie or be considered paid by conversion into realized assets. It is consistent with the idea that unless the intent of the administrator is made apparent it will be presumed, as against him, that he intended that the debt should be deemed paid. Under this view it was not necessary to decide that the creditor, as such, had an independent right to treat the mortgage as an asset.

Jacobs v. Woodside, 6 S. C. 490: The action was against the sureties on a note of the debtor who had been made administrator of his creditor.

It was held, as affecting the sureties on the obligation of the debtor, that the note was to be deemed paid by the fact that the administration had been cast upon the principal debtor. It did not appear that the administrator had attempted to uphold the debt as subsisting security, and if he had it may be doubtful whether he could have done so without affecting the contract of the sureties in a manner inconsistent with the nature and obligacy of that contract and tending to discharge their liability.

Ipswich Manufacturing Company v. Story, 5 Met., 310: In this case one who had given a bond and mortgage to the deceased became his administrator. The administrator accounted for the amount of the bond as so much cash in hand before the Probate Court and a decree of distribution was made. Subsequently the administrator assigned the bond and mortgage to a third party. It was held that the bond and mortgage were extinguished by the fact of the accounting and decree of distribution, that being the act of the administrator signifying his intention to regard the debt as paid.

Shaw, C. J., holds when a debtor becomes the executor or administrator of his creditor "the debt becomes prima facie assets in the hands of the administrator or executor, to be accounted for and adjusted in probate account as assets actually realized." He holds that in such cases a presumption would arise from the fact of taking administration that the administrator intended to regard the debt

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*as paid, and that such presumption is strengthened by the fact that the administrator actually accounted for such debt as cash. He says: "Perhaps the mere fact that one had accepted letters of administration would not so far be regarded as payment or extinguishment of his debt due to the intestate as to bar an action to be subsequently brought by an administrator de bonis non."

The same Judge says, speaking of the case of an executor or administrator dying or being removed without actual payment or distribution made: "Perhaps in such case, if the executor or administrator was to die or be removed before any decree of distribution or satisfaction of such decree, and it should turn out that he had no means to pay and satisfy the amount due in his administration account, it might be held in equity in favor of the sureties on his administration bond that the mortgage given to secure the same debt should not be deemed to be discharged; but when the debt has been in fact credited and a decree of distribution made and satis-

fied, and the sureties in the administration bond exonerated from all responsibility, and no such change of administration, the mortgage debt must be deemed satisfied and discharged as against all persons claiming upon the mortgage under such administration." This intimates that the doctrine may be extended to afford protection to the sureties on the administrator's bond, which could of course only be accomplished, as is said, through the intervention of equity.

Stevens v. Gaylord, 11 Mass., 255: It was held also in this case, which was a demand made by the administrator of the creditor, appointed in Massachusetts, that the debtor having been appointed administrator of the creditor in Connecticut, where such intestate had assets, and having, in that State, accounted for the amount of the debt as cash in his inventory, the Massachusetts administrator could not enforce the debt, it being considered as extinguished. The administrators in the two States having, in a certain sense, co-ordinate powers as between them, on the principle of comity, the presumption of payment was applicable, conformably to the principle on which Griffin v. Bonham depended.

Winship v. Bass, 12 Mass., 198: This case contains discussions as to the rule under consideration tending to confine the idea of extinguishment within narrow limits, but decided nothing material to the present question.

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*Kinery v. Ensign, 18 Mass., 232: It was held in this case that the mortgage was not extinguished by the fact that the mortgagor had become administrator for the mortgagee and had accounted for the mortgage debt as cash in his administration accounts. The administrator was permitted to set up the mortgage for the purpose of exercising, in behalf of the estate, the power of redeeming from a prior mortgage. This case holds distinctly that the rule holding a debt due from the administrator to the estate as assets is a mere rule of convenience that should not be allowed to work prejudice to those beneficially interested.

Chief Justice Shaw says of this case, in Ipswich Manufacturing Company v. Story, that the case just cited was decided distinctly on the ground that although it might be the right of the creditors and the heirs of the mortgagee to require the administrator to account for his own debt secured by mortgage as assets, and to credit it in his administration account, yet that they were not bound to do it.

It is thus seen that all the essential features of the rule stated above have received judicial sanction of the highest respectability. It will be observed that there is some uncertainty in the language of the cases as to whether the original debt of the administrator may be treated as so far existing after the debtor has become the administrator of his creditor and such administration has terminated that an action may be brought upon it by parties interested in the estate for other purposes than upholding a security given for such debt.

This question is of no great importance as it regards the administrator himself, for his estate can be pursued without resorting to such obligation as the foundation of the proceeding nor can it be made available as against personal securities for the debt as we have seen. But the cases fully support the idea that if any mortgage, lien or collateral security is held for the debt, it may be pursued and made available in behalf of those interested in the estate. What may be the rule where the administrator is jointly indebted with another need not be considered here. The foregoing view is important to the present case. The judgment in favor of the original testator, W. Jacobs, and against E. O. Jacobs, was a security of this class, and whatever lien it possessed was a security for its discharge. E. O. Jacobs, the judgment

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debtor, becoming the exe*cutor, as against those beneficially interested, he could only discharge the lien of the judgment by actual payment. In fact, it does not appear that he ever treated the judgment as paid by returning it as cash. The defendant, as administrator of W. Jacobs, transferred the judgment to the plaintiff in trust for the parties entitled to a distributive portion of the estate shortly after the death of E. O. Jacobs. Subsequently the defendant became administrator de bonis non of E. O. Jacobs, and in that character seeks to prevent the judgment from being available in the hands of the plaintiff. It is clear that the trustees, standing in the right of distributees who had the right to subject the judgment considered as a security to the uses of the administration, had a right to receive from defendant the judgment as a distributable portion of the estate. The defendant recognized the right and actually transferred the judgment. He cannot now, in the character of administrator of E. O. Jacobs, defeat that right, for that would be to enable the representative of E. O. Jacobs to take advantage of his intestate's wrong. Nor if the defendant is in possession of the land bound by the judgment, as is intimated, but not established to be the fact, can he defeat the rights of the plaintiff. If he held the land at the time he transferred the judgment, his act setting it up by transfer was supported by the fact that, having the land, he had full right to do so. If he purchased the land subsequently, he purchased with notice; and if with the intention of denying the judgment, it must be presumed that his intention was to take advantage of his own wrong. In any case supposable the defend-

ant is destitute of ground for the exercising the right he claims to prevent the execution of the judgment.

The appeal must be dismissed and the order appealed from affirmed.

McIVER, A. J., and HASKELL, A. J., concurred.

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9 S. C. *303

*HORNESBY v. BURDELL.

(Columbia. Nov. Term, 1877.)

[*Judges* ⇐27.]

A Judge has no jurisdiction at chambers, against the consent of a party, to hear and determine the issues of an action brought in the Court of Common Pleas.

[Ed. Note.—For other cases, see Judges, Cent. Dig. § 110; Dec. Dig. ⇐27.]

[*Judges* ⇐27.]

A perpetual injunction, against the consent of a party, cannot be granted at chambers, or until the issues of the action have been heard and determined.

[Ed. Note.—For other cases, see Judges, Cent. Dig. § 125; Dec. Dig. ⇐27.]

[*Judges* ⇐18.]

Semble, That where the Judge of another circuit grants a temporary injunction, whatever is necessary to give him jurisdiction must appear upon the record.

[Ed. Note.—For other cases, see Judges, Cent. Dig. § 63; Dec. Dig. ⇐18.]

[*Prohibition* ⇐5.]

Semble, Where it is sought to restrain the judgment of a Court of Trial Justices and freeholders in a case of landlord and tenant on the ground of want of jurisdiction, prohibition and not injunction is the proper remedy.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. §§ 20–30; Dec. Dig. ⇐5.]

[*Judgment* ⇐410.]

Injunction does not lie to restrain the execution of a judgment of a special tribunal created by statute. Certiorari is, it seems the proper remedy.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 777; Dec. Dig. ⇐410.]

[*Appeal and Error* ⇐714.]

[Facts of the case must be gathered alone from the statements contained in the "case" as presented here, and any additional statement incorporated in the brief submitted by the counsel for respondents must be wholly disregarded as ex parte, and not properly before us.]

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2962; Dec. Dig. ⇐714.]

Before Mackey, J., at Columbia, November 16, 1875.

This was an action by James Hornesby and wife and their minor children against John Burdell and wife and John Doby, Sheriff.

The following statement contains the facts on which the appeal was heard:

James Hornesby being seized of a tract of 230 acres of land mortgaged the same to Burns & Boswell for a debt due by his sealed note, July 8, 1864. Subsequently 204½ acres of said land was sold for taxes and penalties ($24.27) due by Hornesby, and bought by Lemuel Boswell, survivor of Burns & Boswell, July 22, 1872; and the County Auditor executed and delivered to the purchaser a title for the same in due form, bearing that date. Twenty-five acres of same land had been bid in at a sale for taxes unpaid the year previous by the Auditor. Afterwards the said Boswell and Marietta Burns, executrix of C. B. Burns, (the deceased copartner of Boswell), made their joint deed for valuable consideration, conveying the whole of said tract of land to Mary Johnson, now Burdell, the defendant, and assigned to her the mortgage on said land.

Afterwards (on February 15, 1874,) James Hornesby, still in possession, entered into an agreement with defendant, John Burdell, acting as agent for the said Mary Johnson, for the rent of the premises for that year, giving a lien on his crops and a mortgage of certain chattels to secure the rent. The rent not having been paid when due, under the Clerk's warrant some cotton was seized under the lien and some of the mortgaged chattels taken under the mortgage, and the whole was sold by the Sheriff to pay the rent, but the whole proved insufficient for that purpose.

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*Hornesby holding on and refusing to give possession of the premises at the end of the year, proceedings were had before two Trial Justices and a jury to oust him, and upon the findings of the jury in favor of the landlord the proper writ of restitution was issued by the Justices.

Hornesby claimed a right of appeal and a suspension of the warrant pending the appeal, which was denied. He then applied to Hon. R. B. Carpenter, Judge of the Fifth Circuit, for a writ of prohibition, and, failing in that, for a stay of the writ of restitution until an appeal could be heard by the Court of Common Pleas, both of which motions were refused and the right of appeal denied.

August 27, 1875, defendants were served with the summons and complaint in this action, which demanded that the said mortgage be declared null and void, because the land in question was the homestead of Hornesby and family and not subject to his mortgage.

2. That the tax title be declared null and void for various specified irregularities.

3. That the deed of Mrs. Burns and Boswell to Mary Johnson and the assignment of said mortgage and tax title to said Mary Johnson be declared as illegal and void for a want of consideration and a cloud upon plaintiffs' title.

4. For a writ of perpetual injunction to restrain the said John Burdell and Mary, his wife, from disturbing plaintiffs' possession.

With the summons and complaint was served an order of Judge Mackey's, dated August 19, 1875, enjoining defendants, as prayed, temporarily, and ordering them to show cause before him at Columbia on the 17th day of September then next why this injunc-

tion should not be made perpetual and the prayer of the complaint granted.

The defendants filed their answer in due time and appeared before Judge Mackey, as required by them in the order. Defendants, pursuant to notice, asked for a modification of the order so as to require plaintiff to give an undertaking, with good security, to pay the defendant Mary Burdell such damage as she might suffer by reason of said injunction, and also to refer the question as to whether the injunction should be made perpetual to the hearing of this action upon its merits by the Court of Common Pleas sitting for Kershaw County, upon the issues made in due course of law, supporting the motion by affidavit.

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*The motions were refused and defendants excepted.

The cause was then and there heard upon affidavits, and on the 26th day of November, 1875, His Honor Judge Mackey gave judgment for plaintiffs:

1. Making the injunction perpetual.

2. Adjudging the land to be the homestead of plaintiffs and of less value than $1,000.

3. Declaring the mortgage void.

4. Declaring void the agreement for rent.

5. Ordering the defendants to account before the Clerk of the Court for the value of the cotton and chattels sold for the rent, and that the Clerk report the value and the damages to plaintiffs, by reason of the seizure, within twenty days after the reception of this order.

6. That the tax deed is void and of no effect.

7. That defendants pay the costs and have execution therefor.

The following certificate of His Honor Mackey, J., was submitted to the Court by the respondents' counsel:

"I hereby certify that the order for a temporary injunction, designated as 'Order No. 1,' at page 5 in the brief of the above entitled cause, now pending in the Supreme Court, was made by me at my chambers in Chester, on the 19th day of August, 1875, upon the complaint of the plaintiffs therein, submitted as an affidavit, and upon its appearing that the Judge of the Fifth Circuit was absent from his circuit.

"I further certify that Columbia was designated by me as the place at which the defendants were required to show cause why the said injunction should not be made perpetual upon the urgent solicitation of W. L. DePass, Esq., counsel for plaintiffs, for the convenience of himself and the counsel for the defendants, both of whom resided at Camden. If I had entertained the impression that the counsel for the defendants would have made it a ground for exception that I should have heard the cause at Columbia, beyond the limits of my own circuit, that impression would have been instantly dissipated by the fact that the counsel for the defendants, himself, on the day of the hearing in the Court room at Columbia, returned me

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his thanks for repairing to Columbia to *hear the cause, instead of subjecting him to the inconvenience of proceeding to Chester."

Kershaw, for appellant.

DePass, contra.

November —, 1877. The opinion of the Court was delivered by

McIVER, A. J. This action having been commenced prior to the filing of the decisions of this Court in the Homestead Building and Loan Association v. Enslow, [7 S. C. 1,] heard at November Term, 1875, and Rosenberg v. Lewi, [7 S. C. 344,] heard at April Term, 1876, was doubtless based upon the idea that the head of a family could not, since the adoption of the Constitution of 1868, give a mortgage of real estate which would avail against the right of homestead secured by the Constitution, for this alone can account for the addition of the wife and children as parties plaintiff. These cases having shown the fallacy of such an idea, the wife and children are not only unnecessary but improper parties, and the case may, therefore, be treated as if James Hornesby was the sole plaintiff.

The facts of the case must be gathered alone from the statements contained in the "case" as presented here, and any additional statements incorporated in the brief submitted by the counsel for respondents must be wholly disregarded as ex parte and not properly before us.

If counsel are dissatisfied with the statements of fact contained in the "case," as presented by the appellant, and desire to correct any misstatement of facts therein, or add additional facts, the proper mode of so doing is clearly pointed out in the rules of the Court; and if parties fail to adopt the mode prescribed, they cannot expect the Court to adopt or act upon any ex parte statements made in the argument.

It is very obvious that the issues in this action were improperly heard at chambers, and, therefore, without entering into a consideration of any of the various questions raised, it is sufficient to say that the Circuit Judge had no jurisdiction to determine these issues at chambers; certainly not upon affidavits, and in face of the objection made by the counsel for the appellants, and therefore the judgment determining these issues in favor of the plaintiffs must be set aside. It

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appears, however, that one of the *objects of the action was to obtain an injunction to restrain the defendants from proceeding to oust the plaintiffs from the possession of a certain tract of land in Kershaw County under a warrant issued by the two Trial Justices under a proceeding had before them to eject the

plaintiff, James Hornesby, as tenant of the defendant, Mary Burdell, holding over under a lease which had expired. A temporary injunction was granted, without notice to the defendants, by the Judge of the Sixth Circuit, a circuit which does not embrace the County of Kershaw, where the action was instituted, and the record does not show that this application was made to the Judge of the Sixth Circuit because of the absence or inability to act of the Judge of the Fifth Circuit, to which the County of Kershaw is attached. This order of temporary injunction also required the defendants to show cause before the Judge of the Sixth Circuit, on a day fixed, at Columbia, which is out of the limits of the Sixth Circuit, why such "injunction should not be made perpetual and the prayer of the complaint granted."

On the day appointed by this order the parties appeared, by their counsel, before the Judge of the Sixth Circuit, at Columbia, when the counsel for defendants "excepted to the hearing of the case at chambers," which exception was overruled, and the Judge proceeded to hear the case upon affidavits and argument of counsel, and at a subsequent day he rendered judgment for the plaintiffs upon all the issues in the action, amongst other things making the injunction perpetual, and upon this error is assigned.

While it is undoubtedly true that a Circuit Judge may, in a case of which he has jurisdiction, upon a proper showing, grant an interlocutory or temporary injunction, at chambers, to continue until the final hearing of the case on its merits, it is very clear that a perpetual injunction cannot be granted until the case is fully heard upon its merits and the issues raised determined by the tribunal having authority to make such determination.—High on Inj., § 3.

Now if, as we have seen, the issues in this action were not properly triable by the Judge at chambers against the consent of one of the parties, the judgment granting a perpetual injunction was erroneous and must be set aside.

As to the interlocutory or temporary injunction, if may well be doubted whether the action of the Circuit Judge in granting it without a showing on the record of the absence or inability of the Judge of the Fifth Circuit could be sustained, upon the principle

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*that all facts necessary to give jurisdiction should appear upon the record. But taking it for granted, as we are disposed in justice to the Circuit Judge to do, that he would not have assumed jurisdiction unless it had been made to appear satisfactorily to him that the Judge of the Fifth Circuit was absent, the question still remains whether the injunction was properly granted.

It will be observed that this was an application to enjoin the execution of the judgment of a Court of Trial Justices and freeholders, a special tribunal, erected by statute for a special purpose, rendered in a case of which such tribunal must have had jurisdiction; for if it did not, then the remedy was by probibition.—Leman v. Goutly, 3 T. R., 4; Adams v. Rush, 2 Stra., 1133; Wainwright v. Bagshaw, 2 Stra., 914; McDonald & Bonner v. Elfe, 1 N. and McC., 501; Wakely v. State, 2 N. and McC., 410; Leonard's case, 3 Rich., 113. And as this remedy seems actually to have been resorted to and failed, there is additional reason for assuming that the Court had jurisdiction. We have, then, an application to restrain by injunction the execution of the judgment of a special tribunal created by statute for the purpose of affording a cheap and expeditious mode of ejecting a tenant who holds over after the expiration of his lease in a case of which it had jurisdiction, and the question is whether injunction is the proper remedy.

In High on Injunction, Section 31, it is said: "Where a positive statutory remedy exists for the redress of particular grievances, a Court of equity will not interfere by injunction and assume jurisdiction of the questions involved, nor will it enjoin proceedings under such statutory remedy, since such interference would place the judicial above the legislative power of the government." In support of this doctrine he cites the case of Brown's appeal, (66 Penn. Stat., 155,) which was very much such a case as the one now before the Court, and fully supports the doctrine laid down in the text. The authorities in this State demonstrate that the proper remedy in such a case is by writ of certiorari.—State v. Senft & Prioleau, 2 Hill, 369; Cooper v. Stocker, 9 Rich., 292; Follin & Fourgeaud v. Coogan, 12 Rich., 44. If, therefore, as we have seen, injunction is not the proper remedy to correct the errors or relieve a party from the effects of an alleged erroneous judgment of the Court of Trial Justices and freeholders, it should not have been granted. As Butler, J., in Leonard's case, supra, remarks: "There is a wide difference between the different modes of bring-

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ing up cases for review and re*vision from inferior tribunals to the Courts of superior jurisdiction, and they ought not to be confounded from a desire to do justice in one form when it should be applied for in another."

The judgment of the Circuit Judge, together with the orders of injunction, are, therefore, set aside, and the case is remanded to the Court of Common Pleas for Kershaw County for trial.

Motion granted.

WILLARD, C. J., and HASKELL, A. J., concurred.

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THE STATE v. WIMBUSH.

(Columbia. Nov. Term, 1877.)

[*Criminal Law* ⇐218.]

A warrant issued upon a statement of facts not sworn to is unconstitutional, null and void.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 444–450, 457; Dec. Dig. ⇐218.]

[*Searches and Seizures* ⇐3.]

It is not unlawful to resist an officer attempting to arrest one under an illegal warrant.

[Ed. Note.—Cited in Davis v. Sanders, 40 S. C. 509, 19 S. E. 138; State v. Higgins, 51 S. C. 54, 28 S. E. 15, 38 L. R. A. 561; City of Florence v. Berry, 61 S. C. 242, 39 S. E. 389.

For other cases, see Searches and Seizures, Cent. Dig. § 2; Dec. Dig. ⇐3.]

Before COOKE, J., at Abbeville, May term, 1877.

This was an indictment against Jesse Wimbush and Cyrus Wimbush for resisting a Constable in the discharge of his duty. They were found guilty and appealed.

The case upon which the appeal was heard is as follows:

Henry M. Young, a witness for the prosecution, testified: That he issued two search warrants to search the dwelling houses and other buildings of the above named defendants and others, and warrants to arrest the above named defendants and others; that this was the first case in which he had acted as Trial Justice; that the information on which the search warrants were issued was reduced to writing by him and signed by the parties giving it, and that he knew the search warrants produced in Court to be the original warrants issued by him, and the papers offered in evidence by the prosecution as the information on which the search warrants were issued to be the information which he reduced to writing and on which he issued the search warrants aforesaid, copies of which information and warrants are as follows:

Due West, S. C., April 5, 1877.

Personally appeared before me J. D. Brownlee, and says that he has reason to believe that the bacon stolen from him on the

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night *of the 23d of March was taken by Ned Wimbush, Jesse Wimbush, J. C. Wimbush and B. L. Young.

J. D. Brownlee.

State of South Carolina,
Abbeville County.

By Henry M. Young, Trial Justice in and for the said State.

To the Sheriff or my Special Constable of said County:

Whereas complaint upon oath has been made unto me by J. D. Brownlee that a lot of bacon has been feloniously taken, stolen and carried away out of his house, and that he has cause to suspect, and does suspect, that the bacon, or a part thereof, is concealed on the premises of Ned Wimbush, Jesse Wimbush, Cyrus Wimbush and B. L. Young: These are, therefore, to authorize and require you, with necessary and proper assistance, to enter into the said dwelling houses and other buildings of the aforesaid parties, and there to search for the said goods, and if the same or any part thereof shall be found, that you bring the goods so found, and also the bodies of the above named parties, before me, to be dealt with according to law.

Given under my hand and seal this fifth day of April, 1877.

Henry M. Young. [L. S.]
Trial Justice.

Due West, S. C., April 5, 1877.

Personally appeared before me W. M. Grier, and says that he has reason to believe that three bushels of corn and grist, stolen from him on the night of 23d March, was taken by Cyrus Wimbush, Jesse Wimbush, B. L. Young and Wilson Cowan.

W. M. Grier.

State of South Carolina,
Abbeville County.

By H. M. Young, Trial Justice in and for said State.

To the Sheriff or my Special Constable of said County:

Whereas complaint upon oath has been made to me by W. M. Grier that a lot of corn and grist has been feloniously taken, stolen and carried away out of his crib, and that he has cause to suspect, and does suspect, that the corn and grist, or a part thereof, is concealed on the premises of Cyrus Wimbush, Jesse Wimbush, B. L. Young and Wilson Cowan: These are, therefore, to author-

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ize and re*quire you, with necessary and proper assistance, to enter into the said dwelling houses and other buildings of the above named parties, and there to search for the said goods, and if the same or any part thereof shall be found, that you bring the goods so found, and also the bodies of the above named parties, before me, to be dealt with according to law.

H. M. Young. [L. S.]
Trial Justice.

George W. Bell, a witness for the prosecution, testified that no authority was given to him in writing to execute the warrants, but that the warrants were delivered to him by Henry M. Young, who swore witness to execute the same.

M. G. Zeigler, Esq., Clerk of the Circuit Court for Abbeville County, testified that Henry M. Young had not at any time prior to the trial subscribed before and filed with him any oath of office.

It was proved that the defendants and the other parties named in the two search warrants are all heads of families occupying separate houses, and that the house of B. L.

Young is a half mile from those of the other parties.

Defendants' counsel requested His Honor the presiding Judge to charge the jury as follows:

1. That Henry M. Young was not a Trial Justice, and had no authority to issue a warrant, because he did not subscribe and file with the Clerk of the Court, before entering upon the duties of his office, the oath required to be taken on page 194, Section 6, of the Revised Statutes, which is a prerequisite to his exercising the duties of such office.

2. That, assuming Young to be a legal Trial Justice, the acting Constable was not a legal officer, because he was neither a regularly-elected bonded Constable, nor specially appointed in writing for that case, as required by Section 2, page 205, of the Revised Statutes.

3. That, assuming Young to be a legal Trial Justice, and Bell to be a legal Constable, there was no certain definite information on which to issue a search warrant.

4. That the warrant is a general search warrant, and, is, therefore, prohibited by the Bill of Rights. Search warrants can only issue upon information on oath that certain specific property has been stolen, and that it is concealed in a particular place named

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in the *affidavit, and the affidavit must set forth reasons for the suspicion that the property is in that place.

5. That in order to constitute a riot three or more persons must have assembled to commit an unlawful act, and must have actually committed some unlawful act.

His Honor refused to instruct the jury as requested, overruling all the points of law made by defendants' counsel, who thereupon filed the following exception:

This His Honor said in his charge—

That the validity of the commissions and the legality of the proceeding were only collaterally involved, and that in the interest of the public justice and the public peace he would overrule all the points of law made by defendants, and that, whether the process was void or not, the defendants did not know it, and therefore could not avail themselves of it.

Please take notice that the defendants appeal to the Supreme Court from the verdict and judgment in the above stated case on the following grounds:

Because His Honor Judge J. P. Reed refused to charge the jury, as requested by defendant's counsel, in the following particulars:

1. That Henry M. Young was not a Trial Justice and had no authority to issue a warrant, because he did not subscribe and file with the Clerk of the Court, before entering upon the duties of his office and before issuing the warrant in this case, the oath required to be taken on page 194, Section 6, of the Revised Statutes, which is a prerequisite to his exercising the duties of such office.

2. That, assuming Young to be a legal Trial Justice, the acting Constable was not a legal officer, because he was neither a regularly-elected bonded Constable, nor specially appointed in writing in that case, as required by Section 2, page 205, of the Revised Statutes.

3. That, assuming Young to be a legal Trial Justice and Bell to be a legal Constable, there was no certain, definite information on which to issue a search warrant.

4. That the warrant is a general search warrant, and, is, therefore, prohibited by the Bill of Rights. Search warrants can only issue upon information on oath that certain specific property has been stolen and that it is concealed in a particular place named in the affidavit and the affidavit must set

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forth reasons for the sus*picion that the property is in that place. And that His Honor said, in his charge to the jury, "the validity of the commissions and the legality of the proceedings are only collaterally involved, and in the interests of the public justice and the public peace I shall overrule them all [the points of law made by defendants' counsel]: and that, whether the process was void or not, the defendants did not know it, and, therefore, could not avail themselves of it," which was duly excepted to by defendants' counsel before the case went to the jury.

Burt & Graydon, for appellants:

1. If Bell was not a Constable, the appellants were improperly convicted of resisting his endeavors to enter the house of Jesse Wimbush.

2. Bell claimed to be a Constable, not by election, but by appointment of Young, as Trial Justice, under the proviso "that nothing herein contained shall prevent a presiding Judge or a Trial Justice from appointing a Constable to act by virtue of such appointment only on a particular occasion to be specified in writing."—Rev. Stat., Ch. XXVI, § 2, p. 205.

3. If Young was not a Trial Justice, it follows that he could not appoint a Constable, and that Bell was not a public officer, and the appellants should not have been convicted.

4. In the Revised Statutes (Chapter XXV, page 194.) the Governor is authorized to appoint Trial Justices with the consent of the Senate and in the vacation of the Senate: and Section 6 prescribes that "on receiving such commissions, and before entering upon the duties of their offices, such Trial Justices shall take and subscribe before the Clerk of the Court of their respective Counties the oath required by the Constitution, and file the same in his office, unless in Counties in which the Clerk is not qualified according to law," &c.

5. The issuing of the warrants against the appellants was Mr. Young's first official act as Trial Justice, and he had not taken the requisite oath at the trial of appellants.

6. In the case of The State v. Heyward (1 N. & McC., 566,) it was held that perjury could not be assigned of an oath taken before a Justice who had himself not taken the oath of office before the officer designated by the statute, although he had taken it before another.

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*7. Assuming that Young was a Trial Justice and could have appointed Bell a Constable to execute the search warrant, the appointment was not made in the manner prescribed by the statute.

8. His appointment was not in writing, nor was the act to be done by Bell specified in writing—his name does not appear on the face of the warrant nor on its back. It was directed "To the Sheriff or my Special Constable," and delivered by Young to Bell, the prosecutor.

9. The warrant should be directed to a Constable or other public officer.—2 Hale P. C., 250; 1 Chil. C. L., 65.

10. Assuming, however, that Bell was a Constable, the warrant is void, not being founded upon such information as the law requires.

11. Article 4, Amendments to the Constitution of the United States, is: "The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated, and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or things to be seized."

12. Section 22 of Article I of the Constitution of South Carolina is substantially the same, with the further provision, "and no warrant shall be issued but in the cases and with the formalities prescribed by the laws."

13. "Search warrants are not to be granted without oath made before a Justice that a felony has been committed, and that the party complaining hath probable cause to suspect they [the stolen goods] are in such a place or house, and to show his reasons for such suspicion."—2 Hale P. C., 150.

14. A specification of the goods stolen and the place of their concealment must appear in the information and in the search warrant.—Bell v. Clapp, 10 Johns., 263; Sandford v. Nicholls, 13 Mass. 286; Constitution United States; Constitution South Carolina, ut supra.

15. The recitals in the warrants were not the facts sworn by the owners of the goods alleged to have been stolen, as the Trial Justice testified, and do not embody the information on which the search warrants were issued. The testimony of the Trial Justice is that they were issued on the information contained in the writing signed by Brownlee and Grier.

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*16. In the case of The State v. Killitt (2 Bail., 290), the Court says: "It is not deemed indispensable that the information for a warrant [of arrest] should be on oath or in writing. But as the grounds of the proceeding are exhibited by the Magistrate they will be reviewed by the Court, and, seeing that the only foundation of the charge is the oath of one not competent to testify, the prisoner ought not to be detained in confinement."

17. The warrant is defective and void, if otherwise valid, because it does not "particularly describe the place to be searched."

18. The word "premises" is indefinite. It may mean a house, but it may mean lands or tenements.

19. The appellants had no premises or house in common. Each had his own house apart from the others.

20. If the warrant be defective in itself, or if not enforced by a proper officer, the party may legally resist its enforcement.—1 Chit. Cr. L., 61, and cases cited in note thereto.

21. That the information on which the warrants were issued was for warrants of arrest and not for search warrants.

Cothran, Solicitor, contra.

March 12, 1878. The opinion of the Court was delivered by

HASKELL, A. J. The indiscriminate issuing of search warrants is an abuse of power guarded against by the Constitution of the United States and of this State; while, on the other hand, the proper exercise of the power is both lawful and essential. By Article IV of amendments to the Constitution of the United States, "the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized." The Constitution of South Carolina, Article I, Section 22, in the declaration of rights, is equally explicit, and absolutely prescribes that "all warrants shall be supported by oath or affirmation, * * * and no warrant shall be issued but in the cases and with the formalities prescribed by the laws."

General Statutes, p. 196, Section 16, directs that "all proceedings before Trial Justices in criminal cases shall be commenced on information under oath, plainly and sub-

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stantially setting forth the *offense charged, upon which, and only which, shall a warrant of arrest issue."

In this case the testimony of the Trial Justice who issued the warrants of search and arrest clearly shows that the information on

which the warrants were founded was not given upon oath, as alleged in the warrant, but consisted of a mere statement in writing, not sworn to.

In Ex parte Burford, (3 Cra., 448 [2 L. Ed. 495]), the case came by habeas corpus before the Supreme Court of the United States.

The prisoner had been committed to jail "by a warrant under the hands and seals of Johan Thompson and ten other Justices of the Peace."

"The Judges of the Supreme Court were unanimously of the opinion that the warrant of commitment was illegal for want of stating some good cause certain, supported by oath," and the prisoner was discharged.

The only difference in the cases is that in the one the error was patent on the face of the warrant; in the other, this case, it is proved by the testimony of the Trial Justice. There is no real difference, and the rules of law apply with equal force to each.

This warrant of search and seizure, not being "supported by oath or affirmation," is clearly illegal, and, therefore, is not of any legal force. It is needless to go into the other questions of the want of particular and specific designations of person and place in the information and in the warrant, nor is it necessary to pass upon the qualification of these de facto officers.

It only remains to inquire into the points raised by the Circuit Judge in his charge to the jury, "that the validity of the commissions and the legality of the proceedings were only collaterally involved, and that in the interest of the public justice and the public peace he would overrule all the points of law made by the defendants." This language is too strong and may be construed to mean that a Judge may sometimes overrule what is law for purposes of public policy.

If, however, the meaning be that the legality of a process is immaterial, or that an illegal process may not be lawfully resisted, it is still erroneous. "Even a forcible resistance of an arrest may be defended if it appear not that the arrest was lawful, and a third person may interfere to prevent an il-

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legal capture if he do no more *than is necessary for that purpose."—Per Wardlaw, J., in The State v. Hailey, 2 Strob., 73.

In Rex v. Osmer, (5 East.,) Lord Ellenborough, C. J., said: "If a man without authority attempt to arrest another illegally, it is a breach of the peace, and any other person may lawfully interfere to prevent it."

Defect in the authority of the Court, as in this case, is more fatal than the defect by reason of error on the face of the process. The Court had no power or authority to issue the process without information under oath, and without that information its process was no process, and to resist it was not an offense.

The instruction of the jury concludes as follows: "That, whether the process was void or not, the defendants did not know it, and, therefore, could not avail themselves of it." This is a violent presumption of fact and of law which cannot be permitted. There is no evidence that the defendants "did not know it:" and if there had been, that was a question of fact for the jury; and if they did not know it, there is no difference; for it is proved that it was not a lawful process, and there the case must fail, for the defendants are indicted for resisting a public officer in the execution of a lawful process. In addition to this, it is an unfortunate use of words. In the eye of the law "every man is presumed to be cognizant of the statute law of this realm and to construe it aright, and if any individual should infringe it through ignorance he must, nevertheless, abide by the consequences of his error. It will not be competent to him to aver in a Court of justice that he has mistaken the law, this being a plea which no Court of justice is at liberty to receive."—Brown's Legal Max., 265.

A Court which is bound to presume knowledge to inflict upon the accused a penalty which the law imposes cannot presume ignorance to deprive him of a protection which the law confers, much less can defendant's ignorance of any law constitute an act or crime when the law says it is not a crime.

The motion for a new trial is granted.

WILLARD, C. J., and McIVER, A. J., concurred.

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*CLINKSCALES v. PENDLETON MANUFACTURING COMPANY.

(Columbia. Nov. Term, 1877.)

[*Corporations* ⊂559, 627.]

Where an action is brought to wind up the affairs of an insolvent corporation, and an order for injunction and the appointment of a Receiver is obtained, no judgment afterwards recovered by a creditor entitles it to any priority over other claims.

[Ed. Note.—Cited in Stackhouse v. Wheeler, 17 S. C. 99; Bird & Co. v. Calvert, 22 S. C. 296; Regenstein v. Pearlstein, 30 S. C. 193, 205, 8 S. E. 850.

For other cases, see Corporations, Cent. Dig. §§ 2248, 2476; Dec. Dig. ⊂559, 627.]

Before Reed, J., at Anderson, September Term, 1877.

This was an action by Albert J. Clinkscales against the Pendleton Manufacturing Company, Wm. Perry and others.

The case is stated in a brief, which is as follows:

I. The plaintiff, as stockholder and creditor of the Pendleton Manufacturing Company, filed his complaint for its dissolution, for injunction against suing creditors, appointment of a Receiver, sale of the real and per-

sonal property, calling in creditors, and for the settlement of the affairs of the said corporation, which was hopelessly insolvent.

II. The complaint was filed April 20, 1876.

III. On 24th April, 1876, said Court granted an order enjoining all suing creditors from further proceeding, appointing John W. Daniels, Referee, to take proof of the claims of creditors, and containing this paragraph:

"3d. That John B. Sitton, one of the principal creditors of the said corporation, be, and he is hereby, appointed Receiver of all the moneys, property and effects of the said the Pendleton Manufacturing Company, with the usual powers and duties in such cases of insolvency, upon his giving bond in the penalty of twenty-five thousand dollars for the performance of the duties of such trust, and upon a written consent to such appointment given by stockholders having a majority of the stock of the corporation, to be filed with the proceedings in the case, to be executed to the Clerk of this Court."

IV. Consent of the stockholders for the said proceedings to be carried out April 26th, 1876.

V. Receiver gave bond June 6th, 1876, and receipted for the property June 7th, 1876.

VI. H. B. Claflin & Co., of New York, commenced suit in United States Court for the District of South Carolina against the said Pendleton Manufacturing Company, and process therein was served on defendant on 27th July, 1875. Plaintiffs in said suit obtained

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*judgment against said company on 27th April, 1876, and issued execution same day.

VII. Before the said 27th April, 1876, H. B. Claflin & Co. had not been served with process in the said cause of Clinkscales, plaintiff, against Pendleton Manufacturing Company and others, and had taken no part therein. After said date they appeared before the said Referee and asked that their said judgment be held to be a lien upon the real estate of the said corporation.

VIII. The Referee reported in favor of the lien of the said judgment, reporting the same as obtained on 24th day of April, 1876, and upon exceptions taken thereto the exceptions were sustained and the lien excluded, to which H. B. Claflin & Co. excepted and gave the following notice of appeal:

H. B. Claflin & Co., judgment creditors of the Pendleton Manufacturing Company, give notice that they appeal from the judgment of this Court excluding their lien, on the following grounds:

I. Because this Court could not enjoin H. B. Claflin's suit in the United States Court.

II. Because the lien of said judgment attached before the Receiver accepted said trust or executed his bond.

III. Because the title of the real estate and other assets of the Pendleton Manufacturing Company did not vest in the Receiver until he accepted the trust and gave bond as such Receiver.

Burke, for appellants:

Proposition First.—That Claflin & Co. could not be enjoined by the order of 24th April, 1876, and had a right to go on and get judgment, and that the judgment was a lien on the real estate of the corporation.

1. Proceedings pending in a Court of the United States cannot be interfered with by any act of a State Court.—Ableman v. Booth, 21 How., 506; 2 Abb. Nat. Dig., 54, No. 37.

2. The judgment was a lien, as it would have been so by the State law, if rendered in a State Court.—Ward v. Chamberlain, 2 Black, 430; 3 Abb. Nat. Dig., 128.

3. That the suit in the State Court could only affect the lien of Claflin's judgment if notice of lis pendens were filed, and the statement of facts does not show that any such

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notice was filed. In fact *no such notice was ever filed.—Rev. Stat. p. 600, § 155; City Council v. Page, Sp. Eq., 212; Chatauqua County Bank v. Risley, 5 Smith, 375.

Proposition Second.—That the judgment of Claflin & Co., dated 27th April, 1876, was a lien on the real estate of the company, even if the same was obtained while the property of the company was in the custody of the Court by the appointment of a Receiver; and that other creditors could have no charge thereon until final judgment in the cause, which being subsequent to said judgment must be subordinate to the lien thereof.

1. The appointment of a Receiver did not change the title and created no lien.—Ellis v. Boston, Hartford and Erie Railroad Co., 107 Mass., 1.

2. The appointment of a Receiver is to preserve the property, and does not determine any rights with respect to it.—Beverly v. Brooke, 4 Grat., 187; High on Rec., & 5, note.

3. The appointment of a Receiver did not prevent the acquisition of right by others pendente lite.—High on Rec., § 141, note; Skinner v. Maxwell, 68 N. C., 400.

4. It does not so alter the possession in the person finally adjudged entitled at the time of appointment as to prevent the operation of the Statute of Limitations during the controversy.—Anon., 2 Atk., 15.

Therefore, if any claim on the property was or will be created in the suit, it must be by the judgment therein; then only would the suing creditors be judgment creditors.

At the date of Claflin's judgment there was no judgment in the case against the company in the State Court.

Proposition Third.—That if actual possession by the State Court be held equivalent to actual notice, yet this must be the actual possession of its officer. He did not and could not take actual possession until he gave bond. This was after the date of Claflin's judgment.

Different rules prevail as to whether the Court takes the property into custody at the

date of the order or the time when the Receiver gives bond.—High on Rec., §§ 136, 137.

However this may be, the question now is a different one, for while the Court may prevent any interference with property which it has shown an intention of taking into custody, it does not follow that such intention is actual notice of its custody to a person not

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*legally affected with constructive notice. Therefore the judgment of Claflin & Company was a lien upon the real estate of the corporation and should have its proper priority as such.

Thomson, contra:

I. That a distinction is to be taken between the appointment of a Receiver before judgment as a provisional remedy (Rev. Stat., 628,) and an appointment under supplementary proceedings to reach the property of a judgment debtor.—Rev. Stat., 647. Under the latter provision, no right or property vests in the Receiver until the time of the filing and recording of the order.—Rev. Stat., 764, § 2.

II. But that in cases where a Receiver for a corporation is appointed, (Rev. Stat., § 629,) he becomes vested by relation with the right to and control of the property of the corporation from the time of appointment.—2 Waite's Pr., 247; Voorhies, 434, note f. And where a levy had been made by a Sheriff after appointment of and before the Receiver gave bond: Held, the title to the property commenced when the order was made, and the Sheriff was ordered to return the property.—3 Waite's Dig., 1618, § 119; Steele v. Sturgis, 5 Abb., 442.

III. That it is true the Courts of this State will not enjoin a suit in the United States Courts, nor the collection of an execution issued therefrom.—English & Westbrook v. Miller, 2 Rich. Eq., 320. But that it will in a case like this restrain a party who obtains a judgment in the United States Court from enforcing it by levy and sale of property not liable to levy and sale under execution.—Howard v. Conner, 11 Rich. Eq., 23. A State Court has jurisdiction of an action of trespass against a Marshal for seizing the goods of a third person on an attachment.—Buck v. Colbath, 3 Wall., 335.

IV. That H. B. Claflin & Co., by presenting their debt under the order calling in creditors, elected their remedy and submitted themselves to the jurisdiction of the Courts of this State.—Brenan v. Burke, 9 Rich. Eq., 200.

March 12, 1878. The opinion of the Court was delivered by

WILLARD, C. J. The complaint is in the nature of a bill filed by a creditor and stockholder of the insolvent corporation to

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wind *up its affairs and apply its property as assets for the payment of its debts.

April 24, 1876, the order enjoining creditors from suing the corporation was made, and also one appointing a Receiver, which should, as far as the designation of the person to hold such Receivership was concerned, depend upon a written consent to such appointment given by stockholders having a majority of the stock of the company, to be filed with the proceedings in the case, to be executed to the Clerk of the Court. This consent was filed April 26, 1876.

H. B. Claflin and others, styling themselves H. B. Claflin & Co., have intervened by petition, seeking to participate in the distribution of assets as creditors, and exhibiting a judgment recovered in the United States Court for the District of South Carolina on the 27th day of April, and claiming that such judgment is entitled to priority of payment out of such assets, having regard to an alleged lien of such judgment on the real estate of such corporation. It appears that the action in which such judgment was recovered was pending in the United States District Court at the time the present complaint was filed, but that judgment was recovered after the issuing of the injunction order and after the appointment of the Receiver was complete, though before the Receiver had perfected his official bond.

The present question does not depend on the right of the Circuit Court to enjoin creditors as it regards suits pending in the United States Courts, as alleged by the first ground of objection urged by the petitioners, who are appellants here. The petitioners have not brought themselves into the action as parties by order and proper amendment, so they cannot question the propriety of the orders of injunction and Receivership. They come in as petitioning creditors, claiming either in hostility to the title of the Receiver or as entitled to the benefit of the equities of the complaint. They do not show any lien on the property of the defendants acquired prior to that which arises under the order for the appointment of a Receiver, and, therefore, they are not in a position to claim in hostility to the Receiver unless they can show that the order appointing a Receiver did not affect the title to the assets of the insolvent corporation until either due qualification on the part of the Receiver or their actual reduction to possession by the Receiver.

It admits of no doubt that in an action of the present nature the order appointing a Receiver in itself places the assets of the

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*insolvent corporation in the hands of the Court. The case differs, in this respect, from those to which reference has been made by counsel, where there was a Receivership pendente lite. In that case the sole object of the Receivership is to preserve the property, to answer the purposes of a decree, as between the parties to the suit, without affecting the interest of third persons not parties; while the object of the present Receivership is the

administration of the assets, considered as a trust fund in equity, not only as against parties but all making claim thereto. It also differs from any familiar form of Receivership under a bill filed by a judgment creditor who has exhausted his remedy at law and comes into equity to make assets through the instrumentality of its power of enforcing discovery; and also from the statute Receivership created by the Code in the case of supplementary proceedings to enforce a judgment and assimilated to a Receivership under a creditor's bill inter vivos. In cases of this class, equity does not find assets already imposed with a trust, but intervenes to compel the application of both legal and equitable assets to the satisfaction of the judgment, on the ground of the inadequacy of the legal execution to reach and apply such assets. Having obtained assets by these means, it looks to all legal priorities and equitable demands appropriating them.—Eno v. Calder, MS., 1868 [14 Rich. Eq., 154]; Thompson v. Brown, 4 Johns. Ch., 619.

The practice in application to Courts of equity by those who claim to have priorities affecting a fund in the hands of these Courts is stated very clearly in Wiswall v. Sampson, (14 How., 52 [14 L. Ed. 322],) when it is said that the person making such claim should come in by petition and may be examined pro interesse suo.

It is also held in that case that a judgment recovered in the Courts of the United States after the property had passed into the possession of a Receiver cannot create priority of lien as affecting such assets.

The company being insolvent, its property was held by its officers as a trust fund for creditors and stockholders.—Curran v. Arkansas, 15 How., 304 [14 L. Ed. 705]; 2 Kent's Com., 307. As such the Court of Equity had authority to lay hold of such trust fund and distribute it upon the principle of equity, respecting all legal liens that had attached to it before it came into the hands of the Court.—Garvin v. Garvin, 1 S. C., 55. A proper foundation for the exercise of such jurisdiction was laid down in the complaint, and the Court in making the order appointing the Receiver assumed control of

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the *assets of the corporation, in pursuance of its right and duty to support such assets to equitable sales of distribution. Its injunction order preventing interference with these assets was a proper assertion of the right of exclusive control over them lodged in the Court and was in accord with the fact that the Court was in actual and rightful control of them. Actual possession was not necessary to complete the right of the Court to control them; it was enough that the Court had assumed control of them and had entered upon their administration, protected them from waste, and devoted them by anticipation to certain uses, and they were, therefore, a fund in Court as completely as if in the hands of a Receiver, as was said in State v. Bank, 1 S. C., 71.

A judgment acquired after the order appointing a Receiver cannot obtain a lien on the assets, for the judgment only acts upon the property of the judgment debtor in the hands at the time it was obtained or subsequently acquired, while the control of the property had gone into the hands of the Court and out of those of the judgment debtor at that time. It is true that title to the lands upon which it is claimed that the judgment became a lien stood apparently in the name of the judgment debtor, but the Court had already obtained a power of disposition that, when fully exercised, would relate back to the time when control was assumed over the assets. It was not essential to the validity of that power that actual possession, or its equivalent paper title, should appear to stand in the name of the Court or its officers; such possession is not necessary to uphold powers created by the acts of parties, much less that which results from the right of exercising jurisdiction.

The petitioners cannot, therefore, claim to act in hostility to the right of the Receiver, and must be deemed to have come in to obtain the benefit of the equities set forth in the complaint. Occupying this position, they can take no advantage of anything done contrary to the order of injunction; for, seeking equity, they must do equity, and it is inequitable to seek priority at law against proceedings pending for equitable distribution, the rule of equity being in such cases equality.—Codwise v. Gelston, 10 Johns. R., 507.

It is clear, therefore, that the petitioners are not entitled to set up their judgment as a prior lien, but that they must come in with all other creditors on terms of equality.

The appeal must be dismissed.

McIVER, A. J., and HASKELL, A. J., concurred.

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*RAILROAD COMPANY v. RAILROAD COMPANY.

(Columbia. Nov. Term, 1877.)

[*Carriers* ⇦172.]

In the absence of any contract between the owners of two connecting railroads, one cannot maintain an action against the other for failing to ship cotton over the plaintiffs' road which the other road had transported to the point of connection; and the fact that the owners of the cotton had contracted with the plaintiff to ship the cotton over its road does not give it a right of action against the defendant.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 745; Dec. Dig. ⇦172.]

[*Torts* ⇦3.]

No action can be maintained against a defendant for a wrong committed by him, unless he was under some legal obligation to the plain-

tiff which bound him to abstain from committing it.

[Ed. Note.—For other cases, see Torts, Cent. Dig. § 3; Dec. Dig. ⟸3.]

Before Cooke, J., at Richland, May, 1876.

This was an action by the Wilmington, Columbia and Augusta Railroad Company against the Greenville and Columbia Railroad Company.

The complaint alleged as follows:

1. That the plaintiffs are a corporation created by and under the laws of this State, organized pursuant to an Act of the General Assembly entitled "An Act to charter the Wilmington and Manchester Railroad Company," passed the 18th day of December, A. D. 1846, and another Act of the General Assembly entitled "An Act to incorporate the Wilmington and Carolina Railroad Company," approved March 1, 1870, incorporating the purchasers of the Wilmington and Manchester Railroad, in pursuance of the provisions of which last named Act the name and style of The Wilmington, Columbia and Augusta Railroad Company was duly chosen by a majority of the said purchasers; and that at the times hereinafter mentioned, the plaintiffs, being such corporation, were common carriers of goods for hire, between Augusta in the State of Georgia and Wilmington in the State of North Carolina, and form part of a through connecting line to the city of New York.

2. That the defendants are a corporation created by and under the laws of this State, organized pursuant to an Act of the General Assembly entitled "An Act to authorize the formation of the Greenville and Columbia Railroad Company," passed the 15th day of December, A. D. 1845; and that, at the times hereinafter mentioned, the defendants, being such corporation, were common carriers of goods for hire between Greenville and Columbia.

3. That heretofore, to wit, on the 28th day of October, A. D. 1874, and on divers other days and times between that day and the

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*commencement of this suit, the said defendants received from sundry persons on the line of the defendants' road eight hundred and thirty-six bales of cotton, to be transported by the defendants from the places where shipped to Columbia, and to be there delivered to the agent of the plaintiffs at that place in accordance with the terms of receipts to that tenor and effect given by the defendants to the shippers of said cotton; a schedule of which said shipments, containing the date when, the places where, the persons by whom and the number of bales shipped, together with the marks of bales, the names of the consignees and the destination of said bales of cotton, is hereunto annexed marked "Schedule A."

4. That the defendants did transport the said cotton from the respective points of shipment thereof to Columbia, and it thereupon became and was the duty of the defendants, according to the terms of said receipts, and the custom of dealing among railroad companies in such cases, to deliver the said eight hundred and thirty-six bales of cotton to the agent of the plaintiffs at Columbia aforesaid, when they should be thereunto duly requested.

5. That the defendants, not regarding their duty in this behalf, have hitherto willfully and unlawfully failed and refused to deliver the said eight hundred and thirty-six bales of cotton to the plaintiffs, although thereunto duly requested, and still do fail and refuse so to do.

6. That according to the custom of dealing among railroad companies, insomuch as the said cotton was consigned to be transported over the route of which the plaintiffs' road forms a part, the plaintiffs are responsible to their connections along said route for the proportion of freight money due their said connection.

7. That by reason of the wrongful conduct of the defendants, as aforesaid, the plaintiffs have been deprived of their legitimate gains and profits which they would have derived from their proportion of the freight money for the transportation of the cotton aforesaid, and will be compelled to account, in settlement of freight exchanges with their said connections, for the proportional part of said freight money due them.

8. That by reason of the premises the plaintiffs have been injured as aforesaid, to their damage, two thousand nine hundred and twenty-six dollars.

Wherefore the plaintiffs demand judgment against the defendants for the sum of two thousand nine hundred and twenty-six dollars and the costs of this action.

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*The defendant demurred on the ground that the complaint did not state facts sufficient to constitute a cause of action. His Honor sustained the demurrer and the plaintiff appealed.

Rion, for appellant.

Melton, Chamberlain & Wingate, contra.

March 15, 1878. The opinion of the Court was delivered by

McIVER, A. J. This action was brought to recover damages alleged to have been sustained by the plaintiffs, the owners of a railroad running from Augusta, Ga., to Columbia, S. C., and thence to Wilmington, N. C., by reason of the refusal of the defendants, the owners of a railroad running from Greenville to Columbia, S. C., to deliver to the plaintiffs 836 bales of cotton, shipped by sundry persons along the line of the Greenville and Columbia Railroad and consigned to various persons in the city of New York. The bills of lading given by the defendants to the shippers specify that the cotton was to be for-

warded by the Atlantic Coast Line—a through connecting line to the city of New York, of which the plaintiffs' road forms a part. The damages claimed is the amount of freight which the plaintiffs would have been entitled to if the cotton had been transported over their road and also the freight which would have been earned by the other connecting links, for which it is alleged the plaintiffs are liable according to the custom of dealing among railroad companies. The defendants demurred upon the ground that the complaint does not state facts sufficient to constitute a cause of action, and, the Circuit Judge having sustained the demurrer, the plaintiffs duly excepted and now bring this appeal.

It will be observed that while the complaint does not present the case of an action ex contractu, it is, and must necessarily be, founded upon or grow out of the contract evidenced by the bills of lading; for without such contract the plaintiffs would have no more cause of complaint than they would that every bale of cotton or other article brought to Columbia by the defendants for transportation to New York was not shipped by their trains. In order to maintain this action the plaintiffs are bound to show not merely that they have sustained damage or loss by the acts or omissions of the defendants, but they must also show that such dam-

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age or loss has *been the result of the violation of some legal right of the plaintiffs. Now, in this case the damage or loss complained of is the withholding the cotton from shipment by the plaintiffs' trains; but where is the legal right which has been violated? If it exists at all, it must necessarily, as we have seen, be founded on the contract contained in the bills of lading; for unless the plaintiffs have a legal right to have all the cotton brought to Columbia by the defendants for shipment to New York shipped by their trains, which of course is not pretended, then there is no conceivable reason why they can claim the legal right to have this particular cotton so shipped except by virtue of such contract. But the obligations which the defendants incurred and the duties which they owed by reason of that contract were to the shippers and not to the plaintiffs. Hence the legal right acquired by that contract inured to the shippers and not to the plaintiffs.

This is clear, from the fact that the shippers alone could release the defendants from the obligations incurred by that contract, and might, at any time, with the consent of the defendants, vary or modify, or even abrogate, the contract, without any regard to the consent or the wishes of the plaintiffs. If, then, the plaintiffs are compelled to base their action upon such contract or upon the damages which they have sustained by reason of the violation of the obligations or duties which the defendants thereby assumed, the only question remaining is, can the plaintiffs, who are not parties or privies to such contract, maintain this action? Clearly they cannot; for whether the action be brought directly upon the contract or is in the nature of an action on the case for damages sustained by reason of its breach, it is plain, both on principle and authority, that the action cannot be maintained except by those who are either parties or privies to such contract.

In Addison on Torts, third edition, pp. 11 and 12, it is said: "It is essential that the thing complained of should be legally wrongful as regards the party complaining,—that is, it must prejudicially affect him in some legal right; merely that it has done him harm is not enough." And at page 13, he says: "Whenever an action of tort is founded on contract * * * the plaintiff who brings the action must be a party to the contract, for no person can, in general, sue in respect of a tort founded on contract who was not a party or privy to and could not have been sued upon the contract."

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*In Clancy v. Byrne, (56 N. Y., 129,) [also reported in 15 Amer. Rep., 391,] which was an action to recover damages sustained by the plaintiff in the loss of his horse, occasioned by a rotten plank in a pier, brought against the defendant, the lessee of the pier, who had covenanted with his landlord to make all necessary repairs, and had sublet the pier to a third person, the Court, while intimating that the defendant might be liable upon other grounds, uses this language: "This is not an action upon the covenant of the defendant. * * * If it were an action upon the covenant it could not be maintained. The plaintiff is not a party thereto, nor in privity therewith; nor can this action be maintained as one of tort, founded upon a breach of the covenant. Doubtless where a covenant creates a duty a neglect to perform that duty is a ground of action for tort. But whenever a wrong is founded upon a breach of contract, the plaintiff suing in respect thereof must be a party or privy to the contract, else he fails to establish a duty towards himself on the part of the defendant and fails to show any wrong done to himself."

In Gray v. Ottolengui, (12 Rich., 108-9,) Withers, J., in delivering the opinion of the Court, says: "Whenever redress is sought for an injury arising out of a breach of a contract, whether the action be conceived in form ex contractu or ex delicto, some privity of contract must limit the range of a plaintiff in seeking those who are liable to him." See also Winterbottom v. Wright, 10 Exch. Rep., Mees. & Wels., 109, and the other authorities cited in respondent's brief.

We are, therefore, unable to perceive any error in the decision of the Circuit Judge.

The motion is dismissed.

WILLARD, C. J., and HASKELL, A. J., concurred.

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*CHICHESTER & CO. v. HASTIE.

(Columbia. Nov. Term, 1877.)

[*Dismissal and Nonsuit* ⇐81.]

A Judge has authority to set aside an order of "nonsuit" made by himself at the same term.

[Ed. Note.—Cited in Couch v. Charlotte, C. & A. R. Co., 22 S. C. 560; Booth v. Langley Mfg. Co., 51 S. C. 419, 29 S. E. 204.

For other cases, see Dismissal and Nonsuit, Cent. Dig. § 184; Dec. Dig. ⇐81.]

[*Appeal and Error* ⇐103.]

A motion for leave to amend is within the discretion of the Court and is not a subject of appeal.

[Ed. Note.—Cited in Mason v. Johnson, 13 S. C. 23; Trumbo v. Finley, 18 S. C. 315; Stallings v. Barrett, 26 S. C. 476, 2 S. E. 483; Green v. Iredell, 31 S. C. 594, 10 S. E. 545; Booth v. Langley Mfg. Co., 51 S. C. 418, 29 S. E. 204; Jones v. A. H. Williams & Co., 89 S. C. 583, 72 S. E. 546.

For other cases, see Appeal and Error, Cent. Dig. § 706; Dec. Dig. ⇐103.]

Before Reed, J., at Charleston, June, 1860.

This was an action by Chichester & Co. against William S. Hastie.

The case is fully stated in the opinion of the Court, the order for leave to amend therein mentioned, being as follows:

The order for nonsuit having been set aside in this case, on motion of plaintiffs' attorneys, it is ordered that the plaintiffs do have leave to amend the declaration in this case as they may be advised, within twenty days from the date of this order.

It is further ordered that the plaintiffs shall, in case of such amendment, serve a copy thereof upon the defendant, and that the defendant do have forty days from the service of such amendment upon him within which to plead, answer or demur thereto.

Campbells & Whaley, for appellant.

McCrady & Sons, contra.

March 18, 1878. The opinion of the Court was delivered by

HASKELL, A. J. On motion of the defendant, upon "the ground that the allegata and probata did not agree," an order of nonsuit in invitum was granted in this case, and a motion by plaintiffs for leave to amend the pleadings refused. The plaintiffs' counsel gave notice at the time that they would move before the presiding Judge, at the then term, on a day indicated, to set aside the order of nonsuit, and would, at the same time, renew the motion to amend the pleadings. Both motions were granted.

The defendant appeals:

"First. From the order setting aside the order of nonsuit granted at the trial of the case June 20, 1876; and

"Second. From the order giving leave to amend the declaration as plaintiffs' attorneys may be advised; and also requiring defend-

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*ant to plead, answer or demur to such amended pleadings within forty days from the service of a copy thereof."

The appeal from the order setting aside the nonsuit presents nothing but the question as to the authority of a Circuit Judge in term time to set aside an order of nonsuit in invitum made by him, on motion of defendant, at the same term of the Court; or, in the words of counsel for the appellant, "Could the Circuit Judge lawfully make such an order?"

The opinion of this Court is that the Circuit Judge could, in the exercise of his discretion, correct or set aside during the term an order of nonsuit made by himself at the same term.

The case of McCollum v. Massey, (2 Bail., 606,) cited by the appellant, is different. The order was set aside at a subsequent term, and by another Judge, although the defendant had failed to comply with the terms on which the first order was granted.

In the case of McDermaid v. Earnest, (4 Strob., 192,) also relied on by the appellant, the motion to set aside a nonsuit had been refused in the Court below.

In the opinion by O'Neall, J., who had delivered the opinion in McCollum v. Massey, it is said "that no Court has the power to set aside a nonsuit properly ordered without the consent of the party in whose favor it is rendered is the plain inference from McCollum v. Massey & McNeill."

Most of the Judges concurred in the opinion; but Wardlaw, J., while he concurred in the result, adds: "I think it material to observe that the regular term of the Court had expired before the motion to set aside the nonsuit was made. It will be observed, therefore, that the same material distinction as in McCollum v. Massey exists between McDermaid v. Earnest and the present case, viz., that the motions in those cases were made after the expiration of the term, while in this case the motion was made during the term. The term is, by legal supposition, but one day, and judgments are entered upon the rising of the Court. Until the Court rises, all proceedings of the Court remain under its control. The order of nonsuit is preliminary to a judgment. The judgment is not until it has been rendered, and it is within the discretionary power of the Judge to review his own orders during that time."

In Browning v. Huff, (2 Bail., 179,) the opinion, per O'Neall, J., says: "In cases like the present, it has been a long and well-set-

tled practice to allow a plaintiff, when evi-

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dence essential to support the *issue had been omitted accidentally, or from supposing that before the Court sufficient, to adduce it, even after the evidence had been closed, a motion for nonsuit made and argued, and even the opinion of the presiding Judge pronounced in favor of the motion. The application of this rule of practice must always be left to the discretion of the presiding Judge."

It is true that the same Judge, in Poole v. Mitchell, (1 Hill, 404,) a case precisely similar to Browning v. Huff, does say in reference to the latter case "but the order was not made." The expression, however, determines nothing, for that was not a question in either case. The words are only used to narrate the case, and there is nothing in it to show distinction drawn between an utterance ore tenus and an expression in writing by a Judge on the bench; for after a decision ore tenus the order is signed as a matter of course, and that was exactly the present case. "The Court said the plaintiffs had failed to make out their case, and therefore not properly in Court: there had been no proof to sustain the money counts." Exception was taken. The order was subsequently signed, and the Court allowed a motion to be made to set it aside and heard argument.

The case of Mooney v. Welsh, (1 Mill. Con. Rep., 133,) goes very far—applies this doctrine even to final judgments, and is a leading authority. In it the Court says: "The Court of Common Pleas, under all its modifications, has always exercised the power of looking into its records, and, on motion, affording that remedy after judgment has been entered up which is obtained by writ of error in the English Courts, and we think it has very wisely done so."

The motion in that case was made to set aside a judgment because it exceeded the damages laid in the writ, although it did accord with the verdict. Not only was this motion granted, but the Court went further and reduced the judgment to the sum sworn to by the plaintiff in his affidavit to hold the defendant to bail. The opinion concludes: "The Court thinks that this motion was properly made in the Circuit Court and that it ought to have been sustained there." In the English Courts it was once held that nonsuit could not be set aside, though occasioned by the mistake of the Judge. "But in Sadler v. Evans, (Burr., 1986,) the Court were unanimous, both upon principles and authorities, that where a Judge at nisi prius nonsuits the plaintiff, and is mistaken, the Court, upon motion, may set aside the nonsuit, and this is

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now the settled practice in both *Courts."—Sellon's Practice, p. 465. And writs of error are constantly sued out upon judgments on nonsuits. There is a wide difference, too, between the order or judgment of nonsuit and the solemn judgment of the Court on the trial of a cause. As is remarked by Judge Harper in McEwen v. Mazyck & Bell, (3 Rich., 210,): "It is said that a nonsuit granted in invitum, according to our practice, must be regarded as a determination on a demurrer to evidence. This is not precisely so. A judgment on a demurrer to evidence, according to the English practice, is final and a bar to any future action. We do not regard the judgment of nonsuit as a bar—it determines nothing." It merely decides that the plaintiff has failed to make out his case. If it be shown to the Court that he can supply the missing evidence, or properly amend the pleadings to conform to the evidence, by the cases already cited, and as expressed by Bay, J., in Campbell & Milliken v. Ingraham, (1 Mill. Con. Rep., 293,) the Court, "in furtherance of justice, gives leave to examine the witness."

If cause can be shown to the Judge during the same term, but subsequent to an order of nonsuit, there seems no good reason why he should not, in the same exercise of discretion, set aside a previous order which affects no rights and grant leave to supply the evidence or to amend.

In the case of Messervey v. Hillier, (12 Rich., 483,) per Wardlaw, J., it is said: "It is the opinion of this Court that the presiding Judge had the discretion during the same term of the Court to set aside an order for judgment and the execution of a writ of inquiry thereon, and that his action should not be disturbed in the Court of Appeals for gross abuse of discretion." That is conclusive on the points raised by the first ground of appeal in this case; and it may be well to note that this decision in Messervey v. Hillier brings out clearly the point indicated by Judge Wardlaw in the case of McDermaid v. Earnest above cited, and modifies the language used by Judge O'Neall in that case. Under the rules of practice existing at the time this suit was begun, as well as by the rules as they now are, (Revised Statutes, page 497, § 2,) the Judge in the Court below could grant the order appealed from, and this Court sees no reason to interfere with it.

As to the second ground of appeal—the order granting leave to amend as the plaintiffs "may be advised." The system of pleading and practice under the Code of Procedure

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has done away with *many of the strict rules of former law practice, and applies to law as well as equity cases some of the more liberal principles of the practice in the Court of Equity. Among the important alterations is the right to amend as contained in Revised Statutes, Chapter VI, p. 611–12. Section 196 gives to the Court full power to grant such order giving leave to amend.

The case of McMillan v. McCall, (2 S. C.,

390.) which bears also upon the previously discussed questions, and the case of Ahrens v. The State Bank. (3 S. C., 401,) decide that "under Section 465 the provisions of the Code are applicable to future proceedings in suits theretofore pending where issue has been joined, and governs the proceedings upon the trial and all subsequent proceedings in such cases."

The only objection that can be made is to the indefiniteness of the words "as they may be advised." Amendments made after the trial or during the trial, as in this case, made under Section 196, p. 612, Rev. Stat., are generally for the purpose of conforming the pleadings to the facts as proven, and are made very informally, sometimes orally, or by the Court of its own motion.

There is no prescribed form, and it is left to the discretion of the presiding judge. Almost any amendment may be allowed, provided it does not make a new case. In that event it is not properly an amendment, and there is remedy by appeal. The motion is not made here, and it is hard for this Court to decide "proper terms" or the form of the order. "As they may be advised," if it has any significance, means as they may be properly advised, and test of that is the amendment. If that be improper, then the objection can be made. The order as it stands is no ground for appeal. It does seem to the Court that, properly, terms should have been imposed and that the order might have been more particular, but no special request is indicated as having been made on these points in the Court below, and there may have been sufficient reasons to influence the Judge.

It is possible, too, that the amendment proposed was submitted with the motion for leave. The amendment appears in the brief, but how it got there is not explained: that, however, is not material. The form of the order is a form common in chancery, and as the method is not dissimilar, that gives some guidance in forming the practice.—Renwick v. Wilson, 6 John. Ch., 82.

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*The Attorney General v. The Clergy Society, (8 Rich. Eq., 190,) in which case it also is said: "In ordinary cases this Court rarely interferes with the exercise of the Chancellor's discretion in such matters, as stated in Lancaster v. Seay," (6 Rich. Eq., 111). And in the case of Richtmeyer v. Remson, Sheriff, (38 N. Y., 206.) the Court of Appeals of New York takes the same view in a case under the Code of Procedure, and says: "The motion of the defendant, made upon the trial, for leave to amend the answer was addressed to the discretion of the Court, and its exercise cannot be reversed by this Court."

The appeal is dismissed.

WILLARD, C. J., and McIVER, A. J., concurred.

9 S. C. 335

ARNOLD v. McKELLAR.

(Columbia. Nov. Term, 1877.)

[*Statutes* ⇐30.]

The next regular annual session is the "next meeting" of the General Assembly, in the sense of the term as used in Art. III, § 22, of the Constitution.

[Ed. Note.—Cited in Adams v. Agnew, 15 S. C. 42; State v. Williams, 20 S. C. 15, 16.

For other cases, see Statutes, Cent. Dig. § 32; Dec. Dig. ⇐30.]

[*Statutes* ⇐29.]

A Bill sent to the Governor on the last day of the first session of the General Assembly and returned by him approved on the first day of the next regular annual session becomes a law, although in the meantime an extra session had been held.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 31; Dec. Dig. ⇐29.]

[*Execution* ⇐112.]

Where there are two judgments against the same party, the eldest of which is a lien on a tract of land, and the Sheriff having endorsed a levy thereof on both executions, and sells under the junior, the sale will be referred to the eldest.

[Ed. Note.—Cited in Carrier v. Thompson, 11 S. C. 90; Adickes v. Lowry, 12 S. C. 106, 107; Lawrence v. Grambling, 13 S. C. 125; Weinges v. Cash, 15 S. C. 59; Henry v. Henry, 31 S. C. 5, 9 S. E. 726.

For other cases, see Execution, Cent. Dig. § 232; Dec. Dig. ⇐112.]

[This case is also cited in Adickes v. Lowry, 12 S. C. 97, without specific application.]

Before Cooke, J., at Abbeville, January Term, 1877.

This was an action by Francis Arnold against Peter McKellar to recover the possession of real estate.

The facts appear in the following statement prepared and signed by counsel:

The plaintiff, Francis Arnold, purchased these lands at Sheriff's sale, as the property of William P. McKellar, and brought this action to recover possession of them against Peter McKellar, the uncle of William P. McKellar, who claimed the lands under a deed from the judgment debtor, William P. McKellar, to him.

William P. McKellar, the judgment debtor, owned the lands.

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*August 27, 1875, he conveyed them to his uncle Peter, and left the State September 7, 1875. His deed to Peter expressed the consideration of one thousand dollars, but Peter McKellar swore that the consideration was not money but a payment on a debt of eighteen hundred dollars which William P. owed him. When William P. made the deed to Peter there was in the office against him a judgment of L. D. Merriman for $219, which had been entered up January 26, 1874, and execution issued same date returnable by its terms "in sixty days after its receipt." The only return of this execution was to May Term of the Court, 1875. No summons to make it a lien was served on William P.

McKellar by judgment creditor L. D. Merriman, as he claimed that the judgment was rendered after the amendment to the Code and had a lien. When William P. McKellar left the State, Francis Arnold had a suit pending against him, which went into judgment 18th October, 1875, for $227.05.

The attorney of Francis Arnold gave to the Sheriff written instructions to levy and sell the lands in dispute as the property of William P. McKellar. The Sheriff levied on the land on the 8th of November, 1875, endorsing a levy as of same date on both the execution of L. D. Merriman and Francis Arnold, and advertised the lands for sale "at the suit of Francis Arnold," and sold them sale day in December, 1875. At the sale the attorney of Peter McKellar forbid the sale, and the Sheriff, by direction of both the attorney of Merriman and Arnold, announced that the lands were sold under the judgment of "Arnold and others for the benefit of creditors," giving an opinion that the purchaser would take good title.

Francis Arnold became the purchaser for fifty dollars and received Sheriff's titles conveying the lands "at the suit of Francis Arnold and others." Peter McKellar refused to deliver possession to the purchaser, who brought this action. He claimed a recovery on two grounds:

First. That the Sheriff's deed conveyed good title as against Peter McKellar, even if the conveyance to him (August 27) was bona fide, because the Sheriff sold under both judgments, and that of Merriman was older than said conveyance.

Second. But, if that was not so, the deed of William P. McKellar to his uncle Peter was voluntary, pretensive and fraudulent, to enable William P. to leave the State and defraud his creditors, and therefore void as against creditors.

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*Without going to the jury upon the second ground, His Honor the presiding Judge charged the jury, as matter of law, that the plaintiff was entitled to recover upon the first ground. He held that the judgment of Merriman had a lien from its entry; that the objection to the execution, which by its terms was returnable "within sixty days after its receipt," was technical and did not affect the judgment; that the Sheriff's sale was referable to both judgments, and the purchaser's title good as against Peter McKellar, and directed the jury to find for the plaintiff.

The defendant moved for a new trial on the following grounds:

I. That the judgment of the plaintiff, Francis Arnold, against William P. McKellar, being subsequent to the conveyance of the land by William P. McKellar to the defendant, Peter McKellar, gave to the plaintiff, Francis Arnold, no lien on the said land as against the defendant, Peter McKellar, and the sale thereof under said judgment was null and void.

II. That there was no legal sale under the judgment of L. D. Merriman, because there was no publication of the levy and sale thereof by the Sheriff as required by law.

III. That if publication had been made of the levy and sale under the execution of L. D. Merriman, the said execution had not been returned "within sixty days after its receipt," nor to each successive term of the Court, as provided by law.

IV. That the Act of 25th of November, 1873, amending the Code of Procedure, is null and void, and, therefore, the judgment of L. D. Merriman created no lien on the land at the date of the conveyance to the defendant, Peter McKellar.

V. That, under the Act of 1875, the judgment of L. D. Merriman did not create a lien on said land, because there was no "summons served on the judgment debtor, William P. McKellar, as provided by said Act, and the conveyance to the defendant, Peter McKellar, was, therefore, good as against said judgment.

The Circuit Judge refused a new trial, and the defendant appealed to the Supreme Court for a new trial.

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*Lee & Blake, for appellant:

The appellant claims title under a bona fide deed from W. P. McKellar, executed 27th of August, 1875, when there was no lien on the land in controversy.

I. Appellant's deed is valid, because at the time of the conveyance to the appellant L. D. Merriman's judgment entered up January 26th, 1874, was the only existing judgment, and had no lien on the land for (3) three reasons:

1. Because the Act of 1873 amending the Code as to the lien of judgments, and providing for such lien, was null and void, the constitutional requirements to it becoming a law having been disregarded in its passage, as appears from the following statement:

The Act was passed on the 26th of February, 1873. The Legislature adjourned the next day and reassembled on the 21st October, 1873; in the meantime the Governor retained the Act, and kept possession of the same until the 25th November, 1873, when he returned it to the General Assembly, having failed to do so within two days of its reassembling, as required by the Constitution.—Vide Journals of respective dates; Constitution of South Carolina, Art. III, § 22.

2. Because there had been no service of summons under the Act of March, 1875, which provided this mode of creating a lien upon existing judgments.—Act 8th March, 1875, 15 Stats., 871.

3. Because there had been no levy under Merriman's judgment at the time of conveyance to appellant.—§ 314, Code of Procedure.

II. The respondent's deed from the Sheriff is void for two reasons:

1. Because L. D. Merriman's execution, under which the land is claimed to have been sold, had lost its active energy, the sixty days required by the Code for its return having expired. Section 315, Code of Procedure, directs that "the execution shall be returnable within sixty days after its receipt by the officer to the Clerk with whom the record of judgment is filed." "Every execution has a certain day for its return, and every levy under it must be within the period fixed for such return, as the authority under it then ceases, and to revive such authority the execution must be renewed." Sims v. Randall, (2 Bay Rep., 524.) "where Sheriff takes upon him to levy upon and sell, by virtue of an execution, after the time fixed for its return had expired, and to give title deeds for the land, such deeds are void."—Sims v. Randall,

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2 Bay, 524; Jenkins v. *Mayrant, 3 McCord, 560; Toomer v. Purkey, 1 Mills Con. Rep., 158. Lands were not subject to sale under execution at common law. The provision of the law on this subject is a statutory one, and the requirements of the statute relating thereto cannot be disregarded as a mere technicality.

2. Because there was no valid publication of sale under Merriman's judgment. "The Sheriff of every County in this State shall, before he exposes any lands or tenements which he may be directed to sell by virtue of any execution or mortgage, publicly advertise the same three weeks immediately previous to the sale day or days on which he means to expose the same for sale."—Rev. Stat., Chap. XCV, § 5. An announcement by the Sheriff from the block at the time of sale is not a legal publication.

"If the Sheriff advertise under one execution only, he can sell upon that only."—Mascraft v. Van Antwerp, 3 Cow., N. Y. Rep., 334. "Sales can only be made under the executions advertised."—Husted v. Dakin, 17 Abb., 137. "The Sheriff in selling property under execution only acts by statutory authority, which must be strictly pursued."—Id.

McGowan, contra:

First. The judgment of Merriman was rendered January 26, 1874, in open Court, under Act amending the Code November 25, 1873, and had a lien on the lands. That Act not null and void.

1. The Act was ratified February 26, 1873, the last day of that session.—Senate Journal 1872–73, p. 691.

2. Extra session called October 21, 1873, which attended to the special purpose for which it was called and adjourned sine die November 24, 1873.—House Journal, Special Session, p. 180.

3. Regular annual constitutional session commenced November 25, 1873, and on that lay the Act returned approved.—15 Stat., § 14, p. 498.

This was within two days—"unless the General Assembly by their adjournment prevent its return, in which case it shall not have such force and effect unless returned within two days after their next meeting."—Const., Art. III, § 22.

"Next meeting" means next regular meeting provided for by the instrument being construed. The provision for regular meetings of the Legislature being in pari materia should be incorporated in this sentence.—Const., Art. II, § 12.

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*But special provision authorizing the call of an extra session should not be incorporated. It is like a provision allowing an appeal, which is not to be so construed.—Dwarris on Statutes, 706; Rex v. Justices of Surry, 2 T. R., 504; Const., Art. III, § 16 and § 22.

Second. The judgments of Merriman and Arnold being in existence and having lien on the land, the levy and sale by the Sheriff under one execution enough to legalize the sale, which is referable to both judgments. —Vance & Davis v. Reed & Young, 2 Speer, 90; McElwee v. Sutton, 2 Bail., 361; Magwood v. Legge, Harper, 116; Maverick v. Austin, 1 Bail., 59.

1. The defendant says the Sheriff did not levy and advertise under the execution of Merriman. The fact is the levy was entered on that execution the same day. But if he had not done so—if that execution were irregular or under "wait orders"—yet the execution of Arnold was enough to make the levy and sale for all, and, the sale being made, Merriman's judgment is "entitled to the proceeds of sale and not to a right to resell the land."—Gist v. McJunkin, 1 McM., 342; The State v. Laval, 4 McC., 336.

2. Merriman don't object to the sale. He concurred in it and claims the proceeds of sale. Third persons can make no objection to irregularity. This mere irregularity, execution according to form used before amendment of law.—Barklay v. Scriven, 1 N. & McC., 408; Reynolds v. Corp, 3 Caine's R., 273; Henry v. Fergerson, 1 Bail., 512; Guignard v. Glover, Harper, 457.

3. The purchaser is not required to look into the regularity of proceedings.—Turner v. McCrea 1 N. & McC., 12; Williman v. Farrow, 1 Bail., 619; 1 Hill, 249; Henry v. Fergerson, 1 Bail., 512.

"The execution under which the sale is made need not be described in the advertisement of sale. The notice is sufficient if it states that the sale is to be pursuant to an execution or executions."—4 Waite's Pr., 76; Husted v. Dakin, 17 Abb., 137.

Third. The sale was made under the execution of "Francis Arnold and others." This appears by the title executed to purchaser. That estops the defendant from giving parol evidence to contradict the written deed of

Sheriff.—Jackson v. Pratt, 10 John., 381; Vanderhyden v. Young, 11 John., 151: Jackson v. Vanderhyden, 17 John., 167; Jackson v. Sternberg, 20 John., 51; Webb v. Roberts, 7 Wend., 83.

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* "The Sheriff's deed is valid so long as there was an existing and sufficient authority to the Sheriff to warrant the sale."—Kent in Martin v. Pratt, 10 John.

1. When the Sheriff makes an official sale the purchaser can't look into the proceedings under which he sells, and his title is good if there is in existence any authority to support the sale. Property would sell for nothing at such sales if the purchaser became an insurer and warranter that the whole proceeding was regular.

2. Besides the recitals of the deeds, the fact is that the Sheriff announced, and the attorneys for both Arnold and Merriman announced, before the sale that the land was sold under the judgments of "Arnold and others."

March 18, 1878. The opinion of the Court was delivered by

HASKELL, A. J. The principal question in this case is the validity of "An Act to alter and amend the Code of Procedure, being Title V, Part III, of the General Statutes," approved November 25, 1873.

The Bill was ratified 26th February, 1873, but it could not become a law until it had been presented to the Governor.—Section 22, Article III, of the Constitution. If he approve it in the time, or if it be passed over his veto in the manner therein prescribed, it becomes a law. But, says this Section: "If a Bill or Joint Resolution shall not be returned by the Governor within three days after it shall have been presented to him, Sundays excepted, it shall have the same force and effect as if he had signed it, unless the General Assembly, by their adjournment, prevent its return, in which case it shall not have such force and effect unless returned within two days after their next meeting."

The General Assembly adjourned the next day, 27th February, 1873, and the Bill had not been returned by the Governor.

Under Section 16, Article III, of the Constitution, the Governor did "in extraordinary occasion convene the General Assembly to meet on 21st October, 1873." That body assembled and continued to sit until 24th November, 1873, on which day it adjourned sine die, and the Governor had not returned the Bill.

On the 25th November, 1873, "the session of the General Assembly," in obedience to Section 12 of Article II of the Constitution, was convened at the seat of government at

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the annual period desig*nated in the Constitution, and on that day the Bill was returned by the Governor approved. Such are the facts as submitted. If the regular annual meeting be that which is intended by the words "next meeting" in Section 22, Article III, of the Constitution, then the Bill became law and is of force. If, on the other hand, the special or extra session called by the Governor, beginning in October, 1873, be the "next meeting," according to the meaning and intent of the Constitution, then the Bill was not duly returned within the two days prescribed, failed to become a law, and acquired no force from the subsequent approval and return.

The Court is of opinion that the next regular annual session is the "next meeting," in the sense in which those words are used in Section 22, Article III, of the Constitution, and will endeavor briefly to state its conclusion.

Article II of the Constitution frames the legislative department of the government and prescribes the steps to be taken for the enactment of laws. Article III relates to the executive department. Section 22 of Article III confers and regulates the qualified negative power of the Governor and makes it a portion of the legislating branch of the government. In the exercise of this function the Governor acts purely in a legislative capacity, and, therefore, Section 22 of Article III belongs properly to Article II, which is devoted to the legislative department, and should be considered and construed as if it had occurred therein.

This view is strengthened by the fact that the analogous or veto Section in the Constitution of the United States is made part of the legislative department, Article I, and does not occupy a place in Article II, which declares and defines the executive powers. This Section will, for this reason, be regarded, for purposes of construction, as if it were Section 22 of Article II, instead of Article III, and, as may be observed, it naturally follows Section 21 of Article II. The consequence is that the words "next meeting" mean the same as they would have signified had they occurred in Article II and preceding any provision for extra session. The time at which the session of the General Assembly is to be held is a period fixed by the Constitution and is the annual commencement of a political period in the life of the State.

"The meeting of the General Assembly" is the generic term which distinguishes this recurring event in the existence of the gov-

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*ernment, and, when used, is construed to mean the regular assemblage of that body as fixed by the Constitution, unless the contrary is plainly indicated by the context. It does not appear to be so in the present instance. The extra session of the Legislature is meant to occur only on "extraordinary occasions," and, obviously, the attention of that body, and of the Governor who convened it, should be devoted to the unexpected causes which had necessitated such a measure. The extra session is, by its nature, a rare contin-

gency, is unforeseen, has no connection with the ordinary course of legislation, and its interference therewith is in conflict with that scheme of the Constitution which provides that the interval between the annual sessions shall elapse before the enactment of new or the repeal of old laws. And so important is this consideration that in several of the States the sessions have been made biennial for the better prevention of hasty legislation.

The validity of the Act of 1873–74 (15 Stat., 495.) being sustained, the Merriman judgment had a lien upon the land of McKellar at the time it was sold. An execution issued upon that judgment was in the hands of the Sheriff at the time he levied and sold by virtue of the Arnold or junior execution, and the levy was entered upon both at the same date. The failure on the part of the Sheriff to make the returns as provided by law, if so, might subject him to rule, (15 Gen. Stat., § 16, p. 500.) but could not affect the active energy of the execution, which had run but a short portion of the period of five years from the time of its lodgment.—Ibid, p. 499, § 15.

The Sheriff could unquestionably have made the sale under Merriman's execution. This meets the very points made in the dissenting opinion of Evans, J., and concurred in by Wardlaw, J., in the case of Vance & Davis vs. Red & Young, (2 Speers, 90.) for in that case the dissenting Judges stood upon the point that the Sheriff did not have in his office a senior execution which empowered him to sell. But in the opinion the Court settled the whole question, saying: "It is of no consequence under what named execution or judgment the Sheriff sells a defendant's property, the sale is in virtue of all existing liens of the kind, and every execution gives the practical authority to sell until all are satisfied, and the liens are satisfied successively in the order of priority of time; and thus each execution amounts to a venditione exponas for all the preceding judgments."—Ibid, p. 93.

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*The Court sees no error in the charge of the Judge in the Court below, nor any reason why a new trial should be granted.

The motion is, therefore, dismissed.

WILLARD, C. J., and McIVER, A. J., concurred.

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9 S. C. 344

WILLIAMS & CO. v. VANCE & MOSELEY.

(Columbia. Nov. Term, 1877.)

[Reported and annotated in 30 Am. Rep. 26.]

[*Damages* ⇐79.]

V. & M. agreed to consign and ship to W. & Co. 500 bales of cotton, to be sold by them as cotton factors, on commissions of 2½ per centum, and to pay as liquidated damages $2 per bale for every bale of cotton less than 500 bales which they might fail to consign and ship to them as stipulated: *Held*, That the $2 per bale were liquidated damages.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 164; Dec. Dig. ⇐79.]

[*Payment* ⇐46.]

Covenant between V. & M. on the one side and W. & Co. on the other as follows: W. & Co. agreed to make certain advances to V. & M., to be paid at a future day, and V. & M. gave their mortgage to W. & Co. to secure the performance of their covenants. Other debts for advances not secured by the mortgage were afterwards contracted by V. & M. with W. & Co. Payments were also made on general account before the mortgage debt became due,—nothing being said as to how they should be applied: *Held*, That the payments were not applicable to the mortgage debt alone, and that the account should be taken by carrying the payments into the general account of debts assumed and advances made, leaving the balance at the foot of the account to constitute the mortgage debt.

[Ed. Note.—Cited in Clark v. Smith, 13 S. C. 598; Pelzer, Rodgers & Co. v. Steadman, 22 S. C. 288; Greig & Matthews v. Smith, 29 S. C. 434, 7 S. E. 610.

For other cases, see Payment, Cent. Dig. § 125; Dec. Dig. ⇐46.]

[*Damages* ⇐78.]

The question whether damages covenanted to be paid on failure to perform defendants' part of the contract are liquidated is one of intent merely; and where they are called "liquidated damages" in the contract itself, they must be so *held*, unless such construction is inconsistent with other parts of the instrument or is unreasonable in itself.

[Ed. Note.—Cited in Norwood & Co. v. Faulkner, 22 S. C. 372, 53 Am. Rep. 717; Witte v. Weinberg, 37 S. C. 593, 17 S. E. 681; Anerum v. Camden Water, Light & Ice Co., 82 S. C. 297, 64 S. E. 151, 21 L. R. A. (N. S.) 1029.

For other cases, see Damages, Cent. Dig. § 157; Dec. Dig. ⇐78.]

Before Northrop, J., at Abbeville, September Term, 1877.

This was an action by George W. Williams & Co., wholesale grocers and cotton factors in the city of Charleston, against Vance & Moseley, retail merchants at Hodges, in Abbeville County, to foreclose a mortgage of real estate given by the defendants to the plaintiffs.

The case is as follows:

On the 29th of March, 1876, George W. Williams & Co. and Vance & Moseley entered into a covenant, in which the said George W. Williams & Co. agreed to extend the time of payment of a debt of $1,056.26 then due to them by Vance, Moseley & Co., of which firm the said Vance & Moseley had been mem-

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bers, and the *payment of whose debts they had assumed upon their dissolution, as well as the time of payment of a debt of $1,497.27, then due and payable to them by the said Vance & Moseley from the 22d day of March, 1876, to the 1st day of April, 1877; to advance to the said Vance & Moseley, on their demand, the sum of $1,446.47 in cash, and to sell and deliver to them, upon their orders, groceries, at the customary prices and terms, to the amount of $1,500. The sum of $2,553.-

53, the aggregate of the debts of Vance, Moseley & Co. and of Vance & Moseley, was to bear interest from the 22d day of March, 1876: the sums of the cash advanced were to bear interest from the dates at which they were severally advanced, and the sums of the bills of groceries were to bear interest sixty days after the date at which they were severally advanced, all at the rate of 12 per centum per annum.

And the said Vance & Moseley, on their part, agreed in the said covenant to pay to the said Geo. W. Williams & Co., at their office in the city of Charleston, on the 1st day of April, 1877, the sum of $2,553.53, the aggregate of the aforesaid debts of Vance, Moseley & Co. and of Vance & Moseley, and the sum of $2,946.57, the aggregate of the sums of cash to be advanced and of groceries to be sold and delivered to them by the said Geo. W. Williams & Co., with interest on the said sums as aforesaid; to consign and ship to them five hundred bales of cotton, to be sold by them as cotton factors upon commissions of 2½ per centum, and to pay as liquidated damages two dollars for each and every bale of cotton less than five hundred bales which they might fail to consign and ship to them as stipulated.

Geo. W. Williams & Co. further covenanted to pay to the said Vance & Moseley 1 per centum of the 2½ per centum commissions and retain for themselves 1½ per centum on sales of the cotton to be consigned and shipped to them by the said Vance & Moseley.

On the same day, in order to secure to Geo. W. Williams & Co. the faithful performance of the covenants on their part contained in the said agreement, Vance & Moseley executed to them a mortgage of certain real estate, containing a power of sale to the mortgagees and a covenant to keep the buildings on the mortgaged premises insured.

During the year 1876, Geo. W. Williams & Co. sold and delivered to Vance & Moseley, upon their orders, groceries to the amount of $756.49, and advanced to them, upon their

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demand, $4,252.73 in *cash, and Vance & Moseley made payments at various times to the amount of $3,112.31. There was no proof that Vance & Moseley gave direction as to the application of the payments made, or that the plaintiffs made any application otherwise than to the general account. Instead of shipping five hundred bales of cotton, as covenanted, Vance & Moseley shipped only fifty bales.

The complaint alleged that Geo. W. Williams & Co. did, during the months of March, April, May, June, September, October, November and December, 1876, advance cash and sell and deliver groceries to Vance & Moseley, as covenanted, to the amount of $5,019.62; alleged that Vance & Moseley did not consign and ship to them five hundred bales of cotton, as covenanted, but consigned and shipped to them only fifty bales, and that in consequence thereof, and in accordance with the covenants contained in said agreement, plaintiffs had sustained damages to the amount of $900; admitted that Vance & Moseley made payments to them during the year 1876 to the amount of $3,112.31.

Vance & Moseley answered the complaint, alleging that they had placed collaterals in the hands of the plaintiffs to a large amount in addition to the mortgage, and that plaintiffs had collected an amount unknown of said collaterals, and praying an accounting by plaintiffs.

The case was referred to a Referee to take the accounts between the parties and report thereon. He reported as his opinion that the two dollars per bale of cotton mentioned in the covenant were liquidated damages, and he accordingly charged Vance & Moseley with $900 as the amount of such damages. He also reported it as his opinion "that the payments should have been applied to the mortgage debt and not to excess of the advancements not secured by the mortgage," and in stating the account he so applied them.

The defendants excepted to the report, and His Honor filed the following decree on the exceptions:

On hearing the report of the Referee in this case and the observations of counsel for the plaintiffs and defendants, on motion of the counsel for the defendants, it is ordered and adjudged as follows:

1. That the credit appearing in the account exhibited with the complaint, being the proceeds of fifty-two bales of cotton received and sold by the plaintiffs on account of the de-

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fendants, Vance & *Moseley, and the cash paid in May by them to plaintiffs, be applied to the items specified in the covenant of 22d day of March, 1876, and first to the debt of Vance, Moseley & Co. therein set down.

2. That the excess of advances by the plaintiffs to the defendants, Vance & Moseley, on the money item in the account exhibited be not allowed, as charged by the Referee, on the item of merchandise advanced, and that each of those items stand as stipulated in the covenant; that is to say, that the excess of advances on the items of moneys to be advanced be not charged over on the item for merchandise.

3. That the sum stipulated in the covenant to be paid by Vance & Moseley in the event of failing to forward to plaintiffs five hundred bales of cotton is, to the extent of such failure on their part, adjudged to be in the nature of a penalty to be ascertained and fixed and not as liquidated damages.

4. That the matter be recommitted to the Referee to state the account between the parties in conformity with the principles herein set forth.

The plaintiffs appealed on the following grounds:

First. That the presiding Judge erred in ordering the several payments made by the defendants, Vance & Moseley, in the months of May, June, November and December of the year 1876, and in the month of January of the year 1877, to be applied to the extinguishment of the debt secured by the mortgage, which debt did not become due and payable until the first day of April, 1877, instead of to the repayment of the sums of money advanced by the plaintiffs and not secured by the mortgage, which were due and payable at the times at which they were respectively advanced.

Second. Because the presiding Judge erred in adjudging that the sum of nine hundred dollars, being the aggregate of the sums which Vance & Moseley covenanted to pay to the plaintiffs for the failure to ship to them four hundred and fifty bales of cotton, that is to say, two dollars for each and every bale of cotton less than five hundred bales which they failed to consign and ship to them, is in the nature of a penalty and is not stipulated damages.

Burt & Graydon, for appellants:

Principles of law in relation to the appropriation of payments:

I. The ownership of the money determines the right of appropriation.—1 H. & W. Am. L. C., 308.

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*II. Where a partial payment is made by a person indebted on more than one account, he may, at or before the time of payment, prescribe the application of the payment, on the principle that before the money is paid it belongs to him.—Black v. Shooler, 2 McC., 293; McDonald v. Pickett, 2 Bail. L. R., 617; Mayor, &c., of Alexandria v. Patten, 4 Cra., 317; Field and others v. Holland and others, 6 Cra., 8; Smith's Mer. L., 670; 1 H. & W. Am. L. C., 291, and cases there cited.

III. If the debtor pays the money without directing any application, the money becomes absolutely the property of the creditor, and he may do with it what he will, subject only to the condition that he must apply it to some part of the debtor's liability. The right of the debtor to apply a payment passes absolutely to the creditor along with the ownership of the money and is not limited as to time; the creditor may make the application at the time of trial.

In Schnell v. Schroder, (Bail. Eq., 342,) the Court say: "A party paying money has at the time he pays it the right to direct how it shall be applied; but if he does not direct the application, then the party receiving it may apply it to such debt of his debtor as he may choose. On what account money paid or articles delivered were paid or delivered and received is always a question of fact, and the proper answer to the inquiry is often to be collected from the circumstances attending the transaction."

In the case of Stewart v. Cochran, (Bail. Eq., 380,) Cochran owed his factors two debts,—the one amounting to $3,367.77, secured by judgment, the other to $2,000, secured by a mortgage of slaves. In March and May, 1827, the factors sold a part of Cochran's rice crop for sums amounting in the aggregate to $2,235.40. In June of the same year Cochran executed an assignment for the benefit of all his creditors. In March, 1828, the factors sold the slaves under their mortgage, but the proceeds of the sale were insufficient to pay the mortgage debt, leaving a balance of $455.35. On a bill being filed by Stewart, the assignee, the factors contended that they were entitled to apply the proceeds of the crop of rice sold by them in the first place to the extinguishing of the mortgage debt and the residue to the judgment, and then to come in for the balance due them as judgment creditors. Stewart insisted that the factors were bound to make an application of the fund within a reasonable time,

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and, not having *done so previous to the assignment, they could not do it afterwards; and that, at all events, they had made their election by selling the mortgaged slaves under their mortgage,—inasmuch as the proceeds of the crop would have extinguished the mortgage debt, and, therefore, the enforcing of the mortgage was an abandonment of the right to apply the proceeds of the crop to the payment of that debt: Held, That as Cochran had given no direction as to the application of the proceeds of his crops, his factors had the right to apply them to whichever of their demands they deemed most advantageous to themselves; that their right could not be affected by Cochran's assignment; that the sale of the mortgaged slaves was neither a forfeiture nor an abandonment by the factors of their right to apply the proceeds of the crops as they thought proper; and that they had a right to retain the funds in their hands until they could ascertain by a sale of the mortgaged property what application would be most beneficial to them.

In the case of Heilbron v. Bissell and Warner, (Bail. Eq., 430,) the debtor owed the creditor a judgment debt and a debt on open account, and made sundry payments without making any appropriation of them at the time he made them, nor did the creditor make any appropriation of them at that time. Upon the hearing, there was no evidence that the creditor had made any appropriation at any time of the payments; but he claimed by his answer the right to appropriate the payments to the running account; and the question before the Court was whether he could thus make the application; whether the creditor can apply payments at any time when the debtor has failed to make the

appropriation at the time of payment. After a careful review of the cases, and a particular examination of the case of Devaynes v. Noble, (1 Meriv., 570.) the Court, per Harper, Ch., decided that he had such a right, saying: "The Master of the Rolls, in the opinion I have quoted, comes to no conclusion of his own; but it seems to me that his leaning is in favor of adherence to the rule of the civil law. With the respect due to so great an authority, I have examined the cases referred to and some others on the same subject, and my conclusion is, on the preponderance of authority, that the creditor has that unlimited right to appropriate when the debtor has made no appropriation at the time of payment."—p. 433. After commenting further on sundry cases, the Court go on to say: "Apart from these cases, and that of Heyward v. Lomax, (supra.) I have found

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no *authority for the Court's applying payments on a presumed intention of the debtor nor any dictum recognizing the civil law rule. Heyward v. Lomax has been often overruled, and the other cases are regarded as exceptions: and I must, therefore, conclude in favor of the defendant Joseph Warner's right to appropriate the payments in question."—p. 435. "It is, therefore, ordered and decreed * * * that the amount of the several drafts before mentioned be credited to the running account between the defendant, Joseph Warner, and the said William P. Bason."—p. 436.

In The Mayor of Alexandria v. Patten, (4 Cra., 320.) Marshall, C. J., says: "It is a clear principle of law, that a person owing money upon two several accounts, as upon bond and simple contract, may elect to apply his payments to which account he pleases; but if he fails to make the application, the election passes from him to the creditor. No principle is recollected which obliges the creditor to make this election immediately."

The creditor is entitled to make the application at the time of trial.—1 H. & W. Am. L. C., 296, citing 6 Taunt., 597; 2 M. & Sel., 18; 8 C. & P., 704; Gow., 74.

A debtor making a payment must direct its application at or before the time he makes it, otherwise his right to control it is gone and belongs to the creditor.—1 H. & W. Am. L. C., 293; Sm. Mer. L., 670, and cases there cited.

"The principle applied by common law is, that the ownership of the money determines the right of appropriation. Before the money is paid it belongs to the debtor, and he may, therefore, direct any application he pleases, and the creditor will be bound so to apply: but if he pays the money without directing the application, it becomes absolutely the property of the creditor, and, being his own, he may apply it as he pleases."—1 H. & W. Am. L. C., 308.

"A factor who has a lien on goods or other proceeds to the extent of more than their value has a right to treat them as if they were his own, subject to this single qualification, viz.: that he must apply the proceeds to some part of the debtor's liability."—Upham and others v. Lefavour, 11 Met., 181.

"But, subject to this qualification," (i. e., that when the creditor has once made the appropriation he is bound by it,) "the creditor may make the application at any time." "The later English cases show that where the creditor has not committed himself by the mode of bringing suit, or otherwise, he may

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direct the appropria*tion even at the trial. Of course the application and payment must be considered as having taken place in law, before suit brought, as the right of action must be complete and fixed before the commencement of the suit, but the creditor need not in many cases do any act to declare or manifest his election till the trial."—1 H. & W. Am. L. C., 295.

"The case of Mayor of Alexandria v. Patten, where it" [the right of the creditor to declare the application at the time of trial] "was the direct point in judgment, is itself the highest authority that there ever can be in American law, and it ought to be considered conclusive."—1 H. & W. Am. L. C., 297.

"The fine equities supposed to exist in favor of the debtor, even after he has paid unconditionally, can never countervail the gross equity which a man has to use his own property as he chooses. To allow a debtor to follow and control the application of money of which the entire ownership is in another would be inconsistent with the reason and analogies of the law."—1 H. & W. Am. L. C., 309.

The principle on which this doctrine is founded is laid down in Co. Litt., 145, a.

"When a thing passeth to the donee or grantee, and the donee or grantee hath election in what manner or degree he will take it, there the interest passeth presently, and the party, his heirs or executors, may make election when they will."

IV. When the appropriation passes to the law, it will apply a payment, on the principle that the ownership of the money has vested absolutely in the creditor, according to his presumed intention—that is, to the debt for which the security is most precarious.

In Jones v. Kilgore, (2 Rich. Eq., 66,) the Court say: "There is no doubt, if no directions are given by the party making the payment, the right to make the application is with the party receiving. If neither party has fixed the application, it devolves upon the Court, and will be made, pro rata, to the demands held by him who receives the money against him who paid it: or if one of the demands be less secured than the others, the application will be made to it in the first instance."—Citing also 5 Mas., 82; 4 J. J. Mar., 97; 9 Cow., 420.

In the case of Field v. Holland, (6 Cr., 8,) judgments were obtained against Cox, one of the defendants, in 1793, and in the early part of 1794, by Holland, another one of the defendants.

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*In December, 1794, Cox conveyed to the complainants, who, according to the allegations of their bill, were ignorant of the judgments at the time of their purchase. Executions were levied and the land sold in 1799. The other three defendants, Melton, Tigner and Smith, purchased the lands at Sheriff's sale. It appeared that at a time subsequent to the two judgments Holland made large advances to Cox and took his obligations. Cox made sundry payments, but gave no direction as to their application.

The complainants claimed that the judgments were satisfied, and that, on principles of equity, the Court should apply the payments made by Cox to the extinguishment of the judgments. Marshall, C. J., delivering the opinion of the Court, says, after disposing of some preliminary questions: "There is, then, no question on the merits but this: Were the payments properly applied by the Court, or were they applicable to the judgments? The principle that a debtor may control at will the application of his payments is not controverted. Neither is it denied that on his omitting to make the application the power devolves on the creditor. If this power be exercised by neither, it becomes the duty of the Court, and in its performance a sound discretion is to be exercised. It is contended by the plaintiffs that if the payments had been applied by neither the creditor nor the debtor, they ought to be applied in the manner most advantageous to the debtor, because it must be presumed that such was his intention. The correctness of this conclusion cannot be conceded. When a debtor fails to avail himself of the power which he possesses, in consequence of which that power devolves on the creditor, it does not appear unreasonable to suppose that he is content with the manner in which the creditor will exercise it. If neither party avails himself of his power, in consequence of which it devolves on the Court, it would seem that an equitable application should be made. It being equitable that the whole debt should be paid, it cannot be inequitable to extinguish those debts for which the security is most precarious. That course has been pursued in the present case."

"The application of a payment by a creditor is an act of the mind and a matter of intention; the entry or declaration of it by word or act is but the manifestation and evidence of it. If, after the payment, up to the moment when the appropriation passes to the law, the creditor has the exclusive right to apply, which is agreed by all, the presumption that he did appropriate it ac-

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cord*ingly is a plain conclusion of sense. The relative equities of the parties cannot vary with the different distances of time after the payment, no act to alter their rights or equities having been done by either. If it be just to delegate the application to the creditor during the period which elapses before the appropriation vests in the law, it cannot be just after that to prefer the interest of the debtor. To give the creditor the right to apply at discretion for a certain time is to adopt the principle of consulting his interests. It would be contradictory for a judicial tribunal, after the payment, first to explore and obey the creditor's intention as a matter of fact, and then to seek and follow a presumption of the debtor's intention as a matter of law. The civil law, consistently, required the creditor, in exercising his right of application, to consult the interest of the debtor. The decisions which eliminate that rule from our law seem by inevitable force of common sense to extinguish the other which requires the Court to follow the debtor's interests. In fact the rules of the civil and common law are distinct and opposed: the former empowers the debtor, in effect, to control the application of his payment indefinitely: the latter vests the appropriation of a general payment in the creditor absolutely. The true principle is believed to be that adopted in Field v. Holland, that when the determination of the application devolves on the Court it shall be referred to that debt which is the least secured, to a simple contract debt or open account, for example, rather than to a mortgage, judgment, bond, or bond with sureties." * * * "But the case where one debt is secured by mortgage or judgment and the other is unsecured is that in which the equity of the creditor is least questionable."—1 H. & W. Am. L. C., 299.

For a very able and exhaustive review of this whole subject see notes to Mayor of Alexandria v. Patten and Field v. Holland in 1 H. & W. Am. L. C., 291.

One of the strongest instances to prove that the creditor's interest is consulted where the appropriation passes to the law is that of a bond bearing interest, in which case a payment will be applied to the interest which does not bear interest rather than to the principal which does.—DeBruhl v. Neuffer, 1 Strob., 431.

V. Payments are applied to debts which are due and payable rather than to those which are not.

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*"A payment is applied rather to a debt of which the term is already come than to one that is not yet due.—Hammersley v. Knowlys, 2 Esp. Rep., 666.

"But there is one sum of $250, received by the plaintiffs before any such payments were

made, which must be applied in discharge of the sum due when the suit was brought, as they then had no other claim against the defendant upon which a suit could be maintained."—Upham v. Lefavour, 11 Metc., 185.

"A general payment is always to be referred to a debt that is due in preference to one that is not due, because it is not to be supposed that a debtor intends to make a deposit and not a payment."—1 H. & W. Am. L. C., 292.

"But it is contended that bills for $20,000 were received, and have been applied in discharge of debts which became due two months afterwards. If the receipt given for these bills purported to receive them in payment, this objection would be conclusive. If an immediate credit was to be given for them, that credit must be given on a debt existing at the time, unless this legal operation of the credit should be changed by express agreement."—Field v. Holland, 6 Cranch, 28, ut supra.

"By the express agreement of the parties, a payment may be appropriated to a debt not due."—1 H. & W. Am. L. C., 292, citing Shaw v. Pratt, 22 Pick., 305.

VI. The question as to the appropriation of payments is one between the debtor and the creditor—no third party has any right to interfere.

In the case of The Mayor of Alexandria v. Patten, (4 Cranch, 317,) the Supreme Court of the United States decided that a surety has no right to demand that a general payment made by his principal shall be applied to the demand on which he is surety.

In Field v. Holland, (6 Cra., 8,) cited above, it was decided that the vendee of a judgment debtor has no right to insist that a general payment made by the judgment debtor to the creditor who has other demands against him shall be applied towards the satisfaction of the judgment.

"Thus, if one debt be the sole obligation of the debtor and the other be with a surety, guarantor or joint debtor, whether the sole debt be earlier or later in point of time than the debt with a surety, and, if earlier, whether the surety had at the time of incurring his engagement notice of it or not, the cred-

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itor may apply a general *payment made by the debtor from his own funds to the debt which is not protected, and continue to hold the surety bound,—a guarantor or surety, merely as such, being considered as having no equity to control or change an application made by the creditor."—1 H. & W. Am. L. C., 294, and cases cited.

VII. If a creditor takes from his debtor an assignment of property out of which a certain debt is to be paid, he is bound by his contract to apply the proceeds to the payment of that debt, and cannot apply them to another without the debtor's direction so to do.

In the case of Hunter v. Wardlaw & Edwards, (6 S. C., 74,) Hunter had given a lien on his whole crop to Wardlaw & Edwards for supplies to a specified amount, and, as a security for the performance of the covenants contained in the lien, executed a mortgage to them of certain stock. Wardlaw & Edwards advanced about sixty dollars more than the amount of the lien, and Hunter made payments to the amount of about fifteen dollars more than the lien, but gave no direction as to their application. Wardlaw & Edwards subsequently seized the mortgaged property, alleging that there was a balance due them on the lien of about forty-five dollars, sold it at auction and bought it in for a mere trifle. Hunter objected to the sale at the time, and afterwards brought suit against them for the recovery of the property. The presiding Judge charged the jury to find for the defendants, and Hunter appealed. The Court very properly held that the mortgage was satisfied, because Wardlaw & Edwards had bound themselves by contract to apply the proceeds of the crop to the extinguishment of the lien and mortgage, and they could not make any other application of them without Hunter's express permission.

"If there be only one debt incurred at the time when property is assigned out of which the creditor is to pay himself, and before the money is received another debt is contracted, the application must of course be to the former, and the creditor could not apply to the latter without an express permission to do so."—Donally v. Wilson, 5 Leigh, 329, cited in 1 H. & W. Am. L. C., 292.

"It is a settled rule, also, that the source or fund from which a payment is made will direct the appropriation, that is, when money has come from a particular fund it must be applied by the creditor in relief of the source from which the fund arises."—1 H. & W. Am. L. C., 292.

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*The rules laid down in the cases of Stewart v. Cochran, Heilbron v. Bissell & Warner, and Jones v. Kilgore, are the law of South Carolina, and will guide and govern this Court in the determination of this case, as these cases never have been overruled.

Principles of law deducible from the cases on the subject of liquidated damages:

1. That the intention of the parties controls the particular phraseology.

2. That the intention must be ascertained from the words used.

3. That the disproportion between the sum to be paid and the actual damage is not to be considered in the inquiry whether the parties intended it as a penalty or as liquidated damages.

4. That when the intention is not clear, the Courts incline to consider the sum a penalty, although the words "liquidated damages" are used, in cases for the performance of various things of different degrees of importance.

5. That the instrument, as well as the words, may be consulted in ascertaining the intention—as a bond, a covenant, &c.

6. That the word "penalty" and the context may control the meaning of the phrase "liquidated damages," and the latter and the context may control the word "penalty."

7. That the phrase "liquidated damages" has a meaning as definite and precise as the word "penalty."

8. That the early English and American cases have been modified by recent decisions.

9. That a sum agreed to be paid for the doing or not doing of a particular act, within the power of the party, is always liquidated damages or an alternative agreement.

The stipulation on the part of Vance & Moseley is, within a specified time, to consign and ship to appellants five hundred bales of cotton, to be sold by them as cotton factors on commissions, and to pay as liquidated damages two dollars for each and every bale less than that number which they might fail to ship.

Is this a covenant to pay as liquidated damages the two dollars for each bale not shipped, or is the two dollars a bale a penalty?

In Orr v. Churchill, (1 H. Black., 232,) Lord Loughborough said: "There can only be an agreement for liquidated damages where there is an agreement for the performance of certain acts, the not doing of which would be injurious to one of the parties, or to guard against the performance of acts which, if done, would also be injurious."

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*In Astley v. Weldon, (2 Bos. & Pul., 357,) Ashurst, J., said "When it is agreed that if a party do such a particular thing such a sum shall be paid by him, the sum stated may be treated as liquidated damages."

In Bearden v. Smith, (11 Rich., 550,) the Court said: "The distinction between a penalty and liquidated damages is, that the one is a surety for and the other to be paid in lieu of the act to be done."

All the cases declare that where the intention of the parties is clearly manifested that intention must prevail.

"The intention of the parties is to be ascertained from the words used. That which the words declare is the intention, and neither Legislatures nor Courts have a right to add to or to take away from that meaning."—New York Court of Appeals, Newell v. The People, 3 Seld., 97.

"Our office is to ascertain the intent of the parties, and, if not contrary to law, to carry their intention into execution."—Chief Justice Best, Crisdee v. Bolton, 3 C. & P., 240.

In that case Chief Justice Best said: "A Court has no more authority to put a different construction on the part of an instrument ascertaining the damages than it has to decide contrary to any other of its clauses."

The words "stipulated damages" have a technical or ascertained meaning, as has the word "penalty."

In Reiley v. Jones, (1 Burr., 302,) Parke, J., in giving judgment, referred to the case of Astley v. Weldon, and laid stress on the fact that the words "liquidated damages" had not been used in that case.

In Bearden v. Smith, the Court of Appeals laid stress on the absence of those words.

In that case the Court said that not only the words used, but the instrument itself, may be referred to as showing the meaning. —Astley v. Weldon, 2 Bos. & Pul., 346.

Either phrase, penalty or liquidated damages, may be controlled by some other strong consideration; neither, therefore, is absolutely conclusive.—Crisdee v. Bolton, 3 C. & P., 240; Sedg. on Dam., 401.

As each phrase is subordinate to the intention, and may be controlled by the force of other words, or affected by the character of the instrument, let us see whether such words are in this instrument.

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*It is a covenant, not a bond. The words are plain and express a definite thought.

There are no words to qualify or control the force of the phrase "liquidated damages."

"When the words are clear and explicit the extravagance of the sum cannot be considered."—N. Y. Sup. Court, Baglay v. Peddie, 5 Sandf., 192.

In Taylor v. Sandiford, (7 Wheat., 13,) Marshall, C. J., said "it would require very strong evidence for this Court to say that the words of the parties do not express their intention."—See also Astley v. Weldon, 2 B. & P., 357.

In Dakin v. Williams, (17 Wend., 447,) the Court says it has no dispensary power; cannot inquire whether the parties acted wisely or foolishly; parties may give away their property and the Court cannot interfere.—13 Wend., 587.

In Bearden v. Smith, the Court said: "When the intention is clear, the disproportion of the sum to the actual damages cannot be considered."

If the phrase "liquidated damages" has a meaning, and the disproportion between the sum agreed on by the parties and the actual damage cannot control that meaning, the cases disclose but one consideration that will control it.

In Astley v. Weldon the rule is laid down that "when the agreement contains several distinct covenants on which there may be divers breaches, some of an uncertain nature and others certain, with one entire sum to be paid on breach of performance, the contract will be treated as a penalty."

This rule was approved in Smith v. Smith, (4 Wend., 468,) in which a bond was given in the penalty of $10,000 not to practice as a physician, and, if the obligor did, that he should pay $500 for every month that he so

practiced—the $10,000 held a penalty, but the $500 liquidated damages.

But in Slosson v. Beadle, (7 Wheat., 72,) Bronson, J., said: "This does not belong to the class of cases in which the question of liquidated damages has actually arisen. It will be found in most, if not all, of those cases that there was an absolute agreement to do or not to do a particular act, followed by a stipulation in relation to the amount of damages in case of a breach."

The examples of this rule are numerous and uniform.

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*In Crisdee v. Bolton, £500 were agreed to be a penalty, to be paid as liquidated damages if defendant should set up a victualing house in one mile of that sold to plaintiff: Held liquidated damages.—See, also Barton v. Glover, Holt, N. P. Ca., 203; Pierce v. Fuller, 8 Mass., 223; Mott v. Mott, 11 Barb., 127; Reynolds v. Bridge, 5 Ellis & B., 528.

In Love v. Peers, (4 Burr., 2225,) Lord Mansfield remarked on covenants in general and covenants secured by a penalty or forfeiture, and said in the latter case the party may recover the penalty; that the penalty is the particular sum liquidated by the parties, and is, therefore, the proper amount of damages.

In Fletcher v. Dyche, (2 T. R., 37,) a bond was given in a penalty of £200, conditioned for finishing certain iron work by a specified day, and to forfeit and pay £10 for every week after that time until it was finished: Held liquidated damages.

In Hurst v. Hurst, (4 Excheq., 571,) in an action on covenant not to top trees under a given penalty for each tree: Held liquidated damages.

In Slosson v. Beadle, (supra,) the agreement was that in consideration of $500 paid for fifty acres of land the defendant would convey the land in one year, or in lieu thereof pay $800: Held liquidated damages.

In Hasbrook v. Tappen, (17 John., 200,) the agreement was for the conveyance of certain lands at a fixed time, the price to be paid on the delivery of the deed, and the parties bound themselves in case of failure to pay the one to the other $500 as liquidated damages: Held, too clear for question, that it was a case of liquidated damages.

In Knapp v. Mattby, (13 Wend., 587,) the covenant was to assign a lease and give possession, and for failure of either of the covenants to forfeit $500 as the liquidated damages: Held as "clear a case of liquidated damages if the parties have power to liquidate them."

In Dakin v. Williams, (17 Wend., 447, 22 Wend., 201,) defendants sold to plaintiff a newspaper in Utica for $3,000, with subscription, good will and patronage of the paper, and defendants agreed not to establish a paper in Utica, nor suffer one in any of their buildings, nor aid or assist in establishing one, and bound themselves in $3,000 for the performance of each and every part of the covenant, and that the sum of $3,000 was fixed and settled as liquidated damages, and not as a penalty, for violation of the cove-

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*nant in any of its terms or conditions: Held liquidated damages. In this case all the cases were reviewed, and the principle is maintained that the parties have the same right to make a contract fixing the amount of damages as to make any other contract.

In Pearson v. Williams, (26 Wend., 630,) a purchaser of lots engaged to erect on the lots two brick buildings by a certain day or to pay on demand $4,000: Held liquidated damages.

The cases of Astley v. Weldon and Kemble v. Farren (6 Bing., 141,) have been reviewed and the principle qualified.

In Atkinson v. Kinnier, (4 Excheq., 776,) Parke, J., said Kemble v. Farren was "somewhat stretched," and if a party agrees to pay a sum for the non-performance of a contract, consisting of one or more stipulations, the breach of which cannot be measured, then stipulated damages, and not a penalty, must be taken to have been meant.

Price v. Green (13 M. & W., 700,) was an agreement not to do business as a perfumer in the cities of London and Westminster, and defendant bound himself in the sum of $3,000, to be paid as liquidated damages and not as a penalty: Held liquidated damages.

There are but five cases on the subject in this State, and they do not furnish a principle upon which they can be reconciled with each other or with the English and New York cases.

Law v. House (3 Hill, 270,) was a covenant by which the parties bound themselves in the sum of $2,000 to execute an agreement by which plaintiff was to convey to defendant a tract of land and defendant to pay for it $5,000: Held a penalty.

Owens v. Hodges (1 McM., 114,) was a bond in a penalty to abide an award: Held a penalty.

Bearden v. Smith (11 Rich., 354,) was an agreement without seal to forfeit $100 if defendant failed to put plaintiff in possession of a house and lot: Held a penalty.

Allen v. Brazier & Randolph (2 Bail., 293,) was an agreement to deliver a slave to plaintiff on a certain day or pay $100: Held liquidated damages.

In Worrell v. McClinaghan (5 Strob., 115,) the agreement was that a building should be finished by a particular day, and $100 a month be deducted from the price after that day until finished: Held, That the sum of $100 per month agreed to be paid by defendant was liquidated damages, and that the jury should have been so charged as matter of law.

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*In none of the South Carolina cases was

the phrase "liquidated damages" employed, and yet in two of them the sum stipulated to be paid was held liquidated damages and not a penalty.

A review of the English and New York cases that have been cited shows that the only consideration which takes from the phrase "liquidated damages" its force is that a number of things of different degrees of importance was agreed to be done, and, consequently, the damges for each one could not have been intended to be the sum agreed upon by the parties.

The later case of Esmond v. Benschoten (12 Barb., 366,) seems to repudiate that exception. The covenant in that case was to convey land and to deliver a lot of hay, some apple trees and part of a growing crop of grain, and the other party covenanted to pay a sum of money and to execute a bond of indemnity against two mortgages, and if either party failed to perform to pay the other $500 as "liquidated damages": Held liquidated damages.

The recent English and New York cases, and especially the latter, appear to have modified the earlier cases and to have given to the phrase "liquidated damages" its usual and proper signification, and more fully to recognize the right of parties to make their own contracts, as will appear from the following cases:

In Farnham v. Ross (2 Hall, 167,) the covenant was to finish a building by a certain day, under a "penalty of $30 a day for every day thereafter that it should remain unfinished, to be paid as liquidated damages": Held liquidated damages.

To the same point are Holmes v. Holmes, 11 Barb., 137; Munday v. Culver, 18 Barb., 336; Norman v. True, 19 Barb., 106; Baglay v. Peddie, 24 Barb. 375; Dunlap v. Gregorie, 6 Seld., 245.

In Crisdee v. Bolton (3 C. & P., supra,) Chief Justice Best said: "The law in relation to liquidated damages has always been in a state of great uncertainty. This has been occasioned by Judges endeavoring to make for parties a better contract than they have made for themselves."

Parties have a right to make any contract which does not contravene the law and the Courts are bound to enforce it. They have a right to agree as to the amount of damages after a contract has been violated without resort to the Courts, and they may agree in advance as to the amount of damages to be recovered on such breach.

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*In the Roman law parties are advised in contracts for doing any thing to fix the amount of damages by a precise stipulation in the contract.—Sedgw. on Dam., 398.

This is an alternative obligation and the sum stated cannot be termed a penalty.

Sedgwick (p. 405) defines an alternative agreement to be an agreement to pay a certain sum on a contingency, which is dependent on the choice of the party himself, and considers Hurst v. Hurst an example of such agreements.

For a full discussion of the subject of liquidated damages, see Sedgwick on Damages, page 395.

Cothran, contra:

"Actus legis nemini est damnosus."—2 Inst., 287.

It has been agreed that "there was no proof that defendants, Vance & Moseley, gave directions as to the application of the payments made or that the plaintiffs made any application, otherwise than as appears, to the general account stated." And the appellants now claim that the application of these credits should be made, by operation of law, to the outstanding items—that is to say, to those items of the account not covered by the mortgage. And this by act or operation of law! The law prejudices no man. It is indeed asking much of the Court to do that which if Vance & Moseley themselves had directed would have made them liable to be adjudged involuntary bankrupts.

The second ground of appeal involves the question of difference between that which is a penalty and stipulated damages.

It would be difficult, perhaps, to find a more fruitful cause of litigation, and it is not an extravagant assertion to say that the books are full of decisions upon this subject.

It is, however, safe and well to premise "that the Courts have generally shown an inclination to treat a sum so reserved rather as a penalty than as liquidated damages."—Chit. Con., 764, foot note 2, where the cases are collected.

II. A careful review of nearly all of these cases has induced the following conclusion: Whenever the damages provided against are in their nature uncertain in amount, impossible of ascertainment or capable of being ascertained only at great expense and difficulty, "it is neither illegal nor unreasonable" in the parties, by their mutual agreement, to

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settle the amount of damages uncer*tain in their nature, incapable of ascertainment or only possible of ascertainment by great trouble and expense; and, upon the other hand, wherever the breaches provided against are susceptible of easy and accurate valuation, the Courts have invariably construed the breach of the covenants to be a penalty and not liquidated damages.

III. All the cases are divisible into two general classes as follows: Liquidated damages are recoverable when agreed upon by the parties for breach of the following and like covenants:

1. Upon the dissolution of a copartnership at law, the outgoing partner covenanted not to interfere with the clients of the late firm, or carry on the business of an attorney with-

in fifty miles of a place named, nor in any respect infringe that covenant. Breach held to entitle plaintiff to recover whole amount stipulated.—Galsworthy v. Strutt, 1 Excheq., 659.

2. Where the good will and material of a newspaper were sold for $3,500, valuing the material at $500 and the good will at $3,000, and the vendor covenanted with the vendee in the sum of $3,000 not to publish another newspaper in the same town for the space of seven years, upon breach of the covenant, held that the whole amount stipulated was recoverable as liquidated damages.—Dakin v. Williams, 17 Wend., 447; Williams, survivor, v. Dakin & B., 2 Wend., 201.

3. Where a builder stipulates for the completion of a dwelling house in a given time, and in default covenanted to deduct $100 per month until completion, upon breach of the covenant, builder held liable for the $100 per month as liquidated damages, and this upon the ground that owner of house was subjected to much inconvenience for want of the house, annoyed by the presence of the workmen, &c., the equivalent of which, in money, was incapable of being ascertained by proof.—Worrell v. McClinaghan, 5 Strob., 116.

Other examples might be cited as to liquidated damages, but these and such as these will be found, upon careful observation, to include all that can be referred to this class.

As to cases of penalty, as contradistinguished from liquidated damages:

It may be as well to dispose, in limine, of the expression contained in the covenant "to pay as liquidated damages."

In Kemble v. Farren, (6 Bing., 141,) the plaintiff agreed to pay to defendant £3 8s. and 6d. per night for performing in his the-

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atre *for four seasons, and the agreement contained a stipulation for the payment of £1,000 if either party should neglect or fail to fulfill the agreement, and the said sum was declared by the parties to be liquidated damages and not a penalty. Breach that defendant refused to act during the second season, and plaintiff claimed £1,000. Verdict for plaintiff £750, subject to a motion to increase the verdict to £1,000 if the Court should adjudge it to be a case of liquidated damages. The verdict held to be correct. The Chief Justice, in delivering the opinion of the Court, said: "It is difficult to suppose any words more precise or explicit than those used in the agreement; the same declaring, not only affirmatively that the sum of £1,000 should be taken as liquidated damages, but negatively also that it should not be considered as a penalty or in the nature thereof."

And to like effect is Astley v. Weldon, 2 B. & P., 851.

Suppose the defendants had shipped five hundred bales of cotton as stipulated, valued at the average price of those that were shipped, say $45.30 per bale, the plaintiffs' commissions at 2½ per cent., less the return commissions of 1 per cent., would have amounted to $305.77 instead of $900, as claimed by them; that is to say, for the labor and trouble, care and diligence of handling four hundred and fifty bales of cotton the plaintiffs would have received $305.77, whilst, on the other hand, without labor, trouble, care or diligence, they claim the right to receive $900.

Can it be concluded otherwise than in the language of the Chief Justice in Kemble v. Farren (supra,) that this is precisely the case "in which Courts of equity have always relieved, and against which Courts of law have, in modern times, endeavored to relieve by directing juries to assess the real damages sustained by the breach of the agreement?"

Sustaining this exposition of the law may be found the more recent cases of Galsworthy v. Strutt, (supra); Price v. Green, 16 M. & W., 346; Homer v. Flintoff, 9 M. & W., 678; Beckham v. Drake, 8 M. & W., 846; Boyce v. Ancell, Scott. 364.

VI. What is the difference between this case and a common money bond, with a penalty, where the obligor binds himself to pay twice the number of dollars stipulated in the condition?

Does not the old form of "judgment final" entitle the obligee to recover only the condition of the bond with the accrued interest as the measure of actual damages?

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*Wherefore, in this case, would it not be safe and just to conclude that, the damages complained of being easy of ascertainment, that that which can be made certain is to be regarded as certain? that the plaintiffs are entitled to recover no more than the actual damages sustained? That this is not to be likened to the cases to be found in the books allowing liquidated damages, first, of the removal of the lime kiln, which was a nuisance; second, nor to the turning up of meadow lands, which was a matter of fancy; third, nor to the cutting down of forest trees which injured a pleasant prospect; fourth, nor to the inconvenience of not being let into the building and the disagreeable presence of the workmen; fifth, nor to the establishment of a rival business, the injury resulting from which could not be shown except by troublesome and expensive investigation, if at all, but, upon the other hand, is a matter susceptible of easy and exact proof, and is, therefore, a case of penalty, according to all of the authorities, and not one of liquidated damages?

VII. Judge Cowen, the author of the reports which bear his name, in the case of Spencer v. Tilden, (5 Cowen, 150,) in a note to that case, says:

"This doctrine, which converts damages

apparently stipulated or fixed by the parties into a penalty came from the civil law, through the Court of Chancery, and has at length obtained a firm hold in the Courts of common law. It is obvious that, in order to enforce it, Courts must disregard the particular expressions of the parties; for the moment we agree that a party may, by calling a real penalty liquidated damages, or throwing it in the form of an alternative in a contract, or substituting its payment for some specified default, secure the whole to himself, without regard to the real damages, we bring back the oppressive rule of the common law. The griping creditor will always use the particular form or phraseology of contract which will secure him his pound of flesh, unless the Courts interfere in all cases and tell him that, from the very nature and essence of his bond, whatever he claims, and in whatever shape or upon whatever footing, if it be in truth plainly beyond the legal amount of damages, so far it shall be no more than nominal."

Hence he concludes that the rule laid down by Mr. Holt, in his note to Barton v. Glover, (Holt's N. P. Rep., 43,) is the true one, viz.: "Where a sum of money, whether in the

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name of a penalty *or otherwise, is introduced in a covenant or agreement merely to secure the enjoyment of a collateral object, the enjoyment of the object is considered as the principal intent of the deed or contract, and the penalty only as accessory, and, therefore, only to secure the damages really incurred."

The true and only consideration of the stipulation touching the 500 bales of cotton is the amount of damages which the plaintiffs have sustained by the failure of the defendants to ship the cotton.

The misfortunes of the debtors, who have failed, are not to be regarded as crimes deserving of punishment as in the Court of Sessions. They failed to comply with their contract from causes which were beyond their control. The extent of that failure and its causes are well known, and the damages actually sustained by these plaintiffs are susceptible of easy and exact ascertainment, and to that amount the recovery on the breach of the covenant should be limited.

McGowan & Parker, same side:

1. So far as executed, the parties must be presumed to act with reference to all the stipulations of the covenant. The largest part of the credits was from proceeds of cotton shipped in accordance with the stipulations of covenant, and Vance & Moseley must be presumed to have shipped the cotton with reference to the sums of indebtedness secured by the covenant and mortgage.

It would be monstrous injustice to permit Geo. W. Williams & Co. to claim damages for non-fulfillment of one clause of the covenant, and at the same time to apply the cotton shipped in partial fulfillment of same clause to the payment of indebtedness not secured by the same covenant.

In the absence of any proof as to application by debtor or appropriation by creditor with his knowledge or acquiescence, and without notice of such appropriation, the law will apply the payment according to the intention of party as ascertained from the circumstances of the case.

"But if at the time the debtor makes the payment he declares that it is specifically made in discharge or in part liquidation of a particular account, or if the circumstances show that such was his intention, the creditor is bound thereby and he cannot apply it to any other demands."—Chit. Con., 761,

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marg. p. 650; Newmarsh v. *Teally, East., 239; Peters v. Anderson, 5 Taunt., 596; Shaw v. Picton, 4 B. & C., 715; Reed v. Boardman, 20 Pick., 442; Hall v. Martin, 17 Mass., 575; Bonaffe v. Woodbury, 12 Pick., 463; Berian v. Mayor of New York, 4 Rob., 558.

2. But as to payments made in May and June, 1876, of $893.32, no other application can be made than to the payment of the debt of V., M. & Co., (the oldest,) or the debt of V. & M., or advances made up to that date. At that time these were the only sums due to plaintiffs by V. & M., (and it is immaterial to which applied,) and payments must be so appropriated.

A debtor may pay a debt not due, if we admit these sums not to be due. The recitals of the covenant showed that V. & M. were embarrassed; that they needed cash and goods to enable them to carry on their business.

Their intention must govern, and it cannot be supposed that they intended that sum to remain unapplied in the hands of G. W. W. & Co. until April, 1877. "If neither party makes any specific application of money paid at the time of payment, the law applies it to the oldest claim then held by the party receiving against the party paying; and if there is but one such claim then existing or due, it must apply to that."—Shipway v. Bowery National Bank, New York, 36 N. Y., 501.

To oldest debts, when several.—Mulliken v. Tafts, 31 Maine, 497; Caldwell v. Wentworth, 14 N. Hamp., 431; also, Walter v. Richardson, 11 Rich., 466.

Second. But this was one entire and running account and not two distinct accounts as claimed.

1. This is evidenced by the plaintiffs submitting it as such to defendants, V. & M., on 12th February, 1877, and setting it forth with their account current exhibited as a "bill of particulars" with their complaint.

2. By their making no stop or rest in the account after they had advanced in full the sums covenanted.

3. By their blending together and intermingling the various sums of cash advanced, over and beyond the several sums covenanted, with the items of bills for merchandise sold and delivered under the covenant. To make the mortgage debt and the subsequent advances two distinct debts, it will be necessary to separate the bills for merchandise from the subsequent unsecured advances and rearrange the whole so as to make two ac-

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counts. This cannot now *be done, even if it could have been done before suit. Plaintiffs evidently did not so regard it. It was an after thought, and emanated from the ingenuity and legal acumen of counsel.

4. Because in order to make two separate accounts, it will be necessary to divide one item, to wit: The advance on 19th April, 1876, to J. A. Birch, carter, of $163.60, so as to apportion $135.58 to the mortgage debt and $28.02 to the account for subsequent advances, this sum, $163.60, being in excess of the cash covenanted to be advanced by the latter sum, viz., $28.02. This plaintiff did not and cannot now do.

"Prima facie the doctrine as to the appropriation of payments does not apply where there are not distinct accounts, or where separate accounts are treated as one entire account by all parties. In such cases, therefore, payments made generally are presumed to have been made in discharge of the earlier items of the account, although at the time of payment the debtor was silent on the subject."—Chit. Con., 766, marg. p. 654; United States v. Kirkpatrick, 9 Wheat., 720; Postmaster General v. Furber, 4 Mason, 336; Baker v. Stackpole, 9 Cowen, 435; Pemberton v. Oaks, 4 Russell, 154; Clayton's case, 1 Meriv., 572; Bodenham v. Purchase, 2 Barn. & Ald., 39; Williams v. Rawlinson, 3 Bing., 77; Upham and others v. La Farvfour, 11 Metc., 174; Webb v. Dickinson, 11 Wend., 62; Seymour v. Vandyck, 8 Wend., 418; Trescott v. King, 2 Selden, 147; Shepherd v. Steed, 43 N. Y., (Hand 4,) 52; Coleman v. Lansing, 65 Barb., 54; Smith v. Wigley, 3 M. & Scott, 174; Steindale v. Hawkinson, 1 Sim., 393.

4. But the items of advances beyond covenant were not separate and distinct accounts or debts upon which the plaintiff could have sued separately, and, therefore, the payments should not, as claimed by their counsel, be applied to these accounts as due in preference to the other demands under the covenant.—Walter v. Richardson, Rich. L., 466.

5. But, supposing them to be two separate accounts, (or many, if each item constitutes a separate debt, as claimed by the plaintiffs' counsel,) the payments must be applied to the mortgage debt. "If a debt is due on mortgage and open account and partial payments are made by the debtor without any application, the law will apply the payment to the mortgage debt."—Dorsey v. Garmany, 2 Har. & J., 402; Pattison v. Hull, 9 Cowen, 747; Deverynes v. Noble, 1 Meriv., 570; Trescott v. King, 2 Selden, 147; Dows v.

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*Moorewood, 10 Bar., 183; Allen v. Culver, 3 Denio, 284; Cassen v. Alders and Trustees, 5 Metc., 268; Wardlaw & Edwards v. Hunter, 6 S. C., 74; Lawton v. Maner, 10 Rich., 323.

The following cases in S. C. Reports examined and found not to conflict: Heilbrun v. Bissell & Warren, Bail. Eq., 430; Stewart v. Cochran and others, Bail. Eq., 380; Ordinary v. McCollough, 3 Strob., 494; Adams v. Krimager, 1 McM., 309; Carson v. Hill & Jones, 1 McM., 76; Smith ads. Scriven, 1 McC., 368, top p. 230; Jones v. Kilgore, 2 Rich. Eq., 62; Gowan v. Tunno, Rich. Ch. C., 369; McDonald v. Pickett, 2 Bail., 617; Schnell v. Schroeder, Bail. Eq., 328; Black v. Schroeder, 2 McC., 293.

Second. As to "liquidated damages."—Chit. Con., Chap. VI. p. 763; Shoot v. Taylor, 5 Metc., 61; Spencer v. Tilden, 5 Cowen, 150; Worrell v. McClenaghan, 5 Strob., 116.

The excessive amount claimed as "damages," though denominated "liquidated," show that the parties themselves regarded it as a penalty. The "damages" sustained by Geo. W. Williams & Co. by the failure of Vance & Moseley to ship 450 bales was the loss of commissions on the sales of the cotton. Commissions are charged for services rendered in selling, collecting proceeds and remitting.

March 21, 1878. The opinion of the Court was delivered by

WILLARD, C. J. The solution of the various points of objection raised by the appeal depends on the construction of the contract set forth in the complaint. The transactions covered by the contract were those of merchants dealing together, in the course of their business, to promote business objects, and when it becomes necessary to clear up any doubt arising on the face of the instrument resort may be had to the nature of the business transactions by the respective parties so far as it enters into the contract, in order to define its motives and objects, and thus to lay hold of the key of construction.

The plaintiffs appear in the transaction as merchants residing and doing business in Charleston, selling merchandise, making advances on cotton shipped to them for sale and making sales of cotton upon commission. The defendants, Vance & Moseley, appear as merchants in the interior of the State, purchasing goods in Charleston for resale, and shipping cotton for sale through that city, taking cash advances on consignments of cotton for sale.

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*The leading objects of the contract on the part of the plaintiffs appear to be, first, to obtain security, by way of mortgage, for a past debt due by V. & M. individually and another assumed by V. & M., but originally due from Vance, Moseley & Co., upon an ex-

tension of time for the payment of such debts; second, to obtain security, by way of mortgage, for future sales of merchandise to V. & M., on time, to a limited amount; third, to procure consignments of cotton from V. & M., to be sold on commission, they making cash advances, secured in part by mortgage. The last named object was secured by stipulations on the part of V. & M. to ship a certain quantity of cotton, the plaintiffs agreeing as to the amount of the commissions to be charged for its sale, and also V. & M. agreeing, in the event of their failure to ship the required amount of cotton, to pay for such default a stipulated sum per bale as liquidated damages for such failure.

The objects of the contract on the part of V. & M. appear to have been to get time on account of their debt and that due on account of V., M. & Co.; second, to get a credit for merchandise to a limited amount; third, to obtain cash advances for a fixed amount and fixed time; and, further, to secure reduced commissions on sale of their cotton consigned to plaintiffs.

We have only to consider those features of the contract that provide a mortgage security for goods sold and cash advanced and those that relate to the mode of dealing with consignments of cotton, including the liquidated damages for failure of shipment, there being no question before us as affecting that part of the contract that provides for the payment of past debts. The contract, then, as it stands before us for construction, relates to future mercantile transactions between the parties.

Plaintiffs were bound to sell merchandise to a limited amount and upon certain conditions as to length of credit and interest on sales. They were also bound to make cash advances to a certain limited amount, for which they would hold the mortgage security. These secured cash advances would not be sufficient to cover the whole of the cotton agreed to be shipped, but it is to be presumed that both parties anticipated that, as the consignments of cotton went forward, the plaintiffs would make the customary advances on consignments, independently of the limit of the contract, holding, as the plaintiffs would in that case, the mortgage as security to the extent of the contract and the cotton as to

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any excess. The natural *results of this course of dealing would be that the plaintiffs would not be at liberty to retain the proceeds of cotton sold for the account of V. & M. to any greater extent than would be necessary to keep the indebtedness of V. & M. within the limit agreed for cash advanced; the balance in their hands derived from consigned cotton, less commissions and expenses, the defendants, V. & M., would be entitled to receive in the ordinary course of business. In other words, the plaintiffs' situation, as it regards the proceeds of cotton sold for the account of V. & M., would differ from that of ordinary consignments or commissions only in the respect that they would not be able to retain such proceeds to the full amount of current advances on the cotton, but only to the extent necessary to keep their cash advances within the limit of the contract. Thus plaintiffs would hold the mortgage as agreed security for advances up to the limit agreed upon and until that limit should be passed; as they realized proceeds of the sale of consigned cotton they would be required to hold such proceeds, less commissions and expenses, subject to the draft of the defendants, V. & M. This is the conclusion that would arise from considering the general objects of the contract; and the question arises whether it consists with the terms of the contract.

Before looking to the specific terms of contract, it will be convenient to refer to the views of the defendants as to its true construction.

They say, in the first place, that the plaintiffs agreed to advance cash to a prescribed amount, and to sell merchandise to a fixed amount; that, in point of fact, they advanced more money and sold less goods than the contract called for, and that the mortgage only stands for the security for cash advanced to the fixed amount, the excess of cash advances being unsecured, and that the plaintiffs cannot gain an advantage in this respect from the fact that the amount of goods sold was less than the contract called for, and that the difference should not be added to the amount of cash agreed to be advanced, giving security beyond the limited amount. The next point made by the defendants is that all moneys of the defendants, V. & M., that came into plaintiffs' hands should have at once been credited as against the cash advances called for by the contract, so as to extinguish such cash advances and discharge the mortgage as it regarded them,—the result of which view would be that V. & M., instead of having a standing credit for a

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year, in addition to that *arising from the value of the merchandise consigned, thus securing them valuable facilities for the transaction of their business, would be in the position to have that cash credit wiped out by the first receipts on sales of cotton, and after that would have no means of credit beyond the value of the cotton consigned. It is hardly to be supposed that V. & M. would have advanced this proposition while the contract giving them a cash credit was outstanding.

The next point of objection is that the provisions stipulating as to liquidated damages import a penalty merely, and that recovery can only be measured by damage proved.

We will examine these propositions in the order stated. It is clear that the covenant of V. & M. covered by the mortgage security looks solely to the aggregate of cash advanced and merchandise sold, as it regards the

amount agreed to be paid, and not to the relative amount of cash. Plaintiffs covenanted "to advance to said Vance & Moseley, on their demand, the sum of $1,446.47 in cash, and to sell and deliver to them, upon their orders, groceries at the customary prices and terms, to the amount of $1,500." V. & M., on their part, agreed to pay plaintiffs the "sum of $2,946.57, the aggregate of the sums of cash to be advanced and groceries, to be sold and delivered to them" by the plaintiffs. The covenant of V. & M., standing by itself, imports an obligation based on such advances of cash and sales of merchandise as should thereafter be made, not to exceed the prescribed amount. It would seem thus to support the conclusion that if V. & M. saw fit to diminish the quantity of goods purchased and to increase the amount of cash borrowed, they would be liable for the aggregate sum, provided it did not exceed the prescribed amount. This covenant must be read with those of the plaintiffs most nearly related as consideration to it and the proper sense derived from both taken together. Plaintiffs' agreement imposed a limit to cash transaction separately. The benefit of this limit was intended for the plaintiffs. The defendants, V. & M., wanted credit, and accordingly that construction of their covenant which afforded the largest and the most flexible credit would be the object they would naturally pursue. It was evidently most favorable for V. & M. that in case they did not need groceries to the amount stipulated their cash credit might receive a corresponding benefit. It may be assumed that the interest of the plaintiffs was to sell goods and not to

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lend money. The event *showed that V. & M. were more concerned to borrow money than buy goods. There was nothing in the contract to prevent the plaintiffs at any time from waiving the limit of cash advanced in favor of a request from V. & M., and such a concession to V. & M. could not with propriety operate to defeat their covenant when clearly covered by its language.

There is no ground to narrow the terms of the covenant of V. & M., as it stands expressed, by any inference drawn from the terms of the covenant on the part of plaintiffs, and it must be enforced as it stands. The result of this conclusion is that the amount of cash advanced and groceries sold, not exceeding the sum of $2,946.57, with interest added, as prescribed by the contract, is properly chargeable as secured by the mortgage. The judgment below is, therefore, erroneous in this respect.

The next proposition relates to the mode in which cash advances and net proceeds on the sales of consigned cotton should be charged. The covenant of V. & M. was to pay the sums of cash advanced and groceries sold on the first day of April, 1877. It follows that payment of such amounts could not be demanded until that time, and it follows, also, that sums of money coming into the hands of the plaintiffs for the account of V. & M. over and above any amount in which V. & M. might be indebted on other account than that to which the contract related are to be considered as held subject to the draft of V. & M., the plaintiffs having no right to make any other appropriation of them whatever. It is not to be assumed that the parties intended that the whole yearly transactions of V. & M. with plaintiffs as it regards cotton should be tied up in the hands of the plaintiffs as security for debts due, groceries sold and cash advanced when otherwise fully secured. On the contrary, the very object of the mortgage must have been to render V. & M. free to transact their business in the most favorable method during the life of the credit given by the contract. Such is the clear reason and sense of the contract, and, while the transaction was current between the parties, they seem to have acted upon it. Now that V. & M. have reaped the benefit of the contract, they cannot properly deny such construction, patent on the face of the contract and carried out in the practical operation under it. It follows that the report of the Referee and the decree upon it are erroneous in charging the sums of cash advanced and

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amounts realized from *consigned cotton against the amount secured by way of mortgage. On the contrary, the account should be made up by striking a balance between current debits and credits for cash and groceries and charging such balance, if it does not exceed the amount stipulated by the contract, namely, $2,946.57, with accumulations of interest, computed according to the contract, and that sum, added to the aggregate debts of V. & M. and V., M. & Co., with interest according to the contract, must be decreed as due under the mortgage.

The next question arises on the language of the contract immediately following the agreement to consign 500 bales of cotton, which is as follows: "And to pay as liquidated damages two dollars for each and every bale of cotton less than 500 bales which they might fail to consign and ship to them as stipulated."

The right of parties to a contract to fix the amount of damages, in their nature unliquidated, by an agreed sum or rate of damages is fully recognized by all the authorities. This does not apply to cases where the damage is fixed by law, as in case of damages in failure to pay money stipulated, because in these cases the damage is not in its nature unliquidated, but the rule of damages is fixed with regard to considerations of public policy. It will not be necessary to consider the various exceptions depending on the same general principle above stated, as they do not affect the present case.

In cases where the parties are at liberty to fix the measure of damages by an agreed sum or rate, the question is one of intent merely.

When the parties declare that the sum or rate fixed shall be deemed liquidated damages, and the case is one in which they are at liberty so to declare, such declaration must stand unless inconsistent with other parts of the same instrument or unreasonable in itself.

In inquiring whether it is reasonable it is not necessary to ask whether it is wise or considerate, but whether it is in conflict with the principles and practices that govern transactions of a like nature. This certainly cannot be affirmed of the present stipulation. It does not fix a round sum incapable of adapting itself to the degree of failure to perform, but a rate by which a greater or less failure might be measured. We cannot say from anything before us that that rate is either more or less than the actual damage that could be proved. We have a measure

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of damage in part in the *agreed rate of commissions, but we cannot say from the record that there was no other measurable element of value to the plaintiffs in the consignments of cotton than the commissions to be earned. General experience, if we could resort to it, would lead to an opposite conclusion.

It was perfectly reasonable, in providing for further mercantile transactions that might be interrupted by unforeseen circumstances, that the parties should fix a rule of liability by means of which, in case of failure to perform, their accounts might be adjusted without the necessity of a law suit.

When the contract, according to its intention, is one of liquidated damages, it becomes necessary, before applying such rule of damage, to inquire whether the breach and the damage in any particular case is of the kind in the contemplation of the parties in fixing the measure of liability. While many cases have arisen where the resulting damage has been found so essentially different from that contemplated by the parties as to defeat the apparent intent of the contract in that respect, [Higginson v. Meld, 14 Gray, 156,] the present case is free from any such aspect. The case that has arisen is obviously the very case contemplated by the parties in fixing the measure of liability imposed. We find nothing to prevent the express declaration of the parties in this respect from having its full force and effect.

The plaintiffs are entitled to the sum stipulated in respect of each bale which the defendants Y. & M. failed to ship in accordance with their contract in addition to the sum already referred to.

The decree and the report of the Referee must be set aside so far as they conflict with the foregoing determinations and the cause remanded for further proceedings conformable herewith.

McIVER, A. J., and HASKELL, A. J., concurred.

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*JONES v. MASSEY.

(Columbia. Nov. Term, 1877.)

[*Wills* ⇐630.]

Where a will made a specific allotment of slaves, by name, to legatees, "to be laid off, allotted and vested on the division and partition of my estate," which division and partition the will directed, it was held that until such division and partition was made the slaves did not vest in the legatees but remained part of the estate.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1468; Dec. Dig. ⇐630.]

[*Guardian and Ward* ⇐42.]

Where a will directed a partition and division of the estate, real and personal, to be made, but did not direct how it should be made, a partition by the authority of the executor, with the consent of the guardians of an infant, was held to be void as against the infant.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. § 176; Dec. Dig. ⇐42.]

[*Limitation of Actions* ⇐182.]

A defendant cannot avail himself of the defense of the Statute of Limitations unless he sets it up as a defense by his answer as required by § 97 of the Code of Procedure.

[Ed. Note.—Cited in Richland County v. Miller, 16 S. C. 255.

For other cases, see Limitation of Actions, Cent. Dig. § 678; Dec. Dig. ⇐182.]

[*Equity* ⇐405; *Reference* ⇐47.]

Where the terms of a reference direct the Referee to take testimony and report the same, he must confine himself to the direction, and he has no authority to determine issues of law and fact.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 885; Dec. Dig. ⇐405; Reference, Cent. Dig. § 78; Dec. Dig. ⇐47.]

[This case is also cited in Fitzpatrick v. Wylie, 76 S. C. 262, 270, 56 S. E. 364, 1039, as to facts.]

Before Mackey, J., at Lancaster, August, 1876.

This was an action by Churchill B. Jones, trustee of Sarah Jones, and guardian of James R. Massey, Jr., against James R. Massey and others, defendants.

The facts of the case are fully stated in the report of the Referee, to whom it had been referred to take the testimony, and in the decree of the Circuit Court.

The report is as follows:

Mrs. Elizabeth Massey died in 1859, leaving a will, of which Dixon Barnes was sole executor. She devised to her son, the defendant, James R. Massey, certain mills on her plantation on the Catawba River and one hundred acres of the land surrounding; also, one undivided half of the remainder of said plantation. She also bequeathed to her said son, and to her daughters, respectively, certain personal property, in said will specified. She then disposes of the residue of her real and personal estate, including all of her slaves, as follows: One-fourth thereof each to her daughter Elizabeth Massey, (now Elizabeth Beckham,) her daughter Sarah Jones and her son, the said James R. Massey, and

the remaining one-fourth in the proportions of one-third of said one-fourth each to James R. Massey, Jr., Charlotte A. Massey, (now Charlotte A. Beckham.) and Mary Elizabeth Massey, children of a predeceased daughter of testatrix. The will directs the allotment of slaves, naming the slaves which she desires each legatee shall have, and directs that they "take said negroes at their appraised

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value and account for *said negroes at their appraised value in the division, to my other other legatees."

The complaint herein was filed on the 20th day of June, 1871, alleging amongst other things, that the several parties took possession of their slaves, after an appraisement, in accordance with the provisions of the said will. That the defendant, James R. Massey, has been in the exclusive enjoyment of all of said realty since the beginning of the year 1861, and asks for an equalization and settlement of the shares of the slaves and other personalty, and for an accounting against the defendant, James R. Massey, for rents and profits, and for partition of the land.

The defendant, James R. Massey, denies his liability to pay on account of the slaves; denies that there was an appraisement and setting off of slaves, as directed by the will, and alleges that they remained upon the plantation as common property until they were emancipated; denies that there were any rents and profits of the plantation, and alleges that he cultivated no more than his proportionate share of the land.

The answers of the other defendants do not controvert any material allegation of the complaint.

An order made in the case on the 19th of February, 1872, directs that "it be referred to John M. Beaty, as a Special Referee, to take the testimony offered by the various parties litigant to establish their various rights and claims, and that he do report the same to this Court, with his findings in any special matter. That Daniel W. Brown, executor of Dixon Barnes, deceased, have leave to account for the administration by his testator of the estate of Mrs. Elizabeth Massey;" and, by a subsequent order, the undersigned was appointed Referee in the room of the said John M. Beaty.

The defendant, D. W. Brown, has not been before the Referee, and the plaintiff appears to have abandoned that branch of the case relating to the account of Dixon Barnes.

Testimony has been taken bearing upon the other issues made by the pleadings, except as to the partition of the lands, now pending.

The defendant, James R. Massey, on the opening of his defense before the Referee, gave notice that he pleaded the Statute of Limitations to the various claims set up against him; also notice of discount against any recovery which might be found against him by demands in his favor against the estate of testatrix for money due by her as said defendant's guardian, and offers evidence in support of said claim.

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*A similar claim was presented in favor of each of the defendants Charlotte A. Beckham and Mary Elizabeth Massey, and the returns of Mrs. E. Massey, as their guardian, offered in support thereof.

After hearing the testimony and the argument of counsel, the Referee presents the following findings of facts and conclusions of law:

Findings of Fact:

I. That about the 1st of January, 1861, the negroes named and allotted by Mrs. Massey in her said will were valued by certain persons, who were called together for the purpose by Dixon Barnes, the then executor of said will, and the said negroes placed in the possession of the parties to whom they were severally allotted, or to the guardian of such of said parties as were then under age. That the defendant James R. Massey was then a minor, and was represented at the appraisement of the negroes by his guardian, Francis P. Ingram, who assented to what was done. That the defendants Mary Elizabeth and Charlotte A. Massey were also minors, and were represented by Dixon Barnes, whether as guardian or as executor of Mrs. Elizabeth Massey, who was their guardian at her decease, does not appear.

II. That the aggregate value of the slaves allotted to James R. Massey was seven thousand five hundred dollars ($7,500). The aggregate value of Elizabeth Massey's, (now Elizabeth Beckham,) three thousand two hundred dollars ($3,200). Of Mary Elizabeth Massey's two thousand eight hundred and fifty dollars ($2,850). And of Charlotte A. Massey's, (now Charlotte A. Beckham,) two thousand three hundred and fifty dollars ($2,350). Making the total value of all the negroes the sum of fifteen thousand eight hundred and fifty dollars ($15,850).

III. That James R. Massey received, in excess of slaves, the sum of three thousand five hundred and thirty-seven 50-100 dollars ($3,537.50); Mary Elizabeth, in excess of her share, one thousand four hundred and seventy-nine 17-100 dollars ($1,479.17); and Charlotte A. Beckham, in excess of her share, one thousand and twenty-nine 17-100 dollars ($1,029.17). That Elizabeth Beckham received less than her share the sum of seven hundred and sixty-two 50-100 dollars ($762.-50). That no negroes were allotted to Sarah Jones or to James R. Massey, Jr.; the will

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having directed *that they receive their shares in money, which, according to the said valuation, would be the sum of three thousand nine hundred and sixty-two 50-100 dollars for Mrs. Jones, and the sum of

one thousand three hundred and twenty 83-100 dollars for J. R. Massey, Jr.

IV. That the slaves allotted to James R. Massey, remained upon the plantation devised by Mrs. Massey, superintended by his said guardian, up to the period of his ward's majority, and by said Massey after that time, until they were emancipated in 1865. That James R. Massey attained his majority on the 16th day of September, 1862. That the slaves of Mary Elizabeth and Charlotte A. Massey were hired by Dixon Barnes to the said F. P. Ingram, guardian, on the day of the appraisement, for the ensuing year, and that they, too, remained upon the plantation in the service of James R. Massey until they were emancipated. The slaves allotted to Elizabeth Massey were taken away by her.

V. That besides the negroes there were other articles of personalty not specifically willed, and belonging to the residuary estate, worth, in the aggregate the sum of twelve hundred and fifty-six dollars ($1,256). That James R. Massey received of said property (consisting principally of corn and other supplies for the plantation) to the value of eleven hundred and fifty-six dollars, his guardian assenting thereto; and that the defendant Elizabeth Beckham received of the same to the value of one hundred dollars.

VI. That the defendant James R. Massey has been in the exclusive possession of all of the lands devised by the said will, from 1861 to 1873, inclusive, and that the rental value of said land (exclusive of the profits of the mills) was, for each of said years, as follows: For 1861, the sum of $1,000; for 1862, $1,000; for 1863, $500; for 1864, $500; for 1865, no value; for 1866, $2,250; for 1867, $1,000; for 1868, $1,750; for 1869, $1,600; for 1870, $1,200; for 1871, $1,200; for 1872, $1,400; for 1873, $1,200; making the total rental value for all the years fourteen thousand six hundred dollars ($14,600).

VII. That during the same period the said defendant expended for improvements, which have been of profit to the estate, the sum of three hundred dollars, ($300,) and that he has paid the taxes on the land during the same time to the amount of five hundred and fifty-two 21-100 dollars ($552.21).

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*VIII. That the profits of the mills have been during the same period, the sum of nine thousand one hundred dollars, being at the average rate of seven hundred dollars per year.

IX. That there was due to the said James R. Massey, from the estate of the said Elizabeth Massey, on account of the said guardianship claim, up to January 1st, 1861, the sum of three thousand one hundred and fourteen 60-100 dollars, and that the returns of Elizabeth Massey, guardian of the defendants, Charlotte A. and Mary Elizabeth, do not show any sum due by said guardian to either of said wards.

X. That the lands devised under said will aggregate seventeen hundred and fifty-one acres.

Conclusions of Law:

I. That the defendants James R. Massey, Mary Elizabeth Massey and Charlotte A. Beckham should pay the said excess received by them severally over their respective shares in slaves as aforesaid, with interest from the first day of January, 1861, to the plaintiff and to the defendant Elizabeth Beckham, in the proportion of three thousand nine hundred and sixty-two 50-100 dollars ($3,962.50) to the plaintiff as trustee for Sarah Jones, one thousand three hundred and twenty 83-100 dollars ($1,320.83) to the plaintiff as guardian of James R. Massey, Jr., and seven hundred and sixty-two 50-100 dollars ($762.50) to the defendant Elizabeth Beckham, and with interest on said sums respectively from the first day of January, 1861.

II. That of the said sum of eleven hundred and fifty-six dollars ($1,156.00), the value of personal property not specifically willed, and received by James R. Massey as aforesaid, the said James R. Massey should pay one-fourth each to the plaintiff as trustee for Sarah Jones, and to the defendant Elizabeth Beckham; and one-third of one-fourth of said sum each to the defendants Mary Elizabeth Massey and Charlotte A. Beckham, and to the plaintiff as guardian of James R. Massey, Jr. And that of the said sum of one hundred dollars, the value of said personalty received by Elizabeth Beckham, the said Elizabeth Beckham should, in like manner, pay the one-fourth each to the plaintiff as trustee for Sarah Jones and to the said James R. Massey, and one-third of one-fourth each to Mary Elizabeth Massey, Charlotte A. Beckham and to the plaintiff as guardian of James R. Massey, Jr.

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*III. That from the said sum of fourteen thousand six hundred dollars, the aggregate of rents as aforesaid, there should be deducted the sum of three hundred dollars for repairs, and the further sum of five hundred and fifty-two 21-100 dollars paid out for taxes as aforesaid. That the said sum of rents should then be further reduced in the proportion as one hundred is to seventeen hundred and fifty-one. That the remainder should then be divided by two; that after the division by two the residue of said sum should be applied by the defendant James R. Massey as far as may be necessary in satisfaction of the said debt of three thousand one hundred and fourteen 60-100 dollars found to be due to said defendant from the estate of Elizabeth Massey on guardianship accounts, as aforesaid, with interest on said sum from the first day of January, 1860; the defend-

ant James R. Massey to be charged with interest upon that portion of said rents termed the residue, after the division by two as aforesaid, from the end of each rent year as the said rents would accrue. That after the satisfaction and payment of the said guardianship debt, the defendant James R. Massey should from the balance of said rent moneys, with the accumulations of interest, pay one-fourth of said balance and interest each to the plaintiff as trustee of Sarah Jones, and to the defendant Elizabeth Beckham, and one-third of one-fourth to the defendants Mary Elizabeth Massey and Charlotte A. Beckham, and to the plaintiff as guardian of James R. Massey, Jr.

IV. That the defendant James R. Massey is not liable to pay to the other parties in interest any portion of the profits of the mills.

Exceptions by Defendant, James R. Massey, to Report of Referee:

I. Because, although under the order of reference no authority to decide either issues of law or fact is conferred, he has undertaken in his report to do both.

II. Because, although by the order of reference he was only empowered "to take the testimony offered by the various parties litigant to establish their various claims and to report the same to the Court with his findings in any special matter," he has not only undertaken to decide that this defendant is bound by law to account for the value of sundry slaves and other property belonging to the estate of Mrs. Elizabeth Massey, deceased, and for rent of lands belonging to said estate, but has also held this defendant to an accounting and adjudged him to be chargeable with large balances of money on said account.

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*III. Because the executor of Mrs. Elizabeth Massey's will never assented to the legacy of the slaves contained in said will, with the estimated value of which this defendant is charged in said report.

IV. Because the assumption by the Referee, in his report, that the executor had assented to the legacies, and that a partition of the personal estate of the testatrix, in accordance with the provisions of her will, was made on the 1st day of January, 1861, binding on this defendant, who was then a minor, under twenty-one years old, is wholly unwarranted by the law and testimony.

V. Because, even if such partition was or could have been made, the slaves and other property charged in the report against this defendant could only have been received by his guardian, Francis P. Ingram; and that, according to the conditions of the bequest, only upon his accounting to the other parties for the excess of their value over the share of this defendant under the will. The Referee erred in assuming that said guardian did or could become the owner of said slaves without first accounting for said excess.

VI. Because this defendant claims, under the terms of the will, the whole of the land therein mentioned, having signified his election on the partition thereof, now herein pending to take the same, and to require that the same be vested in him at the appraised value thereof on said partition. The Referee has charged this defendant on an account for the rents thereof.

VII. Because the Referee has overruled and disregarded the Statute of Limitations, formally urged before said Referee, to protect this defendant against the charges made.

Decree:

On the 19th day of February, 1872, by an order of this Court, it was referred to John M. Beaty, Esq., a Special Referee, to take the testimony under the pleadings in this cause, and to report the same with his findings thereon.

W. M. Conners, Esq., now deceased, was afterwards, on motion, substituted for the said Referee, and took the testimony and made his report thereon, as required by the said order.

The issues in the cause came up for trial before me at the May Term, 1876, of the Court of Common Pleas of Lancaster County, upon the report of the Referee and the exceptions thereto filed by the defendant, James R. Massey.

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*At the hearing of the report, and the argument thereon, additional testimony was taken upon the issues of fact involved therein by the defendant, James R. Massey, and the plaintiff, C. B. Jones, both of whom were sworn and examined in open Court.

This additional testimony was taken on motion of the learned solicitor for the defendant, and it is hereunto annexed. In my judgment it tends greatly to confirm the conclusion of the Referee as to the matter of fact to which it specially relates. The report of the Referee is very comprehensive, and appears to be well considered, both as to its findings of law and fact. The two first exceptions to the report allege as error that the Referee has undertaken to decide both the issues of law and of fact.

I am of the opinion that under the terms of the order of reference in the cause the Referee was well warranted in undertaking to find upon all questions of fact and of law arising under the pleadings and the evidence herein. But conceding that the Referee was not required or authorized to find as to issues of law, it is not good ground of exception to his report that it exhibits such gratuitous findings, unless the same can be shown to be erroneous. This has not been done, and the first two exceptions are therefore overruled.

The third exception alleges that the executor of the will of Mrs. Elizabeth Massey

never assented to the legacy of the slaves bequeathed to the defendant, James R. Massey, and that the Referee erred in finding that the executor did assent to such legacy. The testimony abundantly shows that the executor did so assent, and the third exception is therefore overruled.

The fourth exception must likewise be overruled, for the slaves bequeathed by the testatrix to the defendant, James R. Massey, were specifically named and allotted by the express words of the will, and there was nothing left to be done but to appraise and turn them over to the designated legatee. They were accordingly appraised and delivered to F. P. Ingram as the guardian of the said defendant, James R. Massey, pursuant to the terms of the will, and with the assent of the executor thereof. Whether the defendant, James R. Massey, was then a minor or not, is a matter of no legal consequence, for the slaves were allotted by the will and not by the appraisers.

As to the fifth exception, the learned solicitor for the defendant errs in alleging that the Referee, in his report, has assumed that the guardian of James R. Massey did or could become the legal owner of the slaves in question.

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*On the contrary, the Referee held that the legal title and right of property in the slaves bequeathed to the defendant, James R. Massey, vested in the said minor himself, and not in the guardian, and that they were delivered to the guardian as simply the custodian thereof at their appraised value. This exception is, therefore, overruled.

The sixth exception relates to the rents and profits of the lands. The entire landed estate, with the usufruct thereof, was held and enjoyed for many years by the defendant, James R. Massey, in avowed defiance of the terms of the will and in wanton disregard of the rights of his co-devisees, and both law and equity demand that he shall account for the rental thereof. The sixth exception is, therefore, overruled.

The seventh and last exception refers to the Statute of Limitations. The complaint, by proper averments and prayer, demanded that the defendant, James R. Massey, should be held to account for the slaves and other property received by him in excess of his share under the will, and also for the rents and profits of the land from the first day of January, 1861, until the filing of this complaint, and as long thereafter as he continued in possession and enjoyment of the same. The complaint in this action was filed on the ——day of June, 1871.

Notwithstanding the direct averment of defendant's liability for the excess of property received by him, and the demand of the complaint for judgment against him for the rents and profits of the lands, yet he did not, in his answer, plead the Statute of Limitations against any of the plaintiff's demands. He but invoked the statute orally before the Referee, and upon the trial of this cause, when the argument was about to commence on the exceptions to the report, he made a motion for leave to amend his answer by inserting the defense of the Statute of Limitations.

In view of the fact that this cause has been pending on the calendar for five years and that one branch of it has been carried up to the Supreme Court, which Court declared that the defendant, James R. Massey, should account for the rents and profits of the lands down to the time when he elected to take all under the will, I deemed it a just and proper exercise of my discretion, after duly considering all the facts in the premises, to refuse the defendant's motion for leave to amend his answer by inserting the plea of the Statute of Limitations.

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*By an express provision of the Code of Procedure, the Statute of Limitations must be set up in the answer or the defendant cannot avail himself of it as a defense. In view of that provision of the Code and of the well-settled practice of the Courts upon this point, and the utter want of merit or relevancy of such plea in this action, the seventh exception is also overruled.

The findings of fact by the Referee, as set forth in paragraphs I, II, III, IV, V, VI, VII, VIII, and X of the report, have been carefully examined by me, and, in the light of the whole testimony, I am satisfied that they are correct. But the finding contained in paragraph IX thereof, as to the amount due from the estate of Mrs. Elizabeth Massey to the defendant, James R. Massey, is not entirely satisfactory. For if the returns do show such a state of facts as alleged, the executor of Elizabeth Massey, the testatrix, may have had a settlement of this very matter with F. P. Ingram, the latter guardian of the defendant, James R. Massey, and it is difficult to see how such a fact as that stated in the paragraph referred to could be ascertained without making the said F. P. Ingram or his legal representative a party to these proceedings.

This, however, will be passed over for the present, as no point or exception in relation thereto has been made.

The conclusions of law stated by the Referee appear to be fully sustained by the facts in the premises and by the pleadings in the cause.

It is, therefore, ordered, adjudged and decreed that all of the exceptions on the part of the defendant, James R. Massey, to the report of the Referee herein be, and the same are hereby, overruled, and that the said report be, and the same is hereby, confirmed and made the judgment of this Court.

It is further ordered that it be referred to the Clerk of this Court to make the necessary

calculation and ascertain the aggregate amount of indebtedness due by the defendant, James R. Massey, to the plaintiff as trustee of Sarah Jones and as guardian of James R. Massey, according to the principles embodied in this decree, and also the indebtedness of the defendant, James R. Massey, to each of the other devisees or legatees of the testatrix, Elizabeth Massey, and also to ascertain what amount is due by any other legatee to the plaintiff or any other party in interest, and that the said Clerk do report the same promptly to this Court, together with any scheme that he may devise for enforcing the

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principles of this de*cree, being limited in his work by the conclusions of law and of fact embraced in the report hereby confirmed.

It is further ordered that any party herein interested, on the filing of the report of the Clerk hereby contemplated and directed, shall have the right to move before this Court, at chambers, to confirm the report of the said Clerk, upon giving 5 days' notice of such motion to the adverse party.

That the branch of this case relating to the partition of the lands having been carried to the Supreme Court and there determined, independently of the other issues, the owelty of James R. Massey in the lands which he has elected to take in the partition thereof will be adjusted in a separate order.

It is further ordered that any party interested in this decree, at the foot thereof, shall be at liberty to move this Court for such other and further orders as may be equitable and proper in giving effect to this decree and placing such party in the enjoyment of his just rights herein.

The necessary costs of partition shall be paid by all the parties in interest in proportion to their respective shares under the will, but the costs of this litigation must be paid by the defendant, James R. Massey.

Defendant, James R. Massey, appealed on the following grounds:

I. Because His Honor erred, it is respectfully submitted, in overruling said exceptions.

II. Because His Honor in and by said decree erred in charging this defendant with the estimated value of certain slaves alleged to have been turned over and delivered to his guardian, Francis P. Ingram, by Dixon Barnes, as the executor of the will of Elizabeth Massey, deceased, on the 1st day of January, 1861.

III. Because the claim of the said plaintiff against this defendant on account of the estimated value of said slaves had become utterly stale, and His Honor erred in overruling this defendant's objection that the great lapse of time, in analogy to the Statute of Limitations, operated as a complete bar against the same.

IV. Because His Honor in like manner erred in withholding from this defendant the benefit of the Statute of Limitations against the claim of the plaintiff on account of the rents and profits of the land mentioned in the decree.

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*V. Because, inasmuch as this defendant had, more than twelve months before the trial herein, viz., on the reference held by W. M. Connors, Esq., given notice that he relied upon the Statute of Limitations for protection against the claims set up against him by the plaintiff, His Honor erred, it is respectfully submitted, in refusing on the trial to allow to this defendant, by an amendment of his answer, to interpose, in a more formal manner, the Statute of Limitations as a bar against said claims.

[For subsequent opinion, see 14 S. C. 293].

Moore, for appellant.

Allison, contra.

March 21, 1878. The opinion of the Court was delivered by

WILLARD, C. J. The facts of this case are fully stated in the report of the Referee and the decree of the Circuit Court. The main features of the question depend upon the construction of the will of Mrs. Elizabeth Massey. The testatrix had one son, the defendant, James R. Massey, two daughters, and the children of a deceased daughter. She had a large estate, real and personal, including mills, plantation and slaves. The main features of the will were that James R. Massey was to take the mills with one hundred acres of land adjoining and one-half of her plantation, constituting the family residence. The residue of her estate, real and personal, was to be divided into four parts, of which the said James R. was to take one in addition to the specific devises already mentioned, and the two daughters and the children of her deceased daughter the other three-fourths. The will contemplates a partition of all the estate other than that devised to James R., and prescribes certain rules to be observed on such partition. She directs that upon such partition certain slaves, by name, shall be "allotted" to James R., and certain others, by name, to her daughter Elizabeth. For her remaining daughter and the children of her deceased daughter she makes a provision partly in slaves and partly pecuniary, intended to be equal in pecuniary value, and she directs that for this purpose the slaves thus allotted should be valued on such partition and the allotments of slaves and money equalized. She also directs that her son, James R., should have a right to elect to take the whole of the land upon such partition, and provides as follows: "If my son, James R. Mas-

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sey, should decide to take the *lands in this partition at their appraised value, this, with the value of the negroes, will far exceed his one-fourth and put him considerably in debt, having to pay back largely; but he must have a long credit, say ten years, if he should

desire it, with interest from the day the partition is made, in equal annual installments."

The first question that arises is, when the children were, by the terms of the will, to take the shares allotted in slaves by name?

The language of the will bearing on the answer to this question is "on the division and partition of the same," [meaning the residue of the estate, real and personal, after the specific devise to James R]. "I allow the negroes to be laid off, allotted and vested as follows." Then follows the specific allotment of the negroes as already stated. It is clear that this provision is to take effect upon the partition of the estate, and that in the mean time the slaves are to remain part of the testatrix's undivided estate.

By what authority the partition is to be made is not stated. If the parties in interest should be competent to make a voluntary partition, such mode of partitioning would be within the intent of the will; if not so competent by reason of minority or other cause, a partition by authority of law would be clearly within her contemplation.

The conclusions just stated as to the construction of the will are derived from the express declarations of its terms, and there is nothing contained in the will demanding that the sense should be modified either to satisfy the other expressions or to render practicable the accomplishment of the testatrix's full purpose. It follows that, to conform to the intent of the testatrix, all the estate not required for the payment of debts and not specifically devised should have been kept together by the executor until partition could be made, and at that time the various provisions of the will as to such residue should have been carried into effect. This would embrace the slaves and that portion or interest in the land not devised to James R., and upon such partition the appraisal of the slave property should be had for the purpose of equalizing the shares; and in the event that James R. should elect to take the whole land, an appraisal of its value should be made and the terms and conditions of the credit to James R. for the amount due by such appraisal, provided he demanded such credit, should be ascertained.

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*The complaint in this case demands a partition of the real estate and an account, among other things, on the part of James R., for the rents and profits of the realty in his hands and for the personal property held by him in excess of the amount he was entitled under the will to take. This court held on the former hearing in this cause (7 S. C., 134,) that James R. Massey was entitled to his election to take the lands upon appraisal for the purpose of partition in accordance with the provisions of the will. It was also held that James R. should be required to account for the rents and profits of the land held by him other than his own share down to the time of his election.

It appears by the findings of fact "that about the first of January, 1861, the negroes named and allotted by Mrs. Massey in her said will were valued by certain persons, who were called together for the purpose by Dixon Barnes, the then executor of said will, and the said negroes placed in the possession of the parties to whom they were severally allotted, or to the guardians of such of said parties as were then under age. That the said James R. Massey was then a minor and was represented at the appraisement of the negroes by his guardian, Francis P. Ingram, who assented to what was done." The Referee holds that the results of this appraisement are binding upon James R. Massey, and this conclusion is sustained by the Circuit Court.

The executor under the will had no authority to designate appraisers of the slave property, and the consent of the guardian of James R. could confer no such authority; nor had he power to cause an appraisement to be made separate and apart from due proceedings had for the partition of the estate, real and personal, and such an assumption of authority could not be validated by the assent of the guardian. The object of the present suit is to obtain that partition among other things, and the allegations of the pleadings and the judgment of this Court upon them entitling the parties to the partition contemplated by the will estop the parties from affirming that any such partition had, previously to the commencement of this suit, been made in accordance with the provisions of the will.

The defendant, James R. Massey, cannot properly be regarded as having bound himself to the results of such irregular appraisement by anything that appears in the case. The

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only fact on which such *assumed acquiescence can be based is that the real estate and the slaves, with which he is now sought to be charged, remained in his hands, or those of his guardian, up to the time when the slaves were emancipated. It was held on the former hearing in this case, already referred to, that the holding of the real estate by James R., up to the commencement of this suit, could not be regarded as wrongful, so as to forfeit his right of election on partition, inasmuch as it was in the power of any of the parties in interest to institute proceedings for partition, by means of which the possession of the lands devised might have been disposed of agreeably to the provisions of the will. It would follow that, as has been already said, the estate, real and personal, being required under the will to be kept together until partition, that the retaining of the slaves upon the land was in accordance with the provisions of the will and cannot be made ground

for holding James R. to a measure of liability different from that fixed by the will. In addition to this, it appears that James R. attained majority in the year 1862, while absent from home in the Confederate army, from which he did not return until near the close of hostilities, and that the slaves were lost by emancipation at the close of hostilities.

The circumstances attending the occupation of the slave property during the short time that elapsed after the return of James R. from military service until the emancipation show no matter of fact from which an intent to change the nature of his rights and liabilities as established under the will; and as at that time slave property was in imminent jeopardy, it is not to be assumed that James R. voluntarily placed himself in such a position that he would be chargeable with the value of the negroes in case of loss by emancipation, whereas, by the construction of the will, such a loss would fall upon the estate at large if it happened to occur before partition was made.

It must be concluded that the Circuit Court erred in holding that James R. Massey was chargeable with the amounts ascertained by the appraisal made by the authority of the executor. It is proper that he should be charged with whatever value he has derived from the use of the slaves, prior to emancipation, over and above the proportion of such value he was entitled to under the will, on the same ground upon which he was required by the judgment of this Court to account for the rents and profits of the lands.

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*The objection that the Statute of Limitations should have been applied in the accounting for the rents and profits of the land will be next considered.

The Code requires that the defense of the Statute of Limitations shall be taken by answer.—Code, § 97. If, then, the defendant had an opportunity to set up such defense in his answer, he was bound to do so. The complaint prayed an account of the rents and profits of the lands, and the defendant was bound to interpose any defense of which he desired to avail himself growing out of the Statute of Limitations in his answer to the complaint. The Statute of Limitations might constitute either a full or partial defense to the claim to an account. If the right to an accounting was altogether lost under the statute, then it was a full defense; if, on the other hand, the bar was only as to certain transactions entering into the account, leaving the party liable to account as to other matters, then the defense was a partial one only; but in either case it ought to be pleaded that the party may be put on notice of what he is called upon to meet.

It follows that the failure of the defendant to plead the statute barred him from interposing that defense on the trial of the issues. We regard the reasons of the Circuit Court for refusing an amendment by way of setting up the statute as sufficient.

We also concur in the views of the Circuit Court as to the effect of a hearing and decision by the Circuit Court as destroying the force of the exception that the Referee had no authority to submit findings of fact and law, but should have confined himself to reporting the evidence alone, drawn from the terms of the order of reference.

The decree of the Circuit Court and the reports of the Referees must be set aside so far as they are inconsistent with the conclusion already stated, and the cause remanded for further proceedings conformable to this decision.

McIVER, A. J., and HASKELL, A. J., concurred.

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*JONES v. PLUNCKETT.

(Columbia. Nov. Term, 1877.)

[*Witnesses* ⇐143.]

In an action to recover land, brought against one who claimed as a purchaser under "A," who had purchased from "C," deceased: *Held*, That "A" was a competent witness to prove "C's" declarations in relation to the title.

[Ed. Note.—Cited in Holden v. Cantrell, 100 S. C. 280, 84 S. E. 829.

For other cases, see Witnesses, Cent. Dig. §§ 619–624; Dec. Dig. ⇐143.]

[*Witnesses* ⇐150.]

A purchaser from a deceased person, who is offered as a witness to prove the declarations of such person, is not an incompetent witness under the proviso to § 415 of the Code of Procedure.

[Ed. Note.—Cited in Coleman v. Chester, 14 S. C. 290; Blohme v. Lynch, 26 S. C. 304, 2 S. E. 136; Rapley v. Klugh, 40 S. C. 143, 18 S. E. 680.

For other cases, see Witnesses, Cent. Dig. § 654; Dec. Dig. ⇐150.]

Before Reed, J., at Aiken, September Term, 1877.

Action by William B. Jones against Peter B. Plunckett.

The case is stated in the opinion of the Court.

Henderson, for appellant.

Croft, Jordan, contra.

January 15, 1878. The opinion of the Court was delivered by

WILLARD, C. J. The action was for the recovery of land, the plaintiffs alleging legal title and seeking to recover on that alone.

The defendant interposed a claim of legal title, with possession had under it, alleging no other matter by way of defense.

A verdict and judgment were rendered for the defendant, and this appeal now presents certain exceptions, one to the admissibility of testimony and the others to the charge of

the Circuit Judge, on the two-fold ground of misdirection and of refusing to charge matters requested.

The testimony submitted to the jury was almost wholly offered by the plaintiff. From this it appears that plaintiff and defendant claim under a common source of title, viz., the estate of James G. Blewer, which was sold for partition in or about April 5, 1837, P. Readheimer and Mrs. E. Blewer, the widow of J. G. Blewer, becoming the purchasers of a portion of the real estate, including the land in controversy. Readheimer and Mrs. Blewer, jointly, executed to Terry, Commissioner of the Court of Equity, an instrument purporting to be a mortgage of the premises so purchased, to secure a bond for the purchase money on such sale.

A voluntary partition of the land so purchased by Readheimer and Mrs. Blewer was made in December, 1837, and the land in controversy was assigned to Readheimer; but it does not appear that any conveyance was made by Mrs. Blewer of her undivided interest in the lands thus set apart to Readheimer.

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*It appears that on the 26th of September, 1842, a settlement took place at the office of the Commissioner in Equity, at which the heirs of J. G. Blewer were present.

The recitals of the evidence in the brief as to what occurred at this settlement are in the following language: "It was ascertained that Readheimer was indebted on the bond in the sum of $1,450, and that said amount was due the complainant, either as her own right, or as guardian of John P. Blewer, her son; whereupon said bond and mortgage against said land, so held by said Peter Readheimer, was then and there transferred and delivered to your oratrix to enable her to collect and receive from the said Peter Readheimer the balance due on said bond, and as furnishing evidence and security for the payment of the amount due."

To understand the force of the foregoing recital, it is necessary to know that it is derived from the recitals of the pleadings in a suit in equity, commenced many years after the events referred to in it occurred, by Mrs. Blewer, who had become the wife of James B. Coleman, and who is spoken of as the oratrix in the language above quoted from the brief. It appears that the pleadings in the case just referred to were read in evidence without objection to their competency as evidence of the facts recited therein. It is true that the brief alleges that F. G. Walker, who was then in possession of the lands in suit, and under whom defendant claims to have derived title, was not made a party to such suit, yet it is reasonable to infer that the object of this statement was to show that Walker and those holding under him were not bound by the decree in that case, and not that for that reason the recitals in the pleadings were incompetent as evidence.

It must be concluded that the recitals of the pleadings in that case were read in the present case as evidence of the facts recited without objection to their competency as evidence, and they were, therefore, competent to go to the jury.

Recurring, then, to the language above recited from the brief, it is noticeable that an indebtedness of Readheimer, in the amount of $1,450, is spoken of, while the bond was that of Readheimer and Mrs. Blewer jointly, the land having been purchased on joint account. It is probable that the parties to this settlement had in view the separation of interests that had taken place between Readheimer and Mrs. Blewer, and that for the sake of convenience they adjusted the account to conform to such separation of in-

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terests. It *is also said that that amount was due to complainant, then Mrs. Blewer, which can only be said as intending that Mrs. Blewer was entitled to receive an equivalent amount from the estate.

It appears, however, clearly that the bond and mortgage of Readheimer and Mrs. Blewer were transferred from the estate to Mrs. Blewer as her individual property with the manifest intent of enabling her to hold Readheimer on the same to the extent of the amount remaining unpaid thereon, and that Mrs. Blewer took these instruments as part of a distributive portion of the estate to be held by her either in her own right or in the right of others, as events might justify.

Prior to the settlement just referred to, which occurred in September, 1842, judgment had been recovered against Readheimer by G. J. Tony, dated April 18, 1842, and which had become a lien on the real estate of Readheimer. The position of the parties, then, at the date of the judgment was as follows: Readheimer had possession of the land in suit, holding it in part under a conveyance of an undivided interest made to himself in a deed in which he was grantee conjointly with Mrs. Blewer, and partly under an agreement with Mrs. Blewer, by which he (Readheimer) was to take the undivided interest of Mrs. Blewer in the same lands in lieu and compensation for a transfer which he was to make to her of his undivided interest in other parts of the lands conjointly purchased.

Whether this agreement was ever carried out by mutual deeds of conveyance does not appear. At the same time the Tony judgment bound whatever of legal right Readheimer had in the premises. If it was competent to infer the existence of such a deed, it is only as an inference of fact that its existence can be ascertained, and that it was the province of the jury to draw. If, there-

fore, it was important to know the extent of the lien of the Tony judgment as affecting the whole as an undivided part of the lands in controversy then in Readheimer's possession, such fact could only be known as the result of a verdict under proper instructions.

The case, as stated, only shows as matter of legal conclusion that Readheimer had legal title to the extent of an undivided interest in the lands in suit at the date of this judgment and for some time subsequent thereto, with a right of an undivided nature, either legal or equitable, of title to this residue.

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*We find next in the order of time that Readheimer conveyed the lands in suit to F. L. Walker by deed dated August 7, 1842, reserving to the grantor, his heirs and assigns, the growing timber trees on said land.

This appears to have been the position of things as it regards the possession and the legal title to the land in controversy at the date of the settlement at which the bond of Readheimer and Mrs. Blewer became the undivided property of Mrs. Blewer.

The right, title and interest of Readheimer in the premises in suit was sold by the Sheriff under the Tony judgment and purchased by James B. Coleman, being conveyed by Sheriff's deed dated October 13, 1843, recorded October 2, 1844.

It also appears that at that sale James B. Coleman gave notice of the existence of the mortgage and claimed to be the owner thereof. It does not appear in evidence that James B. Coleman had, prior to that sale, intermarried with Mrs. Blewer, and it is altogether unexplained under what right, or supposed right, he made claim to hold the mortgage. It appears, however, that the right to the lien was established by her as against the representatives of J. B. Coleman in the equity suit brought by her.

James B. Coleman died some time prior to June 10, 1853, but the date of that event is not definitely stated.

At the date last mentioned, Mrs. Coleman, the widow of James B., who had previously been Mrs. Blewer, filed a bill in equity to foreclose the mortgage assigned to her.

At the time this suit was commenced Walker was still in possession of the land in controversy under his purchase from Readheimer, that possession not having been disturbed by James B. Coleman during his lifetime under his claim as purchaser under the Tony judgment.

As we gather from the statements of the brief and the provisions of the decree of Chancellor Wardlaw, the theory of that suit was that the title of the lands in suit was in the heirs or distributees of James B. Coleman, and that they remained charged in their hands with the amount remaining unpaid on the mortgage assigned to Mrs. Coleman. The bill was accordingly filed against these heirs and distributees, joining the personal representative, and, by the decree of Chancellor Wardlaw, the lien was upheld for the amount still unpaid on account of the purchase under the original partition, and was made a charge primarily on the lands

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in suit under *the equity arising out of the voluntary partition between Readheimer and Mrs. Coleman, then Mrs. Blewer. No order of sale was, however, made at that time nor until after the events next mentioned.

F. L. Walker conveyed the lands in suit to S. M. Prothro, by deed dated November 9, 1857, which was not recorded until December, 1869.

In 1861 Mrs. Coleman executed and delivered to Walker a deed by which, after reciting the facts of purchase by Walker from Readheimer and the payment by Walker to her of the amount due on the mortgage on account of the land thus purchased of Readheimer by Walker, she covenants as follows: "Know all men by these presents that I, the said E. M. Coleman, for and in consideration of the premises, do hereby confirm the said title to the said land to the said Francis L. Walker, his heirs and assigns, forever, and I, the said E. M. Coleman, do hereby bind myself, my heirs, executors and administrators, to warrant and forever defend all and singular the said premises unto the said Francis L. Walker, his heirs and assigns, against me and my heirs and all other persons claiming the same and any part thereof."

There is much that is unexplained in regard to the circumstances attending the execution and delivery of this instrument.

It bears date subsequent to the deed from Walker to Prothro, but whether Walker had surrendered possession to Prothro before its execution does not appear. It does not appear whether Walker's deed to Prothro contained covenants of warranty as against encumbrances, so that he would have an interest to protect himself against his own covenants by a release from Mrs. Coleman of her demands against the premises. As, however, no question is made as to the effect of this instrument growing out of the fact that Walker had already parted with the title to the land at the time it was made, it may be assumed, for the purposes of the present case, that whatever passed or was capable of passing by the instrument inured to the benefit of Prothro as the successor of Walker in respect to the lands in controversy.

Without stopping to define the precise character and operation of this instrument in other respects, it is clear that, as affecting the decree of Chancellor Wardlaw and all rights that might be derived thereunder, it was a clear bar and estoppel against the enforcement of so much of that decree as

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set up the lien for the moneys due as *expressed by the bond and mortgage, and in this respect it was matter of indifference whether the lien was to be considered as established by the act of the parties through the mortgage, or by the law through the provisions as to statutory liens.

It is also clear that Walker, or his assignee, Prothro, or the defendant in possession under Prothro, could have arrested by appropriate means the enforcement of that decree by a sale of the lands, although Mrs. Coleman's release or act could not affect the rights existing between the heirs and distributees of J. B. Coleman, who succeeded to any right he held at the time of his decease, under the purchase at Sheriff's sale under the Tony judgment, and the parties who held possession under conveyances from Readheimer; yet she could affect her own interest under the decree, and to that extent she did so with such effect that, had Walker or Prothro been parties to the decree as holding possession of the lands affected by it, they could, after the release by Mrs. Coleman, have arrested any proceedings to sell the premises of which they held possession, claiming title thereto, and the fact that they were not made parties places the decree in the same condition, as affecting them, as that to which it might have been reduced by them had they been parties to it.

The plaintiff has no better title that Mrs. Coleman could make under this decree, after the release of Walker, (and his assigns,) as against Walker and his assigns.

The decree under which plaintiff's title arose, and which was made by Judge Melton in April, 1870, was merely supplementary to that of Chancellor Wardlaw, and left all parties standing in the rights in which they stood under Chancellor Wardlaw's decree.

Under Judge Melton's decree the lands in controversy were sold, and purchased under the title held by plaintiff.

The foregoing statement will be sufficient for an understanding of the exceptions raised by the present appeal.

The first exception is to the admissibility of evidence, and arises out of the facts that F. B. Walker was called as a witness for the plaintiff; but in his cross-examination was questioned by the defendant as to conversations and transactions between the witness and Mrs. Coleman, who was deceased at the date of such examination.

This testimony was objected to under the provisions of Section 415 of the Code of Procedure.

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*Section 415 contains a proviso excluding certain persons from giving testimony, on the ground of interest, actual or possible, in certain cases where, in consequence of death, insanity or lunacy, means of contradiction had become lost.

The proviso must be regarded as qualifying the provisions contained in Section 414, which relate to all persons interested in the event of the action, as well as to the provisions contained in Section 415, which relate to parties to such actions.—Guery v. Kinsler, 3 S. C., 423. It excludes the testimony of certain persons in certain defined cases "in regard to any transaction or communications between such witness and a person at the time of such examination declared insane or lunatic."

The persons affected by the exclusion are as follows:

1st. Any party to the action examined in his own behalf.

2d. Persons having a legal or equitable interest which may be affected by the event of the action or proceeding.

3d. Any person who previous to such examination has had such legal or equitable interest liable to be affected by the event of the action or proceeding and the same has in any way become transferred to a party to the action.

4th. Any assignee of anything in controversy.

The ground of the exclusion is as follows: "When such examination or any judgment or determination to such action or proceeding can in any manner affect the interest of such witness or the interest previously owned or represented by him."

But it is only as against certain specified persons that the evidence is capable of being excluded, and they alone can object to its introduction, viz., the executor, administrator, heirs-at-law, next of kin, assignee, legatee, devisee or survivor of such deceased person, or the assignee or committee of such insane person or lunatic. No other description of persons can be added to these enumerated in the statute,—not even a trustee or successor to a deceased trustee.—Guery v. Kinsler, 3 S. C., 423.

In the present case the plaintiff Jones stands in no other light than as purchaser under a sale for foreclosure in a suit in which Mrs. Coleman, the deceased party to whom the evidence relates, was a party demanding foreclosure.

If the plaintiff could come under any title it would be that of assignee. He cannot be regarded as an assignee in any ordinary

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*sense of the term; for, assuming that Mrs. Coleman had a valid lien, with power of foreclosure and sale, yet the plaintiff cannot be regarded as having succeeded Mrs. Coleman in that right. Her rights, whatever they were, were fully and exhaustively exercised in the proceeding that led to the decree of foreclosure, and the plaintiff's title, if any he acquired, was the fruit of the right as it subsisted previously in his hands and not the same identical right subsisting in his hands as an assignee. Nor can the language of the statute be extended upon the principle of analogy to cases not within the classes de-

scribed as embraced within the spirit and intention of the statute, although not included in its terms, as was held in Guery v. Kinsler, already cited.

It follows that there was no error in admitting the testimony, and that exception must be overruled. The Circuit Judge charged that the defendant was entitled to a verdict, placing the right of the defendant to a verdict on the ground that title to the land had matured in Walker by adverse possession at the time of the filing of the bill in Coleman v. Coleman [10 Rich. Eq. 191], and that he ought to have been made a party.

This was clearly erroneous. Although it is possible that the defendant may have been entitled to a verdict as matter of law by reason of the defect in the plaintiff's title, appearing by his own showing in consequence of the release from Mrs. Coleman to Walker, yet as this appeal brings up nothing but certain exceptions, none of which embrace the question whether the defendant was entitled to a verdict on any other ground than that stated in the charge, namely, adverse possession in Walker, we cannot regard the statement of the evidence in the brief as sufficient for the discussion of questions other than those involved in the exceptions as taken.

This conclusion results from the fact that parties are only required to set forth so much of the evidence in the briefs as may be necessary to elucidate the legal character of the propositions ruled upon and their bearing on the verdict.

It is clear that as it regards the ground of the charge, namely, the fact of a completed adverse possession on the part of Walker, the Court improperly charged upon matter of fact, which, if important to the case, should have been passed upon by the jury, and could not be properly found in accordance with instructions by the Court.

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*As the case stands, we do not see that it is material to pass upon the various propositions bearing upon the question of adverse possession; for unless the case can be materially changed upon a new trial, the plaintiff must fail upon the ground of want of title, as shown by the deed from Mrs. Coleman to Walker.

The refusal of the Circuit Judge to charge the propositions contained in the request to charge, relating to Mrs. Coleman's release, does not appear to be erroneous. It is contended that that deed was void, upon the ground that it was executed pending the proceedings in Coleman v. Coleman. We have already seen that the release to Walker was subsequent to the decree of Chancellor Wardlaw, and that it was competent for Mrs. Coleman to vary or affect her rights under that decree in any manner she might deem proper. Nor can the attempt to release the land be regarded as in any respect affected by the objection made in this case.

As it regards the further objection that this, being a deed of confirmation, was inoperative, as there was nothing in Walker to confirm, Mrs. Coleman was competent to divest herself of the right to enforce the decree, and it is clear that her release expresses an intent so to do; nor is it necessary that it should operate as a strict deed of confirmation in order to have that effect.

As already said, we must in the present aspect of the case regard the release as inuring to the benefit of the assignee of Walker, and as such it was clearly competent to divest Mrs. Coleman of all right to enforce her decree as against Walker and those claiming under him.

Neither Walker nor his assigns were parties to the subsequent decree made by Judge Melton, and are not affected by it, while on the other hand the plaintiff has no greater right than Mrs. Coleman was capable of exercising at the time of the sale and purchase, under which plaintiff claims, and this right, as we have seen, could not be asserted as against Walker and those claiming under him, in virtue of the release of Mrs. Coleman.

There must be a new trial.

McIVER, A. J., concurred.

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9 S. C. *401

*GEIGERS v. KAIGLER.

(Columbia. Nov. Term, 1877.)

[*Executors and Administrators* ⇐87.]

The Act (Gen. Stat., 458, Ch. XC, § 9,) in relation to compromises by executors and administrators does not apply to debts contracted with the executor or administrator himself, though they be assets of the estate; and such Act, even where it is applicable, is permissive merely, and does not, it seems, affect compromises otherwise valid.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 323, 384–392; Dec. Dig. ⇐87.]

[*Executors and Administrators* ⇐87.]

A compromise by an administrator which the Court would have sanctioned if application had been made beforehand for that purpose will be sustained.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 387; Cent. Dig. ⇐87.]

Before Cooke, J., at Richland, August, 1876.

This was an action by Caroline J. Geiger, Isabella C. Geiger, Juriah E. Geiger, Frederick Ann Geiger and John A. Geiger for himself and as administrator of the estate of H. J. Geiger, deceased, against George Kaigler, for foreclosure of a mortgage.

The facts are sufficiently stated in the circuit decree and the opinion of this Court.

The circuit decree is as follows:

Cooke, J. This action was tried before me at a special term of the Court held for

said County on the third Monday in July, 1876. The action was brought for the foreclosure of a mortgage, executed on the 5th day of January, 1871, by the defendant to one Alexander Geiger, (now deceased,) as the executor of the will of Henry J. Geiger, to secure six several bonds bearing even date with the mortgage, and each conditioned to pay the sum of one thousand three hundred and fifty dollars in three successive annual installments. The plaintiffs are the sole surviving distributees of the estate of Henry J. Geiger, and one of them, John A. Geiger, is also the administrator of the estate with the will annexed. At the trial the complaint was amended, on the motion of the plaintiffs, by inserting the name of Frederick Ann Wolfe in the place of Frederick Ann Geiger, and by adding as parties plaintiff the names of J. A. Wolfe, husband of F. A. Wolfe, and William Geiger, husband of Juriah E. Geiger. The complaint states that the bonds and mortgage referred to were given to secure the purchase money of a tract of land in Lexington County, of which the said Henry J. Geiger was seized and possessed in his lifetime and at the time of his death, and which his executor, Alexander Geiger, had sold to the defendant. There is no averment that the executor had the power to make the sale under the will of his testator, nor was any

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*proof offered to establish the existence of such authority in the executor; and this was made the ground of a claim on the part of the defendant that the decree ought not in any case to extend beyond an order of foreclosure and sale,—the defendant contending that without direct evidence upon the subject the Court must presume that the sale of the land was unauthorized, and that, while he might not be permitted to controvert the title of his mortgage, so far as the foreclosure was concerned, there was no consideration to support an ulterior decree for money. In the view I have taken of the case, it is not necessary to consider the merits of this objection, and I shall, therefore, assume that the execution of the bonds and mortgage was a sufficient recognition of the executor's authority for all purposes. The authority of the executor, then, being assumed, and the decision of Judge Carpenter upon the demurrer originally filed to the complaint having set at rest any question as to the present administrator's successorship to the trust, the validity of the defendant's main ground of defense is fairly presented for consideration. This defense is, that after the mortgage debt had become due an agreement was made between the parties to satisfy the debt by the surrender of the land to the estate.

The defendant insists upon his equity to have this agreement enforced by the Court, on the ground that he had performed his part in good faith by placing the administrator in possession of the land and permitting him to enjoy its profits and usufructs since January, 1874; and because the plaintiffs ought not to be allowed to repudiate the bargain after they have acted upon it and enjoyed its benefits, more especially as the marketable value of the land has in the meantime depreciated from the financial stress of the country. The evidence leaves no doubt in my mind as to the fact that such an agreement was made between the defendant and John A. Geiger, acting as the representative of the estate: the defendant agreeing to surrender possession of the land and make all necessary conveyances, and the administrator on his part promising to satisfy and deliver up the bonds and mortgages. Nor have I any doubt that the possession and control of the land assumed by the administrator, John A. Geiger, immediately afterwards, in the Spring of 1874, must be referred entirely to this agreement. The only reason why this agreement was not perfected in all aspects seems to have been that the bonds were in possession of Henry A. Meetze, Esq., to whom they had been entrusted as the attorney of one Inabinet, a

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*previous administrator of the estate of Henry Geiger, and Mr. Meetze refused to deliver them until administration was had upon the estate of his client. It was also proved that when the settlement was first proposed the administrator desired time for the purpose of consulting his co-distributors in the estate, who resided in Alabama, and that some three weeks or more after this he went to the defendant's house and informed him that he would make the settlement. If this transaction had taken place between parties acting wholly in their own right, there can be no question that in equity it would operate as a satisfaction of the debt.

The part performance was of such a character as, upon all the authorities, to take the case without the purview of the Statute of Frauds, and in equity that must be held to have been done which ought to have been done.—Adams Eq., *86; Anderson v. Chick, Bail. Eq., 118. But the fact that John A. Geiger was acting not only for himself individually, but also as a fiduciary of others' interests, renders it necessary, if the cestuis que trust are to be bound, that something more should appear besides the bare making of the agreement and its enforceable character in equity.

Such a settlement between a trustee and a debtor of the estate is not necessarily binding, even when the parties act in good faith. —Sanders on Uses and Trusts, 431; Perry on Trusts, §§ 475, 482; Johnson's, Lewis, Bill Eq., 48; Smith v. Prothro, 2 S. C., 371. Neither is it necessarily void at the option of the cestuis que trust. Not the first, because the trustee is acting outside of the strict line of his authority, and those with whom he

acts are bound to take notice of this; not the second, because, for the safety of the estate itself, it is necessary that a certain degree of discretion should reside in the trustee, so that if an exigency arises his hands may not be tied by too inflexible a rule. The principle which must govern such cases has recently undergone examination in our Supreme Court, in the case of Bacot v. Heyward, which, upon a review of the leading authorities, states it as follows: Bacot v. Heyward, 5 S. C., 441: "If the nature of the transaction, though it may even be the compromise of a debt, shows that he [the trustee] was actuated by good intentions and exercised due caution and fidelity in respect to the interests of his cestuis que trust, a Court of equity will confirm what it would, on due application, have ordered, for the result to the trust property is in either event the same." This rule leaves each case to de-

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pend upon its own peculiar *circumstances, and requires that the Court should judge of the propriety of the settlement by placing itself as nearly as possible in the position of the trustee at the time. The difficulty in applying the rule in the present case arises from the fact that the administrator, who is also interested as a distributee, now seeks to repudiate the settlement, and the motives which induced it upon his part can, therefore, only be gathered inferentially; but this ought not to prejudice the defendant.

At the trial the following facts were developed: The premises were originally bargained to the defendant by the executor, Alexander Geiger, in January, 1863, for the sum of $12,000 payable after the war, but upon a written agreement that the defendant should be at liberty to return the land and cancel the debt if, by the depredations of the enemy, his cotton and other property upon the place should be destroyed. The contingency contemplated by this agreement actually occurred, and thereupon, but not till some years after the war, the defendant sought to return the land to the executor. To this the executor refused to accede, on the ground that the defendant had waived his rights by delay, and suit was brought to enforce the contract of sale. This suit was stopped between the parties by a settlement; the executor made title to the land, and the debt, which then amounted to $16,200, was arranged by the payment of one-half, ($8,100,) partly in cash and partly in a bond of Henry Geiger held by defendant, and by giving the six bonds and mortgage which are the subject of this action for the other half. The bonds and mortgage in this action thus had their birth on a settlement of a preceding liability with the executor of the estate. About the time of this first settlement with the executor the defendant placed his son-in-law, Kinsler Davis, upon the land, who put upon it improvements of considerable value. [The value of these improvements was variously estimated by the witnesses—by one as high as $4,000, but by the smallest estimate, that of the witness Knight, they could not have been worth less than $2,000—at the time Geiger went into possession.] He also paid upon the bonds on the 8th of June, 1874, the sum of $1,100. Davis was unsuccessful in his management of the property, and the defendant testified that when the "panic" supervened, becoming hopeless of his ability to discharge the debt, he made the proposition to surrender the land. Evidence was introduced on the other side to show that at the time of the settlement the

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value of the land had *been impaired by the cutting of timber during Davis's occupancy. Geiger and Knight testified that very nearly the whole of the timber within a range of two miles of the saw mill had been cut. Kaigler and Davis, on the other hand, testified that when the land was first purchased it had already been to a large extent depleted of its timber, so that logs had often to be brought to the mill from a distance of more than two miles. As, however, before the settlement was made the administrator was taken over the place and had every opportunity to judge of its condition, I do not think it necessary to go minutely into this part of the testimony. That the land has since depreciated upon the plaintiffs' hands can, of course, not affect the issue here. I think it may well be assumed that the bargain, at the time it was made, was one of no disadvantage to the estate, which had certainly profited largely from the transaction as a whole, and that, under the circumstances, the settlement was so fair and reasonable that the Court would have sanctioned it had the administrator applied there for authority.

There are other circumstances which would make it exceedingly harsh and inequitable to disturb this settlement at the instance of the plaintiffs. As has already been stated, when the settlement was first proposed time was given to the administrator, at his own request, for the purpose of consulting the parties in interest, and the matter was delayed for some time on that ground. This of course does not prove that the other distributees were consulted and gave their consent; but when it is considered that it was easily within their power to show that no such consultation had taken place, if such was in truth the fact, their silence is at least suspicious; and, when connected with the further fact that their representative remained in notorious possession of the place for almost two years before they stirred in the matter, it is not easy for the mind to escape the conclusion that they knew and acquiesced in the settlement. These distributees, so far as appears, are all sui juris. It has been suggested in behalf of the plaintiffs that to

decree the specific performance prayed for by the defendant might restore to them the land with the title embarrassed by intermediate judgment liens against the defendant Kaigler. It has not been made to appear that any such judgment exists; but as it is within the power of the Court, and cannot prejudice the defendant, they may have the assistance of the Court in perfecting their title to the land under the energy of the mortgage. I shall, therefore, decree a fore-

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closure *of the mortgage and sale of the lands. If there should be any surplus upon the sale the plaintiffs will be entitled to it. If the proceeds shall prove deficient, the bonds and mortgage must, notwithstanding, be marked satisfied. In conformity with the foregoing opinion, my findings of fact and conclusions of law are as follows:

I find as a matter of fact:

1. That on or about the 6th day of January, 1874, an agreement was entered into between the plaintiff, John A. Geiger, acting as the representative of the estate of Henry Geiger, deceased, on the one hand, and the defendant on the other hand, whereby the said John A. Geiger, upon the surrender and conveyance to him as administrator of the mortgage premises by the defendant, agreed to satisfy and deliver up to the defendant the bonds and mortgage referred to in the pleadings; and that, in pursuance of this agreement, the said administrator was let into possession of the said premises, and assumed and has ever since exercised an exclusive control over the same, receiving the rent and profits of the land and dealing with it in all respects as the owner.

2. That the defendant has always been ready and willing to complete the performance of the agreement upon his part, and that it was the fault of the said administrator that the agreement was not perfected by the legal conveyance of the lands and the satisfaction of the bonds and mortgage.

3. That the agreement was made in good faith on both sides, and was, under all the circumstances, a fair and most reasonable settlement.

And as a conclusion of law:

That the plaintiffs are bound in equity by the settlement.

It is, therefore, ordered that the plaintiffs have leave to apply at the foot of this decree for all necessary orders to carry it into effect by the foreclosure of the mortgage set forth in the complaint and the sale of the mortgaged premises; but that the said defendant be, and he is hereby adjudged to be, discharged and released from all personal liability upon the said bonds, which must be marked fully satisfied upon the sale.

It is further ordered that the plaintiffs pay the costs of this action, including the defendant's costs and disbursements.

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*The plaintiffs appealed on the following grounds:

1. Because upon the case made the plaintiffs were entitled to a decree in foreclosure as against the mortgaged premises, and to a money decree as against the defendant for any balance that might remain unsatisfied should the proceeds of sale fail to pay the debt in full.

2. Because the defendant sets up in his answer, as an equitable defense, an alleged parol agreement, and prays a specific performance thereof; the said alleged agreement, being as to land, was in itself void under the Statute of Frauds, the same not having been reduced to writing, or evidenced by some memorandum thereof in writing, signed by the parties to be bound thereby.

3. Because there was no part performance of the said alleged agreement which could operate to take it out of the statute; the possession of one of the plaintiffs, (John A. Geiger,) relied upon by the defendant to give effect to such part performance, was referable to an existing legal right to enter upon conditions broken, (the mortgagee being out of possession,) and could not be referred to said alleged agreement; and the introduction of parol evidence under such circumstances to give character to the possession is wholly without authority and would be directly within the mischief that the statute was intended to remedy.

4. Because the said John A. Geiger was not a trustee in the sense of the decree, and could not take possession of land (except under certain peculiar circumstances) in his capacity as administrator, as is alleged in the answer; his duties as administrator de bonis non were confined to the proper administration of such personal assets as came into his hands unadministered, and his possession of land, or his purchase of land directly or indirectly for the estate, was without authority.

5. Because the defendant knew that his bond and mortgage were assets in the hands of John A. Geiger, as such personal representative, to be collected by him, and the proceeds were first to be applied to the payment of debts, if any, and second to be held subject to a division among the parties jointly entitled thereto; and any agreement between the defendant and the said John A. Geiger, as administrator, to divert the assets from their proper channel was, on the part of the administrator, a breach of trust, and on the part of the defendant a fraud, and even in

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the case of an executed agree*ment could be set aside by the parties entitled to a distribution of the fund.

6. Because it is respectfully submitted that for the Court to go further and by its decree to set up an executory parol agreement and

enforce the same, against the wishes and interests of the distributees, against the positive denial, under oath, of the administrator that he ever entered into such an agreement or ever attempted to bind the interests of those entitled to the fund, is in effect for the Court to set up and compel a breach of trust by decree, and to enforce its specific performance by decree against the protestations of the administrator and the rights and interests of those entitled to its protection.

7. Because the decree concludes the rights and interests of those plaintiffs who, it is admitted, were not parties to the agreement: (1) by giving validity and effect to certain alleged acts of John A. Geiger, as administrator, who, as such, had no authority in law to bind the others, and who denies that he ever did so bind them; and (2) by sustaining against them as conclusive evidence a mere inference of a third party, founded upon certain words of the said John A. Geiger, all which said alleged words, acts and inferences were no part of the alleged contract.

8. Because the decree draws this unauthorized conclusion against the plaintiffs, who were not parties to the alleged agreement, upon the extraordinary legal hypothesis that they were required to disprove at the trial (at which they were not present) what was not alleged against them in the answer, to wit, their knowledge of the alleged acts and words of the said John A. Geiger, as administrator, and their knowledge of the inference drawn therefrom as affecting their rights; and, further, that they were required to rebut the evidence (to wit, the words, acts and inference aforesaid,) which for the first time came out at the trial and was unequivocally rebutted by the oath of the said Geiger as wholly untrue.

9. Because the party seeking in equity to enforce the specific performance of an agreement must show that the contract is certain, fair and just in all its parts; whereas the alleged contract is uncertain, unfair, unjust and without adequate consideration; unjust and unfair because defendant, after taking from the land 3,600,000 feet of lumber, and selling the same at large prices, according to his own testimony, now asks a decree that the naked land (its present value, by defendant's own testimony, not being over $4,000,)

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shall *be returned and taken in substitution for and satisfaction of the debt, and seeks to have the bonds and mortgage surrendered to him, and without adequate consideration, because the alleged agreement gives, and proposes to give, to the plaintiffs nothing but what they in fact already had, to wit, the land, which it is admitted could never bring the amount of the debt.

10. Because, after the argument of the cause, the fact was brought to the knowledge of the Court that the plaintiff Isabella C. Geiger was administratrix de bonis non in joint administration with the said John A. Geiger, (which fact had been inadvertently omitted,) and as such administratrix she had a legal title to the choses in action belonging to the estate, which could not be bartered off without her consent and authority and land substituted therefor.

Pope, for appellants:

Upon the examination of the defendant, Kaigler, himself as a witness, upon the first intimation of the line of evidence, the objection was promptly interposed: First, that as the alleged contract was for the transfer of land, parol evidence was not permissible; second, that such agreement, if any, must be established by some memorandum thereof in writing.

Based upon this parol evidence, the Judge comes to his conclusion in the following words: "The evidence leaves no doubt in my mind as to the fact that such an agreement was made between the defendant and John A. Geiger, acting as the representative of the estate; the defendant agreeing to surrender possession of the land and make all necessary conveyances, and the administrator, on his part, promising to satisfy and deliver up the bonds and mortgages. Nor have I any doubt that the possession and control of the land assumed by the administrator, John A. Geiger, immediately afterwards, in the Spring of 1874, must be referred entirely to this agreement."

Both conclusions are utterly indefensible in law.

These exceptions need scarcely an authority to sustain them. We find a mortgagee in possession of land. The law refers his possession to his right of entry as mortgagee, and parol evidence cannot be received to change the character of the possession. If possession of a party be relied upon to evade the Statute of Frauds, then to bring it within the rule it must be impossible to refer the

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*possession to any other legal right, and it must point to the alleged parol contract and to that alone.

That judicious author, Mr. Adams, (Equity, 86,) says: "The doctrine on this point is called the doctrine of part performance. Such, for instance, is the case where upon a parol agreement for the purchase of an estate a party not otherwise entitled to the possession is admitted thereto, for if the agreement be invalid he is made a trespasser and is liable to answer as a trespasser at law." "The agreement must be clearly and unequivocally proved, and must be shown distinctly to be referable exclusively to the contract set up."—Duval v. Myers, 2 Maryland Ch., 401. Possession is often held to be evidence of part performance; but it must be in pursuance and execution of an agreement and traceable to no other title.

In the case of Savage v. Carroll, (1 Ball & B., 282,) Lord Manners says: "Whether the

possession be an unequivocal act, amounting to part performance, must depend upon the transaction itself,—whether it be so circumstanced that it can refer only to a contract of sale."

The rule of law in such case is simple, the test being whether the possession must be a trespass unless the party in possession can only defend himself by a contract. If the possession can be defended by some other right or title, then evidence cannot be given of it to support a parol contract.

In the case of Smith v. Smith, (1 Rich. Eq., 136,) Chancellor Dunkin says: "In Clinan v. Cook, (1 Sch. & Lef., 41,) Lord Redesdale states that possession is only construed as part performance where the party might be treated as a trespasser unless evidence were admissible of the parol agreement. This is, perhaps, the most satisfactory test." The Chancellor refers to the case of Morphett v. Jones, (1 Swans., 181,) where the Master of the Rolls thus states the law: "The acknowledged possession of a stranger in the land of another is not explicable except on the supposition of an agreement, and has, therefore, constantly been received as evidence of an antecedent contract and as sufficient to authorize an inquiry into the terms." And, reasoning from this, he proceeds to show that the possession of the complainant in Smith v. Smith is only explicable, in the language of Morphett v. Jones, upon the supposition of an agreement. Mr. Justice Story (2 Equity, § 763,) is full to the same point.

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*Let these tests be applied to the circumstances of this case. Is the possession of the complainant, John A. Geiger, only explicable upon the supposition of an agreement, so as to authorize an inquiry into the terms of that agreement? Here we have a mortgage, the condition of which has been broken, and we find the mortgagee in possession. Is the mortgagee such a stranger to the estate as to make his possession inconsistent with the title and render that possession a trespass?

The law is clear. Unquestionably, in South Carolina, the mortgagor holds the fee under the statute which modifies the common law, and the mortgage is a mere security. But it is equally unquestioned that where the mortgagor is out of possession the mortgagee may enter upon condition broken, and the incidents of the estate at the common law are restored. Nowhere has the doctrine been better expressed than by Mr. Justice Willard, in the case of Norton v. Lewis, 3 S. C., 33: "The practical effect of the Act of 1791 was to leave in the mortgagor in possession an estate determinable on the contingency of his relinquishing possession. On the happening of such contingency, the statute estate was gone and the parties stood on their rights as existing previous to the statute."—Williams v. Beard, 1 S. C., 309. What were those rights? Simply the right of the mortgagee at common law. The fee became vested in the mortgagee. However Courts or Judges may have differed as to their methods of reasoning, or the sufficiency of reasons for the doctrine, all are agreed that such is the established law of the State.—Mitchell v. Bogan, 11 Rich., 686. Under this doctrine the status of the mortgagee and of his real and personal representatives are fixed by their common law relations. In the language of Mr. Justice Wardlaw: "Upon the death of the mortgagor, without previous assignment of his interest, the equity of redemption passed to his devisee or heir. Upon like death of the mortgagee, the land passed to his heir or devisee, in trust for his executor, the owner of the debt secured."—Wms. on Ex., 574; 2 Wash. on Real Prop., 134, *535. The possession being vacant, the mortgagee or his heir would have a right to enter and hold the possession, subject, nevertheless, to the right of redemption until foreclosed.—Durand v. Isaacs, 4 McC., 54; Stoney v. Shultz, 1 Hill Ch., 495. "At the common law," says Johnson for the Court, "there is no question that the mortgagee was entitled to the possession of the land after

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the condition of the mortgage was *broken, or that he might have maintained a possessory action against the mortgagor or any one else in possession and was entitled to enter upon a vacant possession. And if a mortgagee gave notice to the tenant in possession that the money secured by the mortgage has not been paid, the tenant is bound to account with him not only for the accruing rents but the rents in arrears, and the mortgagee may resort to the summary remedy by distress. And in Moss v. Gallimore, (Doug., 270,) Lord Mansfield says 'that he considers this remedy a very proper additional advantage to mortgagees to prevent collusion between the tenant and the mortgagor.' Thus stood the common law." "I take it, therefore, as clear," says the Judge, "that, the mortgagor being out of possession, the rights and powers of the mortgagee must be determined according to the rule of the common law, and, accordingly, that he had a right to receive and retain the rents, having given notice of the mortgage to the tenants in possession." So, too, the rights of the mortgagee are the rights of the real or personal representatives of the mortgagee. Of this there can be no question.

In Mitchell v. Bogan, (supra, 702,) Mr. Justice Wardlaw says: "Throughout the Acts of 1791 and 1797 mortgagor and mortgagee only are mentioned, without allusion anywhere to the transfer of the rights of either party by act in his lifetime or by his death. Yet it surely was intended, and such has been the received interpretation, that the assignee or executor of a mortgagee should have the same rights and remedies as he himself had.

All to whom the rights come are included under the term mortgagee." Such is the common law rule.—1 Wms. on Ex., 575; Thornbrough v. Baker, 3 L. C. Eq., 857, and many other authorities.

With these authorities before us, with the legal title in his hand, can it be questioned for a moment to what right the law will refer the possession of John A. Geiger? Suppose he were charged as a wrongdoer or for a trespass. Would he not defend himself by his title, by his right of entry and possession, and not by some imaginary vague parol contract? Suppose in this case a bill had been brought by Kaigler to redeem, could Geiger have claimed? Would he have been permitted to prove his part performance by parol evidence of his possession, as founded in contract, when the law would have characterized his possession as founded in another right? Clearly not. This would be to wipe out the Statute of Frauds. In such circumstances the words and the memory of men

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are silent and the *statute speaks. Otherwise this would be to enable every mortgagee in possession to establish absolute title by that kind of evidence which the statute was expressly intended to exclude.

With the law as we have shown it to be, the decree nevertheless sustains an alleged parol agreement, made, it is said, by John A. Geiger as administrator, upon his possession as administrator being evidence of part performance by him in his official capacity as administrator. Be it remembered that the defendant does not and the decree does not anywhere charge John A. Geiger personally, as we shall more particularly see hereafter. And while the decree does this remarkable thing, it does the other most remarkable thing of decreeing a foreclosure and sale. These two things would seem to be as wide apart as the antipodes.

1. If the contract of sale be sustained, as it is by the decree, then there could be no foreclosure in equity, as it would leave no equity of redemption in the mortgage to be foreclosed. His estate in equity would be merged in the contract, would go with it, and the mortgage would fall lifeless by the decree.

2. If it be admitted, as it is by the decree, that the mortgage still had vitality, (and it is only by having vitality that it can be foreclosed,) then this would admit an outstanding equity or estate in equity in the mortgagor, which would be utterly inconsistent with a valid contract of sale to the mortgagee.

From these two propositions many things would follow. If the mortgage be extinct, (as it clearly must be if the contract be valid,) then, pray, what security does a sale give to the title of the vendee under the contract, or to the title of any purchaser under the decree, as against the general liens of the creditors of the mortgagor Kaigler, who are not parties to the suit?

If, on the other hand, the mortgage has vitality, (and its vitality alone can give the Court jurisdiction in foreclosure,) then, pray, by what principle of law or equity can a Court of equity order the surplus fund (after paying the mortgage debt, should the land purchased bring a large surplus,) to be paid to the mortgagee as the owner of the land under a contract, and, therefore, the owner of the fund, to the exclusion of the other creditors of the mortgagor, who, in a foreclosure and sale, would be legally entitled to such surplus?

Again, if the mortgagee, under the sale in foreclosure, could not, under such a decree, have the benefit of the contract thus enforced

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*against him, pray by what principle, operating ex equo et bono, (should the land bring much less than the mortgage debt,) could the Court refuse to give a decree for the deficit according to the practice of the Court?

Again, if the Court could not prevent a higher bidder at the sale from taking the land from the vendee under the contract, (so called,) how in the name of common sense could a Court under the same contract compel the vendee (so called) to take the land on such contract for the debt?

II. The fourth and fifth exceptions to the decree are as follows:

"Because the said John A. Geiger was not a trustee in the sense of the decree, and could not take possession of land (except under certain peculiar circumstances) in his capacity as administrator, as is alleged in the answer; his duties as administrator de bonis non being confined to the proper administration of such personal assets as came into his hands unadministered, and his possession of land, or his purchase of land directly or indirectly, for the estate was without authority.

"Because the defendant knew that his bond and mortgage were assets in the hands of John A. Geiger, as such personal representative, to be collected by him, and the proceeds were first to be applied to the payment of debts, if any, and, second, to be held subject to a division among the parties entitled thereto; and any agreement between the defendant and the said John A. Geiger, as administrator, to divert the assets from their proper channel was on the part of the administrator a breach of trust and on the part of the defendant a fraud, and even in the case of an executed agreement could be set aside by the parties entitled to a distribution of the fund."

By what authority does an administrator undertake to buy land for an estate? The allegation is that "the defendant proposed to deliver to the said John A. Geiger, as administrator, possession of the premises, and reconvey the same to him if the said John A.

Geiger, as administrator, would cancel and return to the said defendant his bonds and mortgage fully satisfied, to which proposition the said John A. Geiger as administrator assented."

By what authority does he undertake to change the personal assets of the decedent into real estate? By what authority can an administrator use the funds in his hands to purchase even personal property for the estate? Since the case of Frazier v. Vaux, (1 Hill Eq., 202,) where the executor undertook

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to use the funds of a plant*ing estate to purchase negroes for the estate, and the purchase was held to be unauthorized, we had not supposed that the question could ever again arise in our Courts. But what would be said of an administrator going beyond the very nature of his office and purchasing real estate!

How can one as administrator hold the fee of real estate? And yet that is the bargain that has been violated and is here to be enforced. It is not that John A. Geiger, in his proper person, had purchased in trust for himself and others. Not at all. He was to pay over the choses as administrator, and there was to be a conveyance to him as administrator. In the stronger case of guardians or trustees, where there is no question as to their relation to the real estate, Chancellor Harper, in the case of Davis v. Gist, (Dudley Eq., 1,) holds the following language: "The Chancellor," says he, "supposes James Dugan to have been appointed guardian or trustee in relation to the land. But suppose this be so, certainly a guardian or trustee is not authorized to purchase for his ward or cestui que trust, or he may do so at his own risk, subject to his assent or dissent." But John A. Geiger was neither guardian nor trustee, and the defendant makes no such case. If a trustee or guardian would not be authorized to purchase, pray what law authorizes an administrator to purchase land for the estate of his intestate? He has no authority to purchase for the heirs or distributees certainly, nor has he authority to purchase for the creditors. He certainly cannot purchase for himself and pay with the assets of the estate.

The decree converts the administrator, nolens volens, into a trustee and puts the case upon the ground of compromise. "The principles which must govern such cases," says the decree, "has recently undergone examination in our Supreme Court in the case of Bacot v. Heyward," (5 S. C., 441). That case has absolutely no relation whatever to the case in hand. In their principles they bear no analogy, not even a remote one, to each other. We as counsel had in hand for several weeks the claim of the plaintiff Bacot, and advised that he had no case against the defendant Heyward upon the very grounds upon which it was finally decided in this Court, to wit:

1. It was held that the trust was not executed, but that it was in full force at the time the compromise was made.

2. That the compromise, though unauthorized, was made by the trustee upon a most doubtful claim, upon the validity of what

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was *known as a negro bond debt, as to the validity of which the Court and the bar were divided in opinion. It was a most doubtful question, and Courts of high authority had decided against such claims. With Mr. Heyward the alternative was whether he should pay half of the bond or run the risk of paying the whole; he accepted the former. With the beneficiaries and the trustee the alternative was whether they should take the certainty of half or run the risk of losing the whole; they in good faith accepted the former.

3. In this condition of things the compromise was concluded, the money paid, the judgment satisfied and the contract became an executed contract. The Court say: "The compromise having been concluded under the circumstances stated and carried into effect by the entry of satisfaction on the judgment, the plaintiff calls upon the Court to set it aside and require the defendant (Heyward) to pay him his portion of the bond which was discharged by the agreement between the trustee and Heyward."

4. The plaintiff made the demand upon the Court after the negro bond question had been decided in such manner as to put an end to the uncertainty involved and upon which the compromise was based; and it was only after the new element of certainty as to the result was manifest that the plaintiff wished to repudiate the compromise.

Under such circumstances the Court refused to lend its aid to the plaintiff and most righteously refused. Every element laid down in the authorities was present in the case and sustained the conclusion: The great uncertainty of the claim, the executed agreement looking to a doubtful issue, the good faith of the transaction, the going back upon a fair and concluded agreement when the uncertainty no longer existed, and finally the application to the Court to lend its aid to undo by its authority what had already been done by the parties.

Is there a single principle here stated applicable to the case in hand?

A reference to these authorities will show that in a proper case made for its consideration the Court will inquire:

1. Has there been an executed compromise, (not executory,) which in good conscience the Court should not disturb?

2. Was that compromise so made founded upon such an uncertain or doubtful claim as would support a wager?

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*3. Was it such a compromise as the Court would have sanctioned had application been made to it to authorize the same?—3 Leading C. E., 381; 1 Smith's L. C., 552.

We say upon a proper case made such would be the inquiries; but our case does not come within the class of cases to which these rules apply, for the simple reason heretofore stated in the argument. But admitting ours to be such a case, could the Court, upon the tests furnished by the authorities, come to any other conclusion than that under the circumstances here alleged this so-called contract would be a clear breach of trust? Eliminate the uncertainty, doubt, risk, hazard, from a compromise, (which would excuse what would otherwise be a breach of trust,) and we have yet to see the case where a Court will sustain any such compromise.

1. As to the cestui que trust, the rule would be he may accept or reject the contract as may be most advantageous to himself.

2. As to the other contracting party, the reply would be: If you have any legal rights against the trustee you may pursue them, but you have no redress in a Court of equity.

III. This brings us to the sixth exception to the decree.

"Because it is respectfully submitted that for the Court to go further and by its decree to set up an executory parol agreement and sustain the same against the wishes and interest of the distributees, against the positive denial under oath of the administrator that he ever entered into such an agreement, or ever attempted to bind the interest of those entitled to the fund, is in effect for the Court to set up and compel a breach of trust by decree against the protestations of the administrator and the rights and interests of those entitled to its protection."

Even admitting, for the sake of the argument, that such a contract had been made, and the administrator or other trustee, discovering his want of authority, or that the contract was against the true interest of the estate, had refused to carry out the agreement, the Court would never compel its performance. It has been expressly laid down in numerous cases "that a contract of sale by trustees made in breach of trust, will not be specifically enforced."—Wood v. Richardson, 4 Beav., 176; Muloch v. Butler, 10 Ves., 311; Thompson v. Blackstone, 6 Beav., 470. Thus it is laid down by Sir John Leach, V. C., in the case of Ord v. Noel: "That if trustees fail in reasonable diligence, if they contract under circumstances of haste and improvidence, if they make the sale with a view

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*to advance the particular purposes of one party interested in the execution of the trust at the expense of another party, a Court of equity will not enforce the specific performance of the contract, however fair and justifiable the conduct of the purchaser may be."—Lewin on Trusts, 462.

"And so," says Mr. Hill, (on Trustees, *282,) "if the person taking from the trustee be a purchaser for valuable consideration, yet if he purchased with notice of the trust his conscience will be affected with the same equity as the trustee from whom he purchased."

Again: "There has been already occasion to state that a purchaser from a trustee (though for valuable consideration) will be bound by the trust in the same manner and to the same extent as the trustee from whom he purchased if the purchase be made with the notice of the trust, and the title of the purchaser will not be strengthened by levying a fine. And we have also seen that this rule applies equally whether the trust is expressly created or arises only by construction of law."—Hill on Trustees, *509, and cases in foot notes.

Again, at page 282: "Although the trustees have the power of disposing of the trust estate at law as if they were the beneficial owners, yet a conveyance by a trustee without consideration will not prejudice the title of the cestui que trust, but the volunteer will in equity be treated as a trustee for his benefit."

If this be law, what would be said of a case like the present:

1. Where the administrator had no authority to contract or purchase at all?

2. Where the so-called contract was without consideration; the one contracting party having already everything that the other contracting party offered, to wit, the land, and the chance of making the whole debt out of it or out of the defendant?

3. Where the contract was not executed and the effort is now to compel its execution as against a party who had no authority to contract?

4. And where the administrator says to the Court that he has not been guilty of the violation of his trust, but, on the contrary, declares under oath as follows: "I never did agree to take back the land. They tried several times to get me to take back the land. I said to Mr. Davis: 'I can't consent to take back the land.' Kaigler had abandoned possession. Kaigler being out of possession, I went into possession"?

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*IV. The seventh and eighth exceptions are as follows:

"The decree concludes the rights and interest of those plaintiffs who it is admitted were not parties to the agreement: (1) by giving validity and effect to certain acts of John A. Geiger as administrator, who as such had no authority in law to bind the others, and who denies that he ever did so bind them; and (2) by sustaining against them as evidence a mere inference of a third party,

founded upon certain words of the said John A. Geiger, all which alleged words, acts and inferences were no part of the alleged contract.

"The decree draws this unauthorized conclusion against the plaintiffs, who were not parties to the so-called agreement, upon the extraordinary legal hypothesis that they were required to disprove at the trial (at which they were not present) what was not alleged against them in the answer, to wit, their knowledge of the alleged acts and words of the said John A. Geiger as administrator, and the inference drawn therefrom as affecting their rights; and, further, that they were required to rebut the evidence which for the first time came out at the trial and was unequivocally rebutted by the oath of the said Geiger as wholly untrue."

If we examine the answer from its beginning to its end we shall find no allegation that any of the plaintiffs (except John A. Geiger) had, directly or indirectly, any part or lot in this so-called agreement, and even as to him the allegation is against him in his official and not in his personal character.

The decree says: "If this transaction had taken place between parties acting wholly in their own right, there can be no question that in equity it would operate as a satisfaction of the debt." The decree then proceeds in these words: "But the fact that John A. Geiger was acting not only for himself individually," [there is no charge against him individually, as we have seen in the answer,] "but also as a fiduciary of others, which renders it necessary, if the cestui que trust are to be bound, that something more should appear besides the bare making of the agreement and its enforceable character in equity."

This is quite true; but what more should appear?

1. It should certainly be charged in the answer against such cestui que trust (as they are called) that they had joined in the so-called contract, or that they knew of such contract and had assented thereto in such words or in such terms or by such acts as would be binding upon them in law. I shall

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not here again elabo*rate the argument of the Statute of Frauds as applicable to them. I call attention to it.

2. Had this been done there would then have been in the answer such an allegation of fact as would have put the parties against whom the allegation had been made upon their defense, and would have opened the case for proof in support of the affirmative and of the negative of the allegation so made.

In this case there was neither the allegation by the defendant to put the plaintiffs on their defense, nor was there any proof at the trial which could possibly bind them, even if the allegation had been made.

McMaster & LeConte, Rice, contra:

The general facts of the case are clearly stated in the decision of the Court below.

The exceptions, in effect, are to the whole decision—as well matters of fact as of law.

I. As to the findings of fact:

1. The testimony in the case was taken orally, in open Court, without a stenographer. The brief was made up from notes taken in the course of the trial, the meagerness of which is apparent upon their face. In such a case, the wise and well-settled principle governing this Court, that the decision below will not be disturbed unless it is against the overwhelming force of the evidence, is peculiarly applicable.

This leaves, in reality, no room for argument. There was some conflict of testimony, but the preponderance was in favor of the findings. The Judge accepted the testimony of Kaigler, the defendant, confirmed as it was by the witness, Kinsler Davis, and corroborated by the written order for titles and other testimony, and rejected the statements of the plaintiff, John A. Geiger. He had the best opportunity to judge of the credibility of the witnesses, and we assume that his conclusions upon such a matter will be accepted by this Court.

2. We submit the following considerations, in addition, upon the third finding of fact:

(a.) The settlement must be considered as of the time it was made (early in 1874). It was then just, fair and advantageous to the plaintiffs. That the land has subsequently depreciated in their hands is no ground to impeach it, but the contrary.

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*(b.) The defendant, Kaigler, purchased the land in 1863 for $12,000—at war prices; or, at least, it may be assumed at a high valuation, as it was sold upon disadvantageous terms to the vendee. He has actually paid about the amount of the purchase money for the land, and, after expending large sums of money on improvements, has returned the land itself. He cannot, therefore, be said to have had any advantage from the bargain.

(c.) As to the suggestion that the land was returned depleted of timber. The valuable timber, viz., all in the neighborhood of the mill, had been cut before Kaigler purchased. Davis testified that most all cut by him had to be hauled two miles. This destroyed its value. Hence Davis failed. The condition of the place as to timber seems to be pretty much the same now as it was when Kaigler bought. It must be remembered that the tract is about 5,000 acres. The relative amount of timber cut by Davis was not great, and the transportation made it of little value. Besides, Geiger went over the place before the settlement.

(d.) It is fair to assume that at the time of the settlement the land needed only good management to make it worth more than

the balance of the purchase money. Geiger evidently thought so. That the other distributees permitted the settlement to stand so long shows that they were not originally displeased. The bad management of Geiger and the general depression in the value of property may account for their present dissatisfaction.

(e.) Upon the whole case, as presented from the stand, having regard to the character of the witnesses and the many circumstances which give color and force to testimony, but which cannot be reproduced here, the Judge below formed the deliberate judgment that the settlement was "so fair and reasonable that the Court would have sanctioned it had the administrator applied there for authority."

II. As to the conclusions of law:

1. The agreement was not within the Statute of Frauds.

(a.) The Court decided distinctly and in accordance with the evidence that Geiger's entry upon the land and his subsequent occupancy were under the agreement. This was such part performance as to take the case out of the statute.—Anderson v. Chick, 1 Bail. Eq., 118; Gregorie v. Bulow, Rich. Eq. Cases, 235; Hatcher v. Hatcher, McM. Eq., 311; Cornwell v. Spence, Harp. Eq., 258; Smith v. Smith, 1 S. C., 130.

(b.) The plaintiffs were seeking equity and bound to do equity.

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*2. It is objected that Geiger, as administrator, could not legally take the land because his duties were confined to the administration of personal assets. Upon this we submit—

(a.) That where a debt secured by mortgage is to be administered, everything incident to the security of the debt is within the purview of the trust. If, in the interest of the estate, he takes the land for the debt, the land is, quoad his trust, personal estate.

(b.) But here the land was sold by Geiger's predecessor in the trust—the executor of Henry Geiger. The plaintiff's case rests upon the assumption that the personal representative had authority to sell the land and has now the right to the proceeds of the sale of land. It is a strange argument that one who can sell land and is entitled to the proceeds cannot bargain to take the land back because it is intermeddling with the realty. Judge Carpenter's decision upon the demurrer determined the law for this case: that the administrator de bonis non was the legal trustee of the bonds and mortgage. Otherwise the demurrer was good.—Code, § 135.

(c.) The bonds and mortgage were for lands sold by the executor of Henry Geiger, whose successor John A. Geiger, as administrator de bonis non, was held to be. If the latter could not contract as to the land the former was also without authority. In that case everything done concerning the land was void, and in gaining possession of the land the rights of the plaintiffs, as heirs of Henry Geiger, were fully satisfied.

3. The bonds and mortgage had their birth in a compromise with the executor of the estate. In seeking to enforce them the plaintiffs adopt this compromise. How can they say, then, that a settlement with the representative of the estate is necessarily and under all circumstances void? If it is not necessarily void, then, as the Court below decided, its validity must depend upon the circumstances, and the question is really one of fact.

4. The exceptions assume that the settlement was a breach of trust. This is the point in controversy. The Court below decided that it was no breach of trust, because, the trust being to collect the debt, it was within the purview of the trust, if the exigency demanded it, to make a settlement, provided the settlement was so just and advantageous that the Court would have sanctioned it.—Swicard v. Adms. of Swicard, 2 M. Const. R., 218; Gage v. Adms. of Johnson, 1 McC., 492; Chappel v. Brown, 1 Bail., 528; Johnston v. Lewis, Rice Eq., 40.

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*5. The peculiarity of this case was that John A. Geiger, who made the settlement, was seeking to deny and repudiate it. Hence, in seeking to ascertain his mind and purpose in the settlement, the Court had no help from him, but as many difficulties as possible thrown in the way. And yet, to determine the equities, it was necessary to find the state of things existing at the time of the transaction. This the Court did.

6. The Court below meted out to the plaintiffs the fullest measure of equity consistent with the equities of the defendant, arising (1) from the agreement with the trustee, which, being adjudged fair and just, &c., and fully performed by the defendant, was, standing alone, sufficient to justify the decree; and (2) from the implied sanction the other plaintiffs had given to the settlement by permitting their representative to hold and enjoy the land for two years, and their laches in delaying to assert their claim until it had become impossible to restore the parties to their original positions, and the settlement could not be opened without great injury to the defendant.—Gillam v. Briggs, Rich. Eq. Cases, 435.

7. It was alleged in the record, and admitted, that the consideration of the bonds was land sold by the executor of Henry Geiger. It was not alleged, nor was any evidence produced to show, that the executor had any authority to make the sale. The presumption from these facts was that the sale was void and the bonds wholly without consideration. This would have been a good defense to an action upon the bonds even at law. Certainly, under such circumstances, no money decree should have been rendered against the defendant.

8. If the Court should come to the conclu-

sion that the decree is erroneous for any cause, we then submit that the order of Judge Carpenter in the cause, made October 18, 1875, overruling the demurrer, should be set aside.

The complaint alleged that the bonds and mortgage were made in consideration of the sale of lands by the executor of Henry Geiger, and did not allege that he had any authority to sell. It thus was made to appear upon the face of the record that the bonds were without consideration, and hence that the plaintiffs had no cause of action.

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*November, 1877. The opinion of the Court was delivered by

McIVER, A. J. This action was brought to foreclose a mortgage of real estate given by the defendant to Alexander Geiger as executor of Henry J. Geiger, to secure the payment of the purchase money of a tract of land sold and conveyed by said Alexander Geiger, as executor as aforesaid, to the defendant. The plaintiffs are the heirs-at-law and devisees of Henry J. Geiger, and one of them, John A. Geiger, is likewise the administrator de bonis non, with the will annexed, of said Henry J. Geiger, he having taken out such letters after the death of said Alexander Geiger as well as after the death of one Inabinet, to whom letters of administration de bonis non upon the estate of Henry J. Geiger had been originally granted. The defense set up was, that by an agreement entered into between the defendant and the plaintiff, John A. Geiger, as administrator de bonis non of Henry J. Geiger, who then, as now in this action, claimed to be the legal owner and holder of the mortgage, together with the bond which it was given to secure, the defendant was to surrender to the said John A. Geiger, as administrator as aforesaid, full possession of the premises, with all improvements thereon, and reconvey the same to him, and he, the said John A. Geiger, as such administrator, was to cancel and return to the said defendant the said bond and mortgages fully satisfied; that, in pursuance of such agreement, the defendant immediately surrendered possession of the premises to said John A. Geiger, and that he has ever since held possession of the same, receiving the rents and profits thereof, and that the only reason why the settlement was not completely carried out was that the attorney of the former administrator, (Inabinet,) who had possession of the bonds and mortgage, refused to deliver them up until administration was taken out upon the estate of Inabinet. The plaintiffs denied the making of any such agreement, and also took the ground that, even were such agreement established, it could not have the effect, claimed for it, of barring the action of the plaintiffs. The Circuit Judge, having heard the case upon the pleadings and evidence and argument of counsel, decided as matter of fact:

1st. That the agreement as set up by the defendant was made, and that, "in pursuance of this agreement, the said administrator was let into possession of the said premises, and assumed, and has ever since exercised, an ex-

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clusive control over the same, receiving *the rents and profits of the land and dealing with it in all respects as the owner.

2d. That the defendant has always been ready and willing to complete the performance of the agreement upon his part, and that it was the fault of the said administrator that the agreement was not perfected by the legal conveyance of the land and the satisfaction of the bond and mortgage.

3d. That the agreement was made in good faith on both sides and was, "under all the circumstances, a fair and most reasonable settlement," or, as he says in another part of his decree, "that, under the circumstances, the settlement was so fair and reasonable that the Court would have sanctioned it had the administrator applied there for authority."

He then finds as matter of law, "that the plaintiffs are bound in equity by the settlement," and concludes his decree with an order: "That the plaintiffs have leave to apply at the foot of this decree for all necessary orders to carry it into effect by the foreclosure of the mortgage set forth in the complaint and the sale of the mortgaged premises; but that the said defendant be, and he is hereby, adjudged to be discharged and released from all personal liability upon the said bonds, which must be marked fully satisfied upon the sale;" and then directed that the plaintiffs pay all the costs of the action.

In conformity with the well-settled rule, this Court will not interfere with the findings of fact by the Circuit Judge unless where such findings are without any evidence to support them or against the overbearing weight of the evidence. Without entering into any discussion of the testimony, it is sufficient for us to say that we are unable to perceive any ground upon which the findings of the Circuit Judge can, under the rule above stated, be interfered with. We shall, therefore, in the further discussion of this case, assume the correctness of the facts as found by the Court below. It will be observed that this is not a case in which a party is seeking by an action to enforce the specific performance of an agreement, but the defendant is here simply invoking as a defense in bar of the plaintiffs' action the agreement hereinbefore stated. Upon the well-established principle that he who seeks equity must first do equity, the Court should not lend its aid in the enforcement of a claim which, though not technically discharged, ought to be by virtue of a previous agreement between the parties. This would involve the

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*exercise of the power of the Court to en-

force that which in equity and good conscience ought not to be done, and the Court will not so exercise its powers. There can be no doubt that if the agreement to satisfy the mortgage and cancel the bonds, followed up by a surrender of the mortgaged premises to the mortgagee, in pursuance of such agreement, had been a transaction between two parties acting in their own right, the defense here set up would have been complete and effectual. The only question, then, remaining is whether an administrator could make such an agreement in reference to a chose in action belonging to his intestate's estate with like effect. This involves the general question whether an administrator has a right to compromise a claim which constitutes a portion of the assets of his intestate.

The question as presented here cannot be affected by the provisions of the statute as has been supposed, (Gen. Stat., Chap. XC, § 9, p. 458,) for two reasons: 1. Because that statute is, by its very terms, merely permissive. It merely authorizes a compromise in certain specified cases and does not purport either to establish a general rule or to prohibit compromises in any other cases. 2. The case now before the Court does not come within any of the specified cases. The demands referred to there are such as would be appraised—that is, such as were in existence at the time of the death of the intestate and those which arose subsequent to his death: for example, notes taken at the sale of the estate by the administrator cannot be brought within the terms of the statute. Here the bonds and mortgage were taken subsequent to the death of Henry J. Geiger, and were payable to his executor and not to him, and would not, therefore, be appraised as a part of his estate. The question must, therefore, be determined upon the general principles regulating the rights and duties incident to the office of an administrator. We are, however, saved the necessity of inquiring into these principles by express adjudications of the Court of last resort, which, in our judgment, finally settle the question.

In Bacot v. Heyward, (5 S. C., 441,) a cestui que trust attempted to set up a judgment which had been compromised by the trustee without his knowledge or acquiescence, and the act of the trustee in making the compromise was sustained upon the ground that it was such a compromise as the Court would have authorized if it had been previously applied for. Moses, C. J., in delivering the opinion of the Court, uses this language:

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"It cannot be questioned that as *a general right, incident to his office, a trustee has no power to compromise a debt on behalf of his cestui que trust. * * * While, however, the general right is withheld, its denial is subject to conditions and exceptions which qualify the rule. If the Court which is asked to vacate it finds from an examination of the circumstances under which it was made that its sanction to the trustee if previously applied for would have been accorded, it will recognize it as an act consistent with the principles and doctrines which it enforces and sustain it."

It is very true that these remarks were made in reference to a trustee, strictly so called, but we see no reason why they are not equally applicable to an executor or administrator, who is certainly a trustee; or as Inglis, in Rhame v. Lewis, (13 Rich. Eq., 292,) in speaking of the tenure by which an administrator holds the assets of his intestate, says: "He holds the title not in any wise for his own use and benefit, but wholly for the uses of the office as the means wherewith to fulfill its duties. * * * His estate is, therefore, according to the strictest definition of a special trust."

The case of Smith v. Prothro, (2 S. C., 371,) furnishes an instance in which the same principle was applied to the case of an administrator. Indeed, the various cases in which this Court, as well as the late Court of Appeals, have sanctioned the acts of administrators and trustees in accepting Confederate treasury notes in satisfaction of bonds secured by mortgages of real estate must necessarily ultimately rest upon this principle, for such notes never acquired the legal attributes of money, they never having been made a legal tender even by the authorities of the Confederate Government; and, therefore, when the holder of a claim accepted satisfaction of it in anything other than money, it was to that extent a compromise,—a yielding of legal right,—for certainly every creditor has the right to have his claim paid in money, and he is not bound to accept anything else in satisfaction of it; and if he does, he, to that extent, compromises or yields his legal rights. The case, therefore, resolved itself into a question of fact whether the arrangement between the administrator and the defendant was such as the Court would, if previously applied to, have sanctioned. This question having been determined by the Circuit Court in favor of the defendant, must, as we have above stated, be regarded here as conclusively settled.

There is another view which may be taken of this case. Assuming, as has been done by the Circuit Judge, and as contended for

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*here by the appellants, that John A. Geiger, as administrator de bonis non of Henry J. Geiger, was the legal owner and holder of the bonds secured by the mortgage, it is difficult to understand why he could not and did not bring the action as sole plaintiff. We are unable to perceive the necessity or propriety of uniting with him, as co-plaintiffs, the heirs and devisees. The reasons suggested for such a course, though quite ingenious, do not strike us as satisfactory. Suppose, then, the action had been brought in the name of

the administrator alone, could it for a moment have been doubted that the agreement, partially performed, as it was found to be by the Circuit Judge, on the part of the defendant, would have been a bar to the plaintiff's action? Certainly, then, the addition of unnecessary, not to say improper, parties plaintiff cannot be allowed to change the result. The Court is not unmindful of the right of parties interested in an estate, upon a proper case made, to set aside an arrangement made between an executor or administrator and a debtor of the estate for the settlement or satisfaction of the debt without actual payment, as, for example, in the case of Thomas v. Gage & Johnson, (Harp. Eq., 197,) where an insolvent administrator, by collusion with the debtor, accepted satisfaction of a judgment in favor of the estate against such debtor in a receipt for an individual debt due by the administrator to the debtor, or in any other case where the transaction amounts to a breach of trust, in which the debtor of the estate knowingly participates. But in such a case it is necessary to allege and prove fraud or collusion between the administrator and the debtor. This, however, is not such a case, for there is no such allegation and no such proof. In Mayer v. Mordecai, (1 S. C., 383 [7 Am. Rep. 26]) an effort was made by a cestui que trust not merely to hold the trustee liable, but also to set up certain bonds and mortgages, in satisfaction of which the trustee had received Confederate treasury notes, worth at the time, in the market, much less than the bonds and mortgages. But the Court, while holding the act of the trustee to be a breach of trust, for which he was liable, refused to set up the bonds and mortgages as against the original debtors, upon the ground that there was no proof of any fraud or collusion upon their part. Now, in that case the debtors knew that the trustee was not only receiving, in satisfaction of their bonds and mortgages, something that was not money, but something that was of less value than such bonds and mortgages, just as in this case the defendant knew that the adminis-

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trator was agreeing to re*ceive in satisfaction of the mortgage something that was not money, but whether of greater or less value in the market does not appear from the evidence, there being no testimony as to whether defendant was solvent or insolvent at the time the agreement was made, and if insolvent it must have been at least of equal value, for in such case the administrator could get no more than what he did get—the land. So that if the absence of fraud and collusion in the one case be a protection, it must likewise be in the other.

As is said by the late Court of Appeals in Austin v. Kinsman, (13 Rich. Eq., 265,) "a creditor, though entitled to demand payment in lawful money, may waive his right and accept any substitute he pleases, and his voluntary acceptance of such substitute as payment makes it so;" or, as is said by the law Court in Bush v. Kilcrease, (1 Strob., 419,) in which the question was whether the Ordinary could accept a bond of third persons in satisfaction of a bond given by defendant to secure the purchase money of land sold for partition: "It cannot be questioned that the Ordinary who receives a bond for the payment of the purchase money of lands directed by him to be sold for partition may collect the money and thus discharge the bond, or he may, for aught that appears to the Court, throw the instrument into the fire: and if he may do the one or the other, it is not perceived why he may not receive satisfaction for it in another bond, in a bill of exchange, or in any manner by which such a debt is extinguished, as other parties." So that it would seem to be the rule of law that if the legal owner and holder of a chose in action, in consideration of something other than money, acknowledges satisfaction, the claim is absolutely extinguished.

This rule, however, like most others, is subject to this qualification: that where such legal owner holds the chose in action not merely in his own right but for the benefit of others, and accepts in satisfaction of it anything other than money, such claim may, at the instance of the parties beneficially interested in it, be set up against the debtor, provided it can be shown that there was fraud or collusion between the debtor and such legal owner and holder of the chose in action. The decree of the Circuit Judge, however, in ordering a sale under the mortgage, after having determined that the mortgage was extinguished, was erroneous and must to that extent be set aside. But as the conclusion reached by the Circuit Judge as to the effect of the defense set up is sustained by this Court, the action cannot be sustained.

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*It is, therefore, ordered that so much of the decree of the Circuit Judge as provides for a sale of the mortgaged premises be set aside and that the complaint be dismissed.

WILLARD, C. J., and KERSHAW, acting A. J., concurred.

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9 S. C. 430

CLEVELAND v. MILLS.

(Columbia. Nov. Term, 1877.)

[*Descent and Distribution* ⇦143; *Wills* ⇦847.]

Where a cause of action upon a guaranty accrued 21st of December, 1866, and the guarantor died in April, 1870: *Held*, That an action upon the guaranty against the heirs and devisees of the guarantor to subject real estate

to the payment of the debt, commenced June 21, 1871, was not barred by the Statute of Limitations.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. § 503; Dec. Dig. ⇐ 143; Wills, Cent. Dig. § 2160; Dec. Dig. ⇐ 847.]

[*Descent and Distribution* ⇐139; *Wills* ⇐ 847.]

An action against heirs and devisees, to subject real estate, descended or devised, to a debt of the testator or intestate, cannot be commenced until nine months after the death of the testator or intestate, although no executor or administrator of the testator or intestate is a party to the action.

[Ed. Note.—Cited in Lowry v. Jackson, 27 S. C. 322, 3 S. E. 473.

For other cases, see Descent and Distribution, Cent. Dig. § 497; Dec. Dig. ⇐139; Wills, Cent. Dig. § 2160; Dec. Dig. ⇐847.]

[*Descent and Distribution* ⇐143; *Wills* ⇐ 847.]

The Statute of Limitations applies to an action against heirs and devisees to subject real estate in their possession to a debt of their ancestor or devisor.

[Ed. Note.—Cited in Wheeler v. Floyd, 24 S. C. 422; Brock v. Kirkpatrick, 60 S. C. 346, 348, 38 S. E. 779, 85 Am. St. Rep. 847; Id., 69 S. C. 237, 248, 48 S. E. 72; Brantley v. Bittle, 72 S. C. 188, 51 S. E. 561.

For other cases, see Descent and Distribution, Cent. Dig. § 503; Dec. Dig. ⇐143; Wills, Cent. Dig. §§ 2159-2164; Dec. Dig. ⇐847.]

[*Executors and Administrators* ⇐437.]

The provision of the Act of 1789 exempting executors or administrators from suit for nine months applies to suits in equity.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1739; Dec. Dig. ⇐437.]

[This case is also cited in Hand v. Kelly, 86 S. E. 385, as an example of the right to trial by jury in actions against estates of decedents.]

Before Northrop, J., at Spartanburg, March, 1877.

Action by R. E. Cleveland against J. C. Mills, T. K. Cureton and Mary Cureton, his wife.

The case is as follows:

J. M. Blair and Jas. A. Patton gave to T. K. Cureton and Nancy R. Mills their sealed note for $5,115.26, dated November 19, 1862, and payable twelve months after date. The payees assigned the note before it became due to the plaintiff and guaranteed the payment thereof. N. R. Mills died in April, 1870, leaving some valuable real estate lying in Spartanburg County. She left, also, a last will and testament, which was admitted to probate in said County, but the executor therein named did not qualify. The action was commenced June 21, 1871, against J. C. Mills and Mary Cureton as heirs and devisees of the said N. R. Mills, and T. K. Cureton as husband of the said Mary, to subject the said real estate to the payment of the debt due upon the said guaranty. The defendants pleaded, amongst other things, the Statute of Limitations. At the trial the defendant requested the presiding Judge to

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charge the *jury that the action was barred by the Statute of Limitations. The request was denied and the defendant excepted.

The jury found for the plaintiff the amount of the note, and the defendant appealed.

Bobo & Carlisle, Steedman, for appellants: The Statute of Limitations began to run in December, 1866.—Wardlaw v. Buzzard, 14 Rich., 158.

The Statute of Limitations was not suspended by the death of N. R. Mills or by operation of military orders, or by any law of this State.—Rev. Stat. S. C., 509; Raymond v. Thomas, 91 U. S. S. C. Rep., 712; Shand v. Gage and others, MS. opinion recently filed.

By the various Acts of our General Assembly the Statute of Limitations was suspended from the maturity of the note, November 19, 1863, until December 21, 1866. At this last date the Statute of Limitations began to run. The action was begun 21st June, 1871, four years and six months after the accrual of the right of action and after the Statute of Limitations had begun to run. The question submitted to the Court is, was the Statute of Limitations a bar to the action? Appellants submit that it is. It is a well-settled principle of law in this State that when the Statute of Limitations has commenced running no subsequent disability can stop it.—Faysoux v. Prothero, 1 N. & McC., 296; Adamson v. Smith, 2 Mills, 269.

In this case no disability was alleged or proven. To prevent the currency of the Statute of Limitations there must be some positive enactment of the Legislature or it must be suspended by necessary implications. By the Act of 1789, (5 Stat., 112,) executors or administrators are protected from any action for the recovery of debts due by the testator or intestate until nine months after such testator's or intestate's death—a creditor by this statute being prevented from bringing suit for nine months. By the decisions of our Court the statute is suspended for nine months. This suspension of the statute is only where executors or administrators are sued, and the Court cannot add to the exceptions so as to include heirs and devisees.

Chief Justice Marshall, delivering the opinion of the Supreme Court of the United

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States, in the case of McIver v. Ragan, *(2 Wheat., 25,) (cited in Angell on Limitations, 487,) says: "Wherever the situation of a party was such as, in the opinion of the Legislature, to furnish a motive for excepting him from the operation of the law, [Statute of Limitations,] the Legislature has made the exception. It would be going far for this Court to add to those exceptions." * * * * * And so cautious have our Courts been in extending the exceptions, that

Chancellor Wardlaw doubted whether a creditor is entitled in equity as at law to nine months in addition to the four years allowed within which to sue the executor of his deceased debtor.—Sollee v. Croft, 7 Rich. Eq., 34.

The plaintiff not having brought his action against the defendants as executors or administrators, but against them as heirs and devisees, is not entitled to the nine months in addition to the four years within which to bring suit. Defendants took possession of the land described in the complaint immediately on the death of Mrs. Mills. There was nothing to prevent plaintiff bringing suit as soon as defendants took possession of the land. No intervening disability existed, either statutory or by necessary implication.

In the case of Mobley v. Cureton (6 S. C., 49,) plaintiff in 1868 filed his bill to subject descended real estate in the possession of the heirs to the payment of a sealed note due in 1854. The Court held that the plaintiff was barred by his laches of his remedy in equity, and the bill was dismissed without prejudice to plaintiff's right to pursue the heirs by action at law. The Court further says: "If the action on the bond here had been at law against the heir, it would not have been barred, except from the presumption of payment arising from the lapse of twenty years, or a shorter period, with such circumstances as would contribute to strengthen it." Can there be any doubt, if twenty years had elapsed since the accrual of the right of action on the sealed note, but that the Court would have presumed payment at law, as it did decide that the plaintiff was in equity barred by his laches?

Mobley brought his action at law in 1871. (6 S. C., 49.) The defendants relied upon the presumption of payment arising from lapse of time. The Court held that "the facts set forth as proof of payment and laches were insufficient to enable the Court to determine the questions of payment or laches." If twenty years had elapsed, would not the Court have decided that the claims would have been presumed to have been paid from the

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lapse of time? If *the presumption of payment will arise in twenty years on a sealed claim, will not four years be a complete bar to a claim not under seal? In the present case four years and six months had elapsed from the time that the Statute of Limitations began to run to the commencement of the action. The action is on a claim not under seal, and to such actions four years is a complete bar unless the respondent can produce some law which arrested the Statute of Limitations. We have failed to find any such law.

The respondent relies with confidence upon the Statute of Limitations, which Justice Cheves, in the case of Adamson v. Smith, (2 Mills, 269,) styles: "Statutes of peace and repose, necessary for the comfort of society. They are found in some shape or other in every country and under every government; their adoption is scarcely a matter of choice."

Simpson, contra:

Whether this be regarded as an action on the debt of the ancestor or on the liability of the appellants as heirs and devisees, the Statute of Limitations fails as a defense.

If it be regarded as a suit on the contract of the ancestor, Mrs. Mills, then, under the facts, it could not have been barred until the 25th September, 1871; but the action was commenced several months before this date.

1. It could not have been barred before the 25th of September, 1871, because the statute did not commence for Mrs. Mills until 25th December, 1866. Mrs. Mills died in April, 1870, some eight months before the statutory period expired. This suspended the statute for nine months. Four years and nine months from 25th December, 1866, would be 25th September, 1871. The action was commenced in June, 1871, some three months before the time was out.

2. At the time, then, this action was commenced against these appellants there was a subsisting debt against their ancestor, and, therefore, if they are sued on their ancestor's debt, the statute cannot shield them.—Moses v. Jones, 2 N. & McC., 259.

But suppose it be regarded as the debt of the appellants, founded upon their own contract, on account of their possession of the real property of the ancestor. In that case the statute would be much less a protection.

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*1. Because the statute does not protect until four years after the accrual of the right of action. Here the right of action did not accrue against these appellants until they became heirs or devisees. This did not take place until the death of the ancestor, which was in April, 1870. The action was brought in June, 1871. This was within the four years from the accrual of the right of action.

Legatees and distributees cannot avail themselves of the statute against a debt of their testator or intestate short of four years' possession of the personal property received by them.—Trescott v. Trescott, 1 McC., 176; Buchanan v. James, 1 Sp. Eq., 382.

This proceeds upon the principle that after four years they then hold the property, not as legatees and distributees, but by possession—a new title; and it concedes the doctrine that as long as they hold as legatees and distributees, if the debt of the testator or intestate is subsisting they are liable.

If this is so as to personal estates, why is it not so as to real estate?

The appellants cannot tack the time which elapsed before the death of the ancestor to the time they became heirs or devisees before suit, to make out the four years, leaving out the nine months.

Because, if this could be done, there would still be a subsisting debt against the ancestor, and yet the heirs and devisees relieved, which would be a strange anomaly,—under the principle making heirs or devisees liable for the debt of the ancestor.

But even if they could tack, when did they become heirs and devisees? Not until twelve months after the death of the ancestor.

The executors could not assent to the devise before that period.

But respondent submits that in no event could the appellants tack, because the true theory of their liability is that they are sued upon their own contract to pay the debt of their ancestor, (which the law raises upon the receipt of real estate, either by descent or devise,) and the statute does not commence until the accrual of the right of action on this contract of theirs, which, in this case, did not take place until about a year before suit was brought.—Angell on Limitations, 80.

But again: It is a rule that legatees become trustees to pay debts of the testator to the extent of property received by them where there is deficiency of assets, and they may be compelled to refund to pay debts.—1 Story Eq., 503; Smith v. Cohens, 1 Bail. Eq., 70.

A legatee is held to be a trustee for creditors. It is because the property received by him was liable for debts.

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*The same reasoning would make an heir or devisee in possession of real estate a trustee for creditors; and inasmuch as the legatee could not protect himself by the statute short of four years' possession, which would change his title, neither could an heir or devisee protect himself short of a period of time which would change his title, e. g., ten years' adverse possession.

March 30, 1878. The opinion of the Court was delivered by

McIVER, A. J. This was an action to subject certain lands, of which Nancy R. Mills died seized and possessed, in the hands of the defendants, as her heirs and devisees, to the payment of a debt due the plaintiff by Nancy R. Mills, by reason of her guaranty of a note. The defense principally relied upon was the Statute of Limitations, and no other question is presented for our consideration.

The statute did not commence to run in favor of Mrs. Mills until the 21st December, 1866, it having been suspended until that time by the fifth Section of the Act commonly called the Stay Law, (Harlee & Pressley v. Ward, 15 Rich., 231,) and if she had lived would have run out on the 21st December, 1870. She, however, having died some time in April, 1870, (the precise day not being stated and not being material,) during the currency of the statute, by virtue of the provisions of the Act of 1789, (Gen. Stat., Chapter CIX, § 10, p. 509,) a further period of nine months must be added.—Moses v. Jones, 2 N. & McC., 259; Lawton v. Bowman, 2 Strob., 190. The result, therefore, would be that the action against her executor or administrator would not be barred until the 21st September, 1871, some months after this action was commenced.

The defendants took possession of the real estate as heirs and devisees of Mrs. Mills, at what particular time does not appear, but, necessarily, after her death in April, 1870. No question has been made, either here or in the Court below, as to the necessity of making the executor of Mrs. Mills a party, and, therefore, we are precluded from considering it or determining anything on that point. It is concluded, on the part of the defendants, that while it may be true that the action was not barred as against the executor of Mrs. Mills, when it was commenced, by virtue of the provisions of the Act of 1789, yet this action being against heirs and devisees, and not against the executor, the provisions of the Act of 1789 do not apply, and that without the addition of the nine

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months pro*vided for by that Act, and the decisions thereon, this action would have been barred as against them on the 21st December, 1870, precisely six months before it was commenced. They, therefore, requested the Circuit Judge to charge the jury to this effect, and excepted to his refusal so to do. It must be remembered that this is not an action to recover from the defendants the amount of a debt due by the testatrix, for the defendants cannot be held liable, personally, at all. If the property which has gone into the possession of the defendants, as heirs or devisees, had proved to be of less value than the amount of the debt, the plaintiff could only recover to the amount of such value by subjecting the property to the payment of the debt as far as it would go, and for any deficiency they would have no claim against the defendants personally. It is, therefore, as has been above stated, an action to subject the lands of the debtor, Mrs. Mills, in the hands of these defendants as heirs and devisees, to the payment of her debt, and it is founded upon the equity which creditors have to follow the assets into the hands of heirs and devisees to obtain payment of their debt. The question, therefore, is, not whether the defendants owe the debt, for there is no pretense that they ever did, but whether the testatrix owed it; not whether the right of action on the debt against the defendants is barred by the Statute of Limitations, for, strictly speaking, there never was such a right of action, but whether the right of action on the debt against her or her executor is barred. Any other construction would involve not only great injustice to an indulgent creditor but

would result in depriving him of his plain legal rights by reducing the statutory period which would bar his action. Take this very case as an example. The plaintiff certainly could, without detriment to his legal rights, indulge his debtor, and postpone the bringing of his action to any day within the period of four years from the 21st December, 1866. But if the theory of the defendants is allowed to prevail, this period would be reduced to three years and four months. For assuming, for the sake of convenience, that Mrs. Mills died on the 21st April, 1870, the plaintiff could not bring his action within nine months from that day, that is, until the 21st January, 1871, a point beyond the statutory period as contended for by the defendants; because if he brought it against the executor the Act of 1789 would certainly apply, and if he brought it against the defendants alone there can be no doubt but that they could force him to make the executor a

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party defendant, and then *the executor could plead the nine months' exemption. If, then, as defendants contend, the nine months' exemption is not to be added to the statutory period in this case, the plaintiff, instead of being allowed four years, would be forced to bring his action within three years and four months—that is between the 21st December, 1866, and the 21st April, 1870.

It is very true that Wardlaw, Ch., in Sollee v. Croft, (7 Rich. Eq., 40,) expressed a doubt whether the provisions of the Act of 1789 above cited applied to proceedings in equity, but this being a mere passing observation, not necessary to the point decided in the case, is not authority; and while we are disposed to pay the utmost respect even to the dicta emanating from that eminent Chancellor, we may be permitted to say that this doubt, however well founded it may have been at that time, could scarcely be entertained now since the abolition of all distinctions between the pleadings at law and in equity. The Chancellor's doubt is founded upon the terms of the Act which exempts executors and administrators from "any action for the recovery of the debts due by their testators or intestates," for, as he says, "a bill in equity is not strictly an action, and a claim for account is not strictly a suit for a debt." But since, by the provisions of the Code of Procedure, the term "action" is equally applicable to proceedings in which equitable relief is sought as well as those for the recovery of demands of a strictly legal character, and as the General Statutes, adopted subsequently to the Code, provides that "No action shall be commenced against any executor or administrator for the recovery of the debts due by the testator or intestate until nine months after such testator or intestate's death," there would seem to be now no ground for the doubt expressed by the learned Chancellor. And in reference to this particular case we may add that this was an action not for an account, but the recovery of a debt due by the testatrix.

The only defense, therefore, that could avail the defendants would have been either to show that there was no such debt due by the testatrix or that the action thereon against her executor was barred by the Statute of Limitations, which they might do, even though the executor should omit to interpose such a defense (Bird v. Houze, Sp. Eq., 250,) or to show such laches on the part of the plaintiff as would deprive him of the right to invoke the equity powers of the Court, as in Mobley v. Cureton, (2 S. C., 140,) or to have relied on their own possession for

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the statutory period, as in Miller *v. Mitchell, (Bail Eq., *437). None of these things have they shown, and, therefore, there was no error in the refusal of the Circuit Judge to instruct the jury as requested by the defendants.

The motion is dismissed.

WILLARD, C. J., and HASKELL, A. J., concurred.

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9 S. C. 438

RANSOM v. ANDERSON.

(Columbia. Nov. Term, 1877.)

[*Ejectment* ⇐69.]

In an action to recover real estate, the complaint alleged that plaintiff was seized in fee simple of the land and entitled to the possession thereof. The answer denied that the plaintiff was the owner of the fee in the premises, or entitled to the possession: *Held*, That the answer amounted to a general denial of the allegations of the complaint.

[Ed. Note.—Cited in Standard Sewing Machine Co. v. Henry, 43 S. C. 25, 20 S. E. 790.

For other cases, see Ejectment, Cent. Dig. § 181; Dec. Dig. ⇐69.]

[*Pleading* ⇐359.]

An answer denying the allegations of the complaint cannot be stricken out as sham.

[Ed. Note.—Cited in Osborne v. Osborne, 41 S. C. 198, 19 S. E. 494.

For other cases, see Pleading, Cent. Dig. § 1121; Dec. Dig. ⇐359.]

[*Ejectment* ⇐23.]

A defendant may rely upon several separate and distinct defenses to the action; and if one of them proves to be sham, or is not established at the trial, that does not preclude him from relying upon his other defenses.

[Ed. Note.—Cited in Branch & Smith v. Knepton, 19 S. C. 599.

For other cases, see Ejectment, Cent. Dig. § 90; Dec. Dig. ⇐23.]

[*Pleading* ⇐359.]

It is only where the defense is manifestly false, and interposed to delay or defeat the plaintiff's action, that the Court will strike it out; not so if there be a doubt upon the point.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 1120; Dec. Dig. ⇐359.]

[*Appeal and Error* ⇐712.]

[Where a fact, although true in itself, does not appear in the case as submitted in the Supreme Court, it cannot be considered.]

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2872, 2951–2954; Dec. Dig. ⇐712.]

Before Maher, J., at Barnwell, May, 1876.

This was an action by M. A. Ransom against M. A. Anderson and N. D. Anderson to recover the possession of certain real estate.

The complaint alleged that the plaintiff was seized in fee simple of the premises in question and entitled to the immediate possession thereof. The answer, for a first defense, denied that the plaintiff was seized in fee of the premises or entitled to the possession thereof; and for a second defense it alleged the special matters stated in the opinion of this Court.

The plaintiff moved the Court, upon the pleadings and certain affidavits which denied the allegations of the answer, to strike out the answer as sham.

The motion was granted, and the case submitted to a jury to assess the damages, which they did.

The defendants appealed to this Court upon the ground of error in the decision of His Honor the Circuit Judge.

Owens, for appellant.

Aldrich, contra.

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*March 30, 1878. The opinion of the Court was delivered by

McIVER, A. J. This was an action to recover possession of certain real estate of which the defendants have possession. There were two defenses set up in the answer: 1. A denial of the plaintiff's title. 2. An assertion of title in the defendants. The plaintiff moved to strike out the answer as sham, and based his motion on certain affidavits hereinafter more particularly referred to. The Circuit Judge having granted the motion, and stricken out the answer as sham, it was referred to the jury to assess the damages, and upon their verdict a judgment was entered that the plaintiff recover the real estate in question, together with the damages assessed by the jury, and his costs. This is now a motion to set aside such judgment, together with the order striking out the answer.

It seems to us that the first defense amounted to a general denial, and would put the plaintiff upon the proof of his title, just as the plea of the general issue in the old action of trespass to try titles would do—the rule in such a case being that the plaintiff must recover upon the strength of his own title and not upon the weakness of his adversary.—Haughabaugh v. Honald, 1 Tr. Con. Rep., 92.

In Wayland v. Tysen, (45 N. Y. Rep., 281) it has been decided that "the Court has no power to strike out as sham an answer consisting of a general denial of the material allegations of the complaint." The fact that the answer in that case was verified while it is not in the case now before the Court, can make no difference, for in 1 Tiffanny & Smith's N. Y. Prac., 384, in speaking of sham defenses, it is said: "The provisions of the Code apply equally to denials of allegations of the complaint as to affirmative or new matter and equally to verified as to unverified answers." We do not, therefore, see upon what ground the order of the Circuit Judge striking out the answer as sham can be sustained. For, assuming for the present that the answer, so far as the second defense was concerned, was shown to be sham, there stood the first defence raising an issue which ought to have been referred to the jury for trial. The reasons which influenced the mind of the Circuit Judge are not stated by him, but if we are allowed to infer them from what is said in the argument here, it would seem that he considered the first defense as dependent upon the second; or, in other words, that the defenses set up in the answer amounted simply to an allegation that the plaintiff had no title because the

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defendants did have title, and *that, as the affidavits satisfied him that the claim of the defendants that they had title was unfounded, the first defense must also fail. We do not think this a proper construction of the answer. The defendant, in a case like this, may rely upon several different and distinct defenses: a paper title in himself, a title of possession, or he may simply fold his arms, and, by a general denial require the plaintiff to prove his own title. And if one of his defenses proves to be sham or as not established on the trial, that should not deprive him of the benefit of any other defense which he may have set up in his answer. Although this would be decisive of the case, we think it best to consider also the propriety of the circuit decision so far as the second defense was concerned, for the purpose of giving a proper direction to the practice on this subject.

The defendants not only asserted title in themselves by their second defense, but proceeded to disclose the grounds upon which such assertion rested. These were, that by virtue of an agreement made by them with one E. L. Patterson, acting as agent of the former owner, A. W. Atkinson, they went into possession of the land in question, under a contract to purchase and the defendants were ready and willing to comply with the terms of such agreement on their part, but

were prevented from so doing by the fraudulent conduct of said Patterson, who conspired with the plaintiff and said Atkinson to deprive the defendants of their rights under such agreement by bringing about a pretended sale and conveyance of the premises to the plaintiff by said Atkinson, which conveyance was without consideration, fraudulent and void. The only affidavits upon which the motion to strike out the answer as sham was based were the affidavits of the parties charged with this fraud and conspiracy, viz., E. L. Patterson, A. W. Atkinson and the plaintiff, in which they deny explicitly the charge made. It strikes us as a very unsafe practice to allow such issues to be decided upon a mere motion based upon affidavits and these, too, the affidavits of the parties who were charged with the fraud; and, therefore, as the case is presented here, we do not think there was sufficient ground for striking out the answer as sham. We are aware that some of the New York Courts have gone very far in this direction—much further than we propose to go. We prefer to be guided by the rule as laid down in Tharin v. Seabrook, (6 S. C., 117,) where it is said: "If the pleading is manifestly false and interposed to delay or defeat the plaintiff's action, the Court will strike it out.

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This power *should be sparingly used, and only in cases free from doubt." We are not prepared to say that where a party is charged with fraud his simple denial, even under oath, without more, is sufficient to show that the charge "is manifestly false" or that it makes a case "free from doubt."

It may be, however, that there was something more presented to the Circuit Judge than what appears in the "case" as presented here. Indeed, it is not improbable, from what was said in the argument, that the agreement referred to in the answer, which is not before us, was before the Circuit Judge, and that, upon examination, it proved to be of a wholly different character from that represented in the answer and altogether insufficient to support the defense, or, perhaps, in direct conflict with it. But, be this as it may, we cannot, under the rules of this Court, allow any facts which are not to be found in the "case" as presented here to influence our decision.

The judgment of the Circuit Court, together with the order striking out the answer as sham, must be set aside and the case remanded to the Circuit Court for trial.

Motion granted.

WILLARD, C. J., and HASKELL, A. J., concurred.

9 S. C. 441

HAYES v. CLINKSCALES.

(Columbia. Nov. Term, 1877.)

[*Constitutional Law* ⇐48; *Limitation of Actions* ⇐151.]

Defendant gave his promissory note, payable 22d November, 1859. In October, 1869, he made a verbal promise to pay the note on a certain condition, which in March, 1874, was performed. This action was then commenced: *Held*, That the claim was not barred by the Statute of Limitations.

[Ed. Note.—Cited in Black v. White, 13 S. C. 40; Bolt v. Dawkins, 16 S. C. 213; Lanier & Co. v. Tolleson, 20 S. C. 62; Stoddard v. Owings, 42 S. C. 91, 20 S. E. 25; Milwee v. Jay, 47 S. C. 440, 25 S. E. 298.

For other cases, see Constitutional Law, Cent. Dig. § 46; Dec. Dig. ⇐48; Limitation of Actions, Cent. Dig. § 618; Dec. Dig. ⇐151.]

[*Constitutional Law* ⇐157; *Limitation of Actions* ⇐146.]

A verbal and binding promise to pay a debt, barred by the Statute of Limitations, on the performance of a certain condition, was made five months before the adoption of the Code of Procedure, and the condition was not performed until 1874: *Held*, That the claim was not within Section 96 of said Code.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 438; Dec. Dig. ⇐157; Limitation of Actions, Cent. Dig. § 594; Dec. Dig. ⇐146.]

[*Constitutional Law* ⇐48.]

An Act of the Legislature should not be so construed as to bring it in conflict with the Constitution, if such construction can possibly be avoided.

[Ed. Note.—Cited in Ex parte Tillman, 84 S. C. 563, 66 S. E. 1049, 26 L. R. A. (N. S.) 781.

For other cases, see Constitutional Law, Cent. Dig. § 46; Dec. Dig. ⇐48.]

[This case is also cited in Rodgers v. Mut. Endowment Assessment Ass'n, 17 S. C. 410; Heath v. Haile, 45 S. C. 649, 24 S. E. 300; Smith v. Smith, 50 S. C. 68, 27 S. E. 545, as to the distribution between subject of action and cause of action, and in Stoddard v. Owings, 42 S. C. 89, 20 S. E. 25, and distinguished therefrom.]

Before Reed, J., at Anderson, October, 1875.

Action by Baxter Hayes, administrator of John B. Armstrong, deceased, against Reuben Clinkscales.

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*The case as gathered from the report of a Referee, to whom all the issues were referred, is as follows:

The action was to recover the amount of a promissory note for $681.45, given by the defendant to the plaintiff's intestate, due and payable November 22, 1859. In October, 1869, after the death of the intestate, the defendant made a verbal promise to the plaintiff to pay the note whenever he should be relieved from all liability as surety on certain guardianship bonds given by the intestate on the 16th of June, 1855, to the Commissioner in Equity for Anderson District. In March, 1874, the condition was performed,

and on the 7th day of the same month this action was commenced.

The defense mainly relied upon was the Statute of Limitations.

The whole issue was referred to a Referee, who reported that in his judgment the case came within Section 96 of the Code of Procedure, and, consequently, that the action was barred by the Statute of Limitations.

His Honor made an order confirming the report, and the plaintiff appealed.

Featherston & Brown, for appellant:

Feeling assured that the Court will readily grasp the facts in this case from the pleadings and report, I will at once direct my argument to what is regarded by the Referee in his report to be the main point upon which this case must turn, to wit: the promise made to Mr. Whitner in October, 1869. This was a conditional promise, and, but for the condition annexed to the promise, the Referee and the Court below would have decided that it was not affected by Section 113 of our Code, which provides that "no acknowledgment or promise shall be sufficient evidence of a new or continuing contract, whereby to take the case out of the operation of this title, unless the same be contained in some writing, signed by the party to be charged thereby."

The decisions in reference to promises in order to revive debts barred by the Statute of Limitations prior to the adoption of the Code were to this effect: "That when a debt was not already barred by the Statute of Limitations, a slight acknowledgment was sufficient to revive it; but after it was barred, there must be an express promise to pay, which did not revive the debt, but gave a new cause of action, the old debt being the

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consideration for the *new promise."—See Lomax v. Robinson, Dud., 366; Sims v. Radcliffe, 3 Rich., 290; Gowdy v. Gillam, 6 Rich., 290.

In the case of Jones v. Moore, decided by the Supreme Court of Pennsylvania, (2 Browne R., 35,) Chief Justice Tilghman clearly expressed the law as it is now generally understood to be. He says: "If six years elapse after the cause of action accrued, there can be no recovery, although the debt is not extinguished but remains due in conscience and is a good consideration for a new promise." The law as fully established both in England and in this country is: 1st. That a debt barred by the Statute of Limitations may be revived by a new promise. 2d. That such new promise may be an express or an implied one. 3d. That such new promise may be created by a clear and unqualified acknowledgment of the debt.

But it is argued by counsel for respondent that in the case before us the promise was conditional, therefore not a good promise. In Brown v. Joiner, (1 Rich., 212,) it was decided that if the promise is conditional it must be declared on specially and performance of the condition averred. In the case of Grist v. Newman, (2 Bail., 92,) it was said by the Court: "I observe that a doubt is thrown out whether a debtor has the power to subjoin a condition to a promise to pay a debt barred by the Statute of Limitations; but I am satisfied there is nothing in it. There must be a promise to pay; a promise on condition does not bind until the condition is accepted and performed, if precedent. If, says Judge Story, in Bell v. Morrison, (1 Pet., 351,) conditions are annexed to a promise to pay a debt barred by statute, they ought to be shown to be performed."

It has been held that an acknowledgment of a debt, if accompanied with a promise to pay conditionally, is of no avail unless the condition to which the promise is subjected by the defendant be complied with or the event has happened upon which the promise depends.—See Angell on Limitations, § 235. The same author further says: "Therefore, the cases wherein it has been held that if the condition accompanying the acknowledgment is complied with it will avail, and not otherwise, must go on the ground that the acknowledgment furnishes a new promise. In the words of Mr. Justice Story, in Bell v. Morrison, 'springing out of and, supported by, the original consideration.'"

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*On page 127, the same author puts a case thus: If A promise B to pay him a sum of money if he will do a particular act, and B does the act, the promise becomes binding, although B at the time does not engage to do the act.

This statement furnishes a complete analogy to the case before us. The defendant promised to pay Mr. Whitner, who was agent for the plaintiff, the note sued on as the consideration for the new promise whenever the defendant should be relieved from all liability as surety from a certain guardianship bond. The plaintiff performed this condition, and although he may not have engaged to do so at the time of the promise, yet it became binding upon the defendant, and the old debt was a sufficient consideration therefor. It was in the power of the defendant to revoke his promise, but there is no proof that he did so; therefore, he was willing that the plaintiff should perform the condition at any time, and it was in law an offer renewed from day to day and from year to year.

This promise made to Mr. Whitner in October, 1869, was certainly a good promise at the time it was made, and it is difficult to conceive how the adoption of the Code could vitiate it, or, as it is argued by the respondent, make it a nullity without one note of warning to the plaintiff. Section 113 of the Code, requiring a written acknowledgment or promise as evidence of a new or continuing contract, whereby to take the case out of

the operation of the Statute of Limitations, was not intended to be retrospective, as will appear from Section 90 of the Code, which enacts that the provisions of this title [referring to the Statute of Limitations] shall not extend to actions already commenced or to causes where the right of action has already accrued. This provision is clearly intended to except promises made before the Code. The Act of 9th George IV, known as the Lord Tenterden Act, gave all persons in possession of parol promises seven months and more in which to bring their actions founded on such promises. In Section 26 of the Referee's report, it is said that the English Courts were quite as scrupulous in impairing the obligation of contracts as we are. In reply, we say that if the Referee's construction of Section 113 of our Code is the correct one, then the enactment of 9th George IV (which gave seven months to persons in possession of parol promises in which to bring suits on such promises) was more liberal and scrupulous to avoid impairing the obligation of contracts than our own State in the enactment of Section 113 of the Code, for it

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does *not give one day for persons in possession of parol promises to bring their suits.

We maintain, however, that this provision of the Code is not retrospective in its operation, and is not intended to interfere with contracts or promises made before its enactment. There is a similar provision in the New York Code, [see Section 113 of said Code,] which was held to be wholly prospective.—See Van Allen v. Felty, 1 Keys, 332; 9 Abb., 277.

"But," says the Referee, "it must be remembered that this was a conditional promise, and, being conditional, did not waive the bar at the time the promise was made, and that no cause of action existed at the time of the adoption of the Code."

It is true that when a conditional promise is made, that no suit on such promise can be brought until the condition is performed; but in Angell on Limitations, [see § 113, p. 127,] the doctrine is clearly announced that the Statute of Limitations is suspended between the time of the promise and the performance of the condition. Again: "That while a promise is suspended by a condition, the statute does not run from the time of making it, for no right of action accrues until the condition is performed."

In this case, the promise was made in October, 1869, more than four months before the adoption of the Code; and as the operation of the statute was suspended until the performance of the condition and relates back to the time of the promise and becomes binding, it would seem that the Statute of Limitations in existence at the time of the promise should govern, and not the statute in existence at the time of the performance of the condition, for in contemplation of law no time elapses between these periods. The 96th Section of our Code manifestly intended that every provision in that title respecting the Statute of Limitations should be prospective, and that rights and remedies that existed prior to the Code should not be divested. The plaintiff in this case could not have anticipated the action of the Legislature in changing the statute and have prepared himself for that event by requiring a written promise from the defendant. As the law existed at the time the promise was made, the plaintiff had a right to perform the condition, and to the benefit that would accrue therefrom, of which no legislative enactment could rightfully divest him. To hold otherwise would be to make the law retrospective in its operations. A retrospective law is defined to be a law which takes

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away or impairs vested rights, *or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions already past.—See Calder v. Bell, 3 Dallas (Penn.) Rep., 386; Bush v. Van Kleek, 7 John's (N. Y.) Rep., 447.

If the Legislature of a State should pass an Act by which a past right of action should be barred, and without any allowance of time for the institution thereof in futuro, it would be difficult to reconcile such an Act with the express constitutional provision in favor of the rights of private property. —See Jackson v. Lamphire, 3 Pet. (U. S.) Rep., 280; Eckstein v. Shoemaker, 3 Wheat. (Penn.) Rep., 15; Ward v. Kilts, 12 Wend. (N. Y.) Rep., 137.

In New Hampshire it was decided that an Act of the Legislature repealing an Act of limitations was, with respect to all actions pending at the time of appeal which were previously barred, to be retrospective and contrary to the State Constitution.—Waart v. Wurnock, 3 N. H. Rep., 473.

In the case of Patterson v. Gaines, (6 How., U. S., Rep., 550,) it is stated that "a statute of limitations may well apply to contracts in existence at the time of its passage, provided a reasonable time be allowed before the statute takes effect within which creditors may institute their actions."

To require the plaintiff in this case to produce written evidence of a new promise, signed by the party to be charged, when no such written evidence was required at the time the promise was made to bind the defendant, would clearly militate against the decisions both in the United States and State Courts, as will appear from the cases just cited. Before the promise made to Mr. Whitner, to wit, in December, 1868, the defendant made a promise to Mr. James A. Cowan similar to that made to Mr. Whitner, which was such a clear acknowledgment of his liability as that a promise might be implied therefrom. On the 10th day of March, 1870, the defendant substantially repeated his

promise to Mr. Whitner, and again, on the 14th day of September, 1870, the defendant made a solemn admission and promise to pay the note in question whenever he was relieved from his suretyship on guardianship bond heretofore spoken of. It is evident from all of these promises that a weight of moral obligation was resting upon the defendant that was not easily to be borne, and from which he at that time did not wish to absolve himself, for we cannot think that he at the time intended to deceive the plaintiff by these promises, and thereby urge him to pay the bond, and then plead the Statute of Limitations.

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*As will be seen by reference to the report of Referee, the defendant stood in a confidential relationship to the wards of John B. Armstrong, and that this note had been transferred to said John B. Armstrong as part of the minors' estate. He, though a surety for John B. Armstrong, the intestate of the plaintiff, was also a debtor to him, which indebtedness, if it had been paid, would have gone very far towards the satisfying of said bond. In the forum of conscience the defendant has nothing to plead, save that the consideration of said note was for slaves; yet it is evident, from the section of the report just referred to, that the defendant did not purchase any slave or slaves from John B. Armstrong, the intestate; for he says that the note was part of the estate of the minors of the estate of William M. Cowan, and must, therefore, have been transferred by the administrator of the estate of William M. Cowan to John B. Armstrong, the guardian, who is held to account for the note, whilst the defendant, who was the maker thereof, must be freed from all liability.

If the consideration of said note was for the purchase of slaves, as set forth in the answer, and from the evidence of the defendant, then we maintain that the note was not barred by the Statute of Limitations at the time of the promise to Mr. Whitner in October, 1869. The Referee excludes the time during the operation of the Stay Law, from December, 1861, to December, 1866, from the operation of the statute; therefore, by analogy, the time during which the State Constitution prohibited suits being brought on slave contracts ought also to be excluded.

The State Constitution, ratified on the 16th day of April, 1868, (see Section 34, Article IV.) declares that "all contracts, whether under seal or not, the consideration of which were for the purchase of slaves, are hereby declared null and void and of no effect; and no suit, either at law or equity, shall be commenced or prosecuted for the enforcement of such contracts."

If the Stay Law disabled parties from bringing suit, and thereby prevented the operation of the statute, for a much greater reason the State Constitution, the fundamental law, prevented parties from bringing suit and suspended the operation of the statute until the decision in the case of Calhoun v. Calhoun, at the April Term, 1870, when it was decided that slave contracts were collectible and removed the disability created by the said Section of the Constitution. If this view of the case is correct, then only the

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two years *and about one month that the note ran before the Stay Law, and the one year and about four months from the repeal of the Stay Law in December, 1866, until the ratification of the State Constitution, ought to be counted, and which would only make, in the aggregate, about three years and six months that the statute was operative.

By way of recapitulation, we insist—

1. That the promise made in October, 1869, was upon sufficient consideration; and that the Statute of Limitations did not run between the time of the promise and the performance of the condition.

2. That at the time of the promise a verbal promise was sufficient evidence of a new and continuing contract, and that the provision of the Code requiring written evidence of a new and continuing contract is not retrospective, but wholly prospective, and does not require any higher evidence than existed at the time the promise was made.

3. That if the consideration of the note was for the purchase of slave property, then the note was not barred by the Statute of Limitations when the verbal promise was made, because the State Constitution prohibited suit on slave contracts.

McGowan & Moore, contra:

First. The well-established difference between cases barred and not barred as to the effect and character of a new promise. When the case is already barred, the promise must be sufficient to create a new cause of action.

Second. The Code, as to promise in writing, applies to all promises, whether before or after the Code, only excepting "actions already commenced, or to cases where the right of action has already accrued" at the time of its adoption.

Third. All the promises alleged here were parol. It is admitted that they all were after the Code but the one alleged to Whitner, the attorney. At that time the cause of action was barred clearly, and the alleged promise was conditional. That did not create a new cause of action at that time; therefore, there was no cause of action, either old or new, at the time the Code was adopted.

Fourth. Then no subsequent promise would suffice unless in writing, by the express words of the Code.

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*Fifth. If the conditional promise created a cause of action which brought it under the exception of the Code, then that cause of action was also barred, because it was more than four years before condition performed.

March 30, 1878. The opinion of the Court was delivered by

McIVER, A. J. This action, which was commenced on the 7th of March, 1874, was brought to recover a sum of money originally secured by an ordinary promissory note, which was payable on the 22d of November, 1859. The defense relied upon was the Statute of Limitations, to meet which the plaintiff relied upon new promises. While it does not very clearly appear whether the action was brought upon these new promises as well as upon the original note, the language of the "case" as presented here being, "This action was brought on a promissory note and alleged new promises," and then sets out a copy of the note, we shall assume that the complaint set out several causes of action—the note and the new promises—inasmuch as no question has been raised here upon that point and none seems to have been raised below. The new promises were verbal, were all conditional, and all of them were made after the action on the note would have been barred by the Statute of Limitations, the earliest promise being some time in December, 1868. The complaint alleged performance of the condition upon which these promises were made on the 3d of March, 1874. The defendant contended that, as these new promises were not in writing, they were not sufficient to take the case out of the operation of the Statute of Limitations under the provisions of Section 133 of the Code of Procedure, because those made in March and September, 1870, were made after the adoption of the Code, and those made in 1868 and 1869, though made prior to the Code, were conditional, and therefore no right of action could accrue upon them until the condition was performed, which did not take place until after the adoption of the Code, inasmuch as, by the terms of that statute, its provisions were applicable to all cases, except where the action had already been commenced or where the right of action had already accrued, (Section 96 of the Code); and that as it was apparent that the action had not been commenced at the time of the adoption of the Code, and as the plaintiff's right of action had not then accrued, the condition not having then been performed, this case could

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not *be brought within either of the exceptions provided for in Section 96 of the Code. This conclusion the Referee, to whom the issues in the action were referred for trial, adopted, and his conclusion was confirmed by the Circuit Judge.

It will be observed that before any of the new promises were made the action on the note was barred, because the Statute of Limitations having been suspended for a period of precisely five years by the fifth Section of the Act of 1861, commonly called the Stay Law, (Harlee & Pressley v. Ward, 15 Rich., 231,) the practical effect in cases like the present is to add just five years to the period fixed by the Statute of Limitations prior to the Code, and as this note became payable on the 22d of November, 1859, any action on it would have been barred on the 22d of November, 1868. The new promises being all made after that time, they could not, as the law then stood, have the effect of reviving or renewing the original contract embodied in the note, but must of themselves constitute new causes of action; for while the earlier cases may possibly have left this matter in some doubt, there is no doubt but that the more recent adjudications in this State have established the rule as above stated.—See Smith v. Caldwell, 15 Rich., 365, and the cases therein cited. And this, we may be permitted to add, in strict conformity to the terms of the statute, which declares that the action shall be commenced within the time limited "and not after." Hence the propriety of the rule that if action is brought after the expiration of that time, it should be not upon the original contract but upon the new promise, as a new and substantive contract.

The next inquiry is, whether the provisions of the Code, as cited above, can affect this case? As a matter of convenience, let us confine our inquiries to the promise made to Mr. Whitner in October, 1869, that being the one principally discussed in the Referee's report. When this promise was made, though the plaintiff's right of action upon the note was forever gone, and incapable of being revived, yet, the debt not having been paid, it constituted a valid consideration to support a new contract; for though the legal obligation was gone, the moral obligation remained, and that was a sufficient consideration to support the new promise.—Reigne v. Executors of Desportes, Dud., 122; Lomax v. Robertson, Dud., 366; Sims v. Radcliffe, 3 Rich., 290; Goudy v. Gillam, 6 Rich., 29.

This promise, then, to Whitner was an entirely new contract, based upon a sufficient consideration, which the defendant became

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*liable to perform according to its terms. If the condition upon which the promise was made never be liable to fulfill his promise. When, however, the condition did happen, he forthwith became liable to fulfill his promise, and if he failed or refused so to do the plaintiff could bring his action. It is important to a proper understanding of this case to keep in mind what has been stated—that this promise constituted an entirely new contract, independent of the original note, except

in so far as it furnished a valid consideration, and that such contract must be regarded as any other separate and independent contract. Looking at it in this light, the practical question presented by this case is, whether the provisions of the Code can be allowed to import other elements into this contract, or, rather, whether additional formalities can be required, as essential to its validity, which were not required at the time the contracting parties entered into it. In other words, as the law stood when the plaintiff and the defendant entered into this contract, it was not necessary to its validity that it should be in writing. Is it competent, then, for the Legislature, by any subsequent legislation, to deprive such a contract of its validity by declaring that unless it is in writing it shall not be enforced? The bare statement of the question, when reduced to this form, would seem to afford a sufficient answer. The fact that the contract was upon a condition to be performed in the future cannot alter the result. The question with which we are concerned, and to which we must confine our attention, is as to the validity of the contract when made. Its breach is altogether another question.

One of the legal incidents which flow from every contract, and which inheres in it from the moment it is made, is that upon a breach of it an action accrues. This is an essential element of every contract, and if the Legislature, by any mode of legislation, undertakes, subsequent to the making of the contract, to deprive a party of this right, such legislation is null and void as impairing the obligation of the contract.—State v. Carew, 13 Rich., 498 [91 Am. Dec. 245]; Wood v. Wood, 14 Rich., 148.

Suppose A borrows a sum of money from B and executes to him a bond, conditioned to return the same whenever B does some act in the future, for example, as in this case; whenever B releases A from a liability which he has assumed as his surety, would any one contend that an Act of the Legislature passed after the execution of the bond, but prior to the performance of the condition,

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declar*ing that such a bond should not be valid, or, to use the language of the Code, should not be sufficient evidence of such a contract unless it was executed in the presence of two subscribing witnesses, could apply to such bond? Why not? Because it would be importing additional requisites into the contract which were not necessary at the time it was made. So here, in October, 1869, when this promise was made, or when this contract was entered into, it was quite as valid and complete in a verbal form as if reduced to writing with all possible solemnities, and the Legislature has no power, by an Act passed 1st March, 1870, to declare such a contract invalid or incapable of being enforced unless it is reduced to writing. It may, however, admit of a question whether the Legislature has ever undertaken to do so. And as it is the duty of a Court, in construing Acts of the Legislature, to put such a construction upon them, if possible, as will avoid giving them retroactive operation ([Ex parte Graham] 13 Rich., 277,) or bringing them into conflict with any constitutional provision, let us examine the provisions of the Code which are relied upon in order to see if such results can be avoided. The important inquiry is, what is the proper construction to be placed upon the words "right of action," as used in Section 96 of the Code? Do they mean the right to bring the action or do they mean the primary right, which is the foundation upon which the cause of action rests? The Referee and the Circuit Judge must necessarily have construed them to mean the former, for their whole decision rests upon the argument that the provisions of the Code requiring the promise (which is relied upon to take the case out of the operation of the Statute of Limitations to be in writing) applies to the case, because the right of action, that is the right to bring the action, had not accrued at the time of the adoption of the Code, inasmuch as the action could not have been commenced until after the performance of the condition, and that having happened after the adoption of the Code the case could not be brought within the excepting words of Section 96 of the Code. But, as we have seen, this construction not only gives the Code a retroactive operation, but brings it in conflict with the constitutional provisions designed to prevent any legislation which would impair the obligation of contracts. We must, therefore, seek for some other construction.

Pomeroy, in his very valuable work on Remedies and Remedial Rights by the civil action, according to the Reformed American Procedure, inquiring into the true meaning

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of the words "cause of *action," after telling us in Section 452, page 486, that "the American Courts of the present day seem to avoid the announcement of any general principle or the giving of any general definitions," proceeds in Section 519, pages 554–5, to say: "Every action is based upon some primary right held by the plaintiff and upon a duty resting upon the defendant corresponding to such right. By means of a wrongful act or omission of the defendant this primary right and this duty are invaded and broken, and there immediately arises from the breach a new remedial right of the plaintiff and a new remedial duty of the defendant. Finally, such remedial right and duty are consummated and satisfied by the remedy which is obtained through means of the action and which is its object. Now, it is very plain that, using the words according to their natural import and according to their technical

legal import, the 'cause of action' is what gives rise to the remedial right or the right of remedy, which is evidently the same as the term 'right of action' frequently used by Judges and text writers. This remedial right, or right of action, does not arise from the wrongful act or omission of the defendant—the delict—alone, nor from the plaintiff's primary right and the defendant's corresponding primary duty alone, but from these two elements taken together. The 'cause of action,' therefore, must always consist of two factors—(1) the plaintiff's primary right and the defendant's corresponding primary duty, whatever be the subject to which they relate, person, character, property or contract; and (2) the delict or wrongful act or omission of the defendant, by which the primary right and duty have been violated."

If the words "right of action," as used in Section 96 of the Code, be given a secondary signification, as is not only allowable but proper, in order to avoid a conflict with any constitutional provision, and be construed to mean the primary right, which constitutes one of the foundations of the cause of action, and not the remedial right which flows from such primary right held by the plaintiff and the breach of the primary duty resting upon the defendant, which would seem to be their technical legal import, then the statute would not conflict with any constitutional provision and would not be liable to the charge of being retrospective legislation. The primary right which accrued to the plaintiff upon the making of the promise in 1869 would be left unimpaired and unaffected by any subsequent legislation; for, in this sense, the right of

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action *had accrued prior to the adoption of the Code, and therefore the case comes within the exception mentioned in Section 96, and it was not necessary that the promise should be in writing.

The position taken, that the action not having been brought within four years after the making of the promise in 1869 is barred by the Statute of Limitations, cannot be sustained. The promise being conditional, no action could have been commenced upon it until after the condition was performed, and therefore the statute could not commence to run until that time; for in such a case it would be necessary to allege and prove the performance of the condition.—Brown v. Joyner, 1 Rich. 210; Bangs v. Hall, 2 Pick., 368; Wetzell v. Bussard, 11 Wheat., 309 [6 L. Ed. 481].

The judgment of the Circuit Court must be set aside and a new trial had.

Motion granted.

WILLARD, C. J., and HASKELL, A. J., concurred.

9 S. C. 454

CARRIER v. HAGUE.

(Columbia. Nov. Term. 1877.)

[*Trial* ⇐194.]

It is error to charge the jury that "there was no proof of a certain fact," if there be any evidence whatever to establish it.

[Ed. Note.—Cited in Fripp v. Williams, Birnie & Co., 14 S. C. 510; Norris v. Clinkscales, 47 S. C. 517, 25 S. E. 797.

For other cases, see Trial, Cent. Dig. § 450; Dec. Dig. ⇐194.]

[*Evidence* ⇐263.]

Where a plaintiff relies upon certain statements of an answer as admissions in his favor, the whole statement must go to the jury, and not merely that part which makes in favor of the plaintiff.

[Ed. Note.—Cited in Geiger v. Kaigler, 15 S. C. 268; Reeves v. Brayton, 36 S. C. 400, 15 S. E. 658.

For other cases, see Evidence, Cent. Dig. § 1026; Dec. Dig. ⇐263.]

[*Bills and Notes* ⇐489.]

[In an action on a note, defendant may, under a general denial, introduce evidence to show that he did not execute or deliver the note.]

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 1603; Dec. Dig. ⇐489.]

Before Northrop, J., at Spartanburg, April Term, 1877.

This was an action by G. D. Carrier, assignee of H. D. Carrier, against James A. Hague and E. L. Hague, his wife.

The case, as set forth in a brief prepared by counsel, is as follows:

The cause of action, as set forth in the complaint, was a sealed note, as follows:

"$188. One day after date I promise to pay H. D. Carrier one hundred and eighty-eight dollars for value received.

"James A. Hague. [L. S.]
"E. L. Hague. [L. S.]

"November 20, 1873."

"Pay the within to G. D. Carrier.
"H. D. Carrier."

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*Which, it was alleged, was assigned to the plaintiff before suit.

The defendants answered separately.

The appellant, E. L. Hague, in her answer, stated "that at the time she signed the note sued upon and set forth in plaintiff's complaint she was, and now is, a married woman; that the contract was made and the said note executed in North Carolina, and that she is informed and believes that by the laws of North Carolina a married woman could not execute a contract or sign a note binding herself, but that the same was void, and she pleads her coverture in bar of the plaintiff's recovery against her." She stated further in her answer "that the said note sued on was not made for her use or benefit; that she signed it at the request of the said H. D. Carrier and the defendant, James A. Hague, and that the said note was without consideration so far as she was concerned."

The case was called for trial at April Term, 1877.

The plaintiff relied for proof of execution of note on the admissions of the answers.

G. D. Carrier, sworn for plaintiff, stated that the note had been assigned to him, and that he was the real owner and holder of the note.

On cross-examination, witness stated that the defendants, James A. Hague and E. L. Hague, lived in North Carolina at and since the date of the note, and that the original payee, H. D. Carrier, also lived in North Carolina. Witness stated further that he did not recollect telling defendant's attorney, John H. Evins, Esq., that the note was executed in North Carolina; would not deny that he said so, but had no personal knowledge where the note was executed; that he did not see it executed, and had not heard either of the parties say where it was executed.

Defendant then introduced in evidence the 74th volume of North Carolina Supreme Court Reports, in which are reported the cases of Wm. M. Pepper v. Chas. M. Wessen and Caroline Wessen, p. 437, W. M. Rountree v. W. M. Gay et al., p. 447, and W. F. Atkinson v. Mary E. Richardson and W. E. Richardson, p. 455, to the effect that a wife cannot bind her separate property for the debts of the husband by such a contract as the one sued upon, and that she could not be bound unless it was proved that she meant to charge her separate property.

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*By consent, the statements of John H. Evins, Esq., one of defendant's attorneys, was admitted in evidence, to the effect that, a few weeks before, he had sought an interview with the plaintiff in order to know whether he would admit that the execution of the note was in the State of North Carolina, or would require witness to come from North Carolina to prove the fact, and that in said interview plaintiff did admit that the note was executed in North Carolina.

After argument, the defendant, E. L. Hague, submitted to the Court a written request to charge the jury as follows:

1. That it having been proved the defendants and payee of the note lived in North Carolina, that the presumption was that the note was executed there.

2. That the defendant, E. L. Hague, being a married woman, could not be liable for the debts of her husband, there being no proof that the debt was for her benefit.

3. That under the laws of North Carolina a married woman is not liable upon such a contract.

All of which requests to charge were refused, and His Honor charged the jury:

4. That there was no proof that the contract was executed in North Carolina, or that the defendant, E. L. Hague, was a married woman.

5. That under the laws of South Carolina the defendant, E. L. Hague, was liable to pay the note.

To all of which charges and refusals to charge the defendant, E. L. Hague, excepted.

The verdict was for plaintiff, and the defendant, E. L. Hague, appealed.

Evins & Bomar, Thomson, for appellant.

Bobo & Carlisle, contra.

March 30, 1878. The opinion of the Court was delivered by

HASKELL, A. J. There are five exceptions in this case; but if it should be ascertained that there is good ground for the fourth it will be unnecessary to consider the remainder. The fourth exception is: That the presiding Judge erred in charging the jury "that there was no proof that the contract was executed in North Carolina, or that the defendant, E. L. Hague, was a married woman."

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*If there was any evidence as to these facts, the case should have gone to the jury, and the Judge should have instructed the jury about the questions of law which would have arisen out of these facts. If there be any evidence on these two questions of fact, it was produced either by the plaintiff or by the testimony of John H. Evins, or by both.

Mr. Evins testifies that a few weeks before the trial he had sought an interview with the plaintiff in order to know whether he would admit that the execution of the note was in the State of North Carolina, or would require a witness to come from North Carolina to prove the fact, and that in said interview plaintiff did admit that the note was executed in North Carolina. Mr. Evins was defendant's attorney. It is not clear whether the plaintiff merely made the admission in conversation or whether he agreed to admit the fact at the trial. The latter rather seems to have been the understanding, and the defendants were thrown off their guard, and if that was the case the plaintiff could not be allowed to take advantage of it. While there does, therefore, appear to be evidence in the testimony of Mr. Evins that the contract was executed in North Carolina, and that the Judge erred in charging that there was not, still that would not of itself be sufficient ground for a new trial; for if there was no evidence that the defendant was a married woman, neither the lex loci contractus nor coverture, as pleaded, would avail, and the mistake on the part of the Judge would have been immaterial. This leads us to an examination of the evidence produced by the plaintiff. The cause of action set forth in the complaint was a sealed note, as follows:

"$188. One day after date I promise to

pay H. D. Carrier one hundred and eighty-eight dollars for value received.

"James L. Hague. [L. S.]
"E. L. Hague. [L. S.]

"November 20, 1873."

"Pay the within to G. D. Carrier.
"H. D. Carrier."

Which it was alleged was assigned to the plaintiff before suit. This statement induces the conclusion that the complaint was in the form prescribed in Section 185 of the Code of Procedure: That "in an action founded upon an instrument for the payment of mon-

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ey only, *it shall be sufficient for a party to give a copy of the instrument and to state that there is due to him thereon from the adverse party a specified sum which he claims." It devolved upon the plaintiff in this case to prove, unless it was stated and admitted in the answer, that the note was signed, sealed and delivered to the payee therein named. The assignment to the plaintiff was alleged and not controverted by the answer, and, therefore, may be taken as true. The plaintiff, however, proved that the note had been assigned to him, and that he was the real owner, and states that he relied "on the admissions of the answer" of the defendant, E. L. Hague, to prove the execution of the instrument by her.

The answer set up by the plaintiff to prove the execution is as follows:

"That at the time she signed the note sued upon and set forth in the plaintiff's complaint she was, and now is, a married woman: that the contract was made and the said note executed in North Carolina, and that she is informed and believes that by the laws of North Carolina a married woman could not execute a contract or sign a note binding herself, but that the same was void, and she pleads her coverture in bar of the plaintiff's recovery against her." She stated further in her answer "that the said note sued on was not made for her use or benefit: that she signed it at the request of the said H. D. Carrier and the defendant, James A. Hague, and that the said note was without consideration so far as she was concerned."

It must be observed here that the defendant's mention of the contract and that the note was executed are no admissions that she made the contract or executed the note, for the contract was already made and the note executed by another, and to that fact her statements may consistently, and should, be applied: otherwise her answer would contradict itself. The signature is all that she states and admits that can aid the plaintiff. The material allegation in the complaint is that so much money is due by the defendant on the note. That allegation is controverted by the answer and cannot be taken as true. —§ 191, Code of Procedure. The statement of signature as made in the answer is not responsive to any allegation in the complaint; and the question is, whether a part of such statement can be taken advantage of by the plaintiff as evidence and a part be rejected

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or excluded. This can only be deter*mined by ascertaining the true character of the answer. "In the construction of a pleading for the purpose of determining its effect, its allegations shall be liberally construed with a view of substantial justice between the parties."—§ 182, Rev. Stat., 608.

The confusion in this case arises from the unnecessary recital in the answer. The substance of the answer is the plea of coverture: that the note, so far as this defendant is concerned, is void ab initio.

A general denial can be pleaded in an action on a note, under the Code of Procedure, when the defendant can show at the trial that he never executed or delivered the note in the legal sense of those terms.

In an action against a femme covert on a bond, the coverture may be given in evidence under a general plea of non est factum.—Freer v. Walker, 1 Bail., 184.

Under a general denial in the present case all the facts alleged in the answer would properly come in by evidence upon the defense at the trial. The answer is largely an argumentative recital of the points and the law by means of which the general denial which it contains is to be sustained, and to that extent is surplusage and might have been stricken out and the pleadings amended. It is not as where the answer admits material averments of the complaint but accompanies it with statement of affirmative matter in explanation and qualification by way of defense, though that makes a nice and important question which has not yet been decided by this Court. But in this case, by the plea that the cause of action is void ab initio, the answer is responsive only to the general allegation, money due—and must be construed only in its aspect of general denial so far as it is subjected to the rules of pleading, and if produced as evidence to prove any other fact than denial is subject to the ordinary rules of documentary evidence. Thus the pleading leaves upon the plaintiff the onus probandi, and the allegations of the answer are but a proffer of the points upon which defendant relies to sustain her denial. Prior to the opening of the defense the plaintiff resorts to the answer and produces it as evidence in his behalf. He must take it as it stands, and cannot be permitted to carve out a part and reject the residue, which qualifies, explains or pertains to the portion selected.—Adams Eq., *21; Ibid, *303; Cohen v. Robert, 2 Strob., 410; Cordray v. Mordecai, 2 Rich., 518.

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*The whole answer should have been admitted as evidence so far as it explains or qualifies or is properly connected with the

portions relied on by the plaintiff. This lets in evidence of both the facts in question, viz., that the contract was executed in North Carolina, and that the defendant, E. L. Hague, was a married woman.

The motion for a new trial is granted.

WILLARD, C. J., and McIVER, A. J., concurred.

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9 S. C. 460

ANDERSON v. EARLE.

(Columbia. Nov. Term, 1877.)

[*Executors and Administrators* ⇐125.]

Where one is both executor of a will and trustee thereunder of a legacy given by the will, his receipt of the legacy vests the fund in him as trustee, and his co-executor is no longer liable for it.

[Ed. Note.—Cited in Hyatt v. McBurney, 18 S. C. 215.

For other cases, see Executors and Administrators, Cent. Dig. § 508; Dec. Dig. ⇐125.]

[*Trusts* ⇐38.]

Where A and B were appointed executors of a will and trustees thereunder, and B qualified as executor and accepted the trust, and then A qualified as executor and paid the trust money to B, taking his receipt therefor as trustee: *Held*, That this was not only evidence that A had not accepted the trust, but was also conclusive evidence that he had repudiated it, and, consequently, that A was not liable to account to the cestui que trusts for the trust fund paid to B.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 54–56; Dec. Dig. ⇐38.]

[*Executors and Administrators* ⇐125.]

An executor *held* not liable for the devastavit of his co-executor.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 522; Dec. Dig. ⇐125.]

[*Executors and Administrators* ⇐91.]

One appointed both executor and trustee by the will: *Held*, Upon the evidence, to have accepted the trust, and by such acceptance to have been discharged from liability as executor.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 398; Dec. Dig. ⇐91.]

[*Trusts* ⇐38.]

Where one is appointed by the will both executor and trustee, the mere fact that he qualified as executor is not proof that he accepted the trust.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 55; Dec. Dig. ⇐38.]

[*Trusts* ⇐44.]

The evidence given in the cause *held* insufficient to prove that one appointed by the will both executor and trustee, and who had qualified as executor, had accepted the trust.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 66–68; Dec. Dig. ⇐44.]

[This case is also cited in Graveley v. Graveley, 20 S. C. 93, and distinguished therefrom.]

Before Northrop, J., at Spartanburg, April, 1872.

This was a bill in equity by David Anderson, executor of the last will and testament of Thomas P. Brockman, against Henrietta M. Earle and Alexander C. Earle, her husband.

The case will be understood from the opinion of the Court.

Bobo & Carlisle, Simpson, for appellants.

Dunkin & Cleveland, Earle & Wells, Thomson, contra.

March 30, 1878. The opinion of the Court was delivered by

McIVER, A. J. Thomas P. Brockman, being possessed of quite a large estate, died in 1859, leaving a will, of which his son Benja-

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*min T. Brockman and his son-in-law, the plaintiff, were named executors. By his will he gives to his wife, during her natural life, a considerable portion of his estate, which, at her death, was to be equally divided amongst his children, except Mrs. Hudson, upon "the same trusts that are provided for in the preceding clauses" of his will. As to the shares of his daughters, after making various provisions for his other children, the testator provides for his two daughters, one of whom is the defendant, Mrs. Earle, in the eighth clause of the will, in the following words: "I give to my executors, in trust for Henrietta and Eloise, two thousand dollars each, to be invested in slaves for them and their use, with ample power to sell and reinvest, or to put the money at interest. In either case the use, profit, hire or interest to be applied to the entire use and benefit of the said two girls. Provided, however, if my estate is not sufficient, on the first division, to pay these legacies and Jesse's, that it be divided pro rata until the estate is sufficient, when the remainder shall be fully arranged, with interest from the time they become of age."

In the ninth clause of the will the testator says: "It is my will, at my death, that all my property be sold (except what I have willed to my wife) on such credit as the Ordinary and my executors may think best, and the proceeds thereof, after the legacies already willed are paid, shall be equally divided among all my children, (except Keziah A. Hudson, who, I think, through her husband, S. P. Hudson, has received more than her share,) * * * and my executors will hold the [here follows a blank in the copy of the will printed in the "case," doubtless to be filled with the word "amounts" or "shares,"] giving to Henrietta and Eloise, in the same manner as the first, amounts willed for their use, with the same powers." The plaintiff, Anderson, at first declined to qualify as executor, and Benjamin T. Brockman alone qualified as such soon after the death of the testator, took charge of the estate and proceeded in the administration of the same until some time in 1861, when he went into the army. It seems, however, that by sales

and collections he had reduced into his possession a very large part, if not the whole, of the assets of the estate, except that given to the widow, which constituted an amount much more than sufficient to pay all the pecuniary legacies and leave a considerable balance to be divided amongst the children, as provided for in the ninth clause of the will. The widow died in 1861, and Benja-

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min T. Brockman *being then absent in the army the plaintiff qualified as executor of Thomas P. Brockman, took possession of the property which the widow left as part of the estate of Thomas P. Brockman, and, under the terms of his will, sold the same, and, after having advertised for creditors to come in and paid off such as were properly presented, proceeded to divide the balance amongst those entitled under the will. In making this division it was assumed that the share of each would amount to one thousand dollars, and the plaintiff accordingly paid that amount to B. T. Brockman, taking a receipt therefor, of which the following is a copy:

"$1,000. Received, November 22, 1862, of David Anderson, executor of J. P. Brockman, deceased, one thousand dollars, as part of legacy due Hettie M. Brockman.

"(Signed) B. T. Brockman,
"Trustee for Hettie Brockman."

Some time in 1864 B. T. Brockman died, leaving a will, of which the plaintiff is the qualified executor. The estate of B. T. Brockman proving to be wholly insolvent, occasioned, as is alleged, by the results of war, the defendant, Mrs. Earle, now seeks to hold the plaintiff responsible for her legacies under the will, and the Circuit Judge having so decided the plaintiff appeals.

It is difficult to understand how, in any aspect of the case, the plaintiff can be made liable for the legacy of two thousand dollars. He cannot be made liable as co-executor, because, in the first place, he was not co-executor at the time the money came into the hands of the other executor; but, even if he had been, he could not be so made liable under the facts as presented in this case.

The rule is, as stated by Harper, Ch., in O'Neall v. Herbert, (McM. Eq., 497,) "that one executor is not liable for the assets which come into the hands of his co-executor unless under particular circumstances, such as having paid them over to him, having joined in a misapplication of them, or having joined in a receipt by which he enabled him to receive them." See, also, Johnson v. Johnson, 2 Hill Eq. 288 [29 Am. Dec. 72]; Atcheson v. Robertson, 3 Rich. Eq., 137 [55 Am. Dec. 634]. Now, as there is no evidence whatever tending to show that the plaintiff did any act which enabled B. T. Brockman to receive this money, or that he in any way contributed to the devastavit charged against B. T. Brockman, he cannot, under the rule,

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be made liable *as co-executor. There is, however, one view of the matter which will effectually dispose of the question. B. T. Brockman was not only executor, but he was also appointed trustee for Mrs. Earle under the will; and although there is no evidence that he ever, in so many words, accepted the trust, yet, as no such formal acceptance was necessary, (Hill on Trustees, *214, 215,) we are satisfied that the circumstances in the case are quite sufficient to show that he did accept the trust. In the statement of his accounts as executor, filed with the bill as Exhibit C, he credits himself with this legacy of two thousand dollars as paid, and as it could only be paid by him as executor to the trustee the necessary inference is that by such entry he intended to transfer this amount from his liability as executor to his liability as trustee, and that of itself would be a sufficient circumstance to show that he had accepted the trust. For, as the writer just cited says, at page *215, "where the same person is appointed both executor and trustee, it is difficult, though sometimes of importance, to determine when the office of executor has ceased and that of trustee has commenced. The rule appears to be that if a part of the assets has been clearly set apart and appropriated by the executor to answer a particular trust he will be considered to hold the fund as trustee for those trusts, and no longer as mere executor." But another circumstance which is perfectly conclusive is the signing of the receipt of 22d November, 1862, as trustee of Mrs. Earle, then Miss Hettie Brockman. If, then, B. T. Brockman, as we have seen, accepted the office of trustee, as soon as the amount of the legacy was ascertained to be in his hands as executor and payable to the trustee of Mrs. Earle, he being the trustee, the same was paid by operation of law, so far as his liability as executor was concerned, and became cash in his hands as trustee.—Schnell v. Schroder, Bail. Eq., 334. This was ascertained, as appears by the statement which was filed with the bill as Exhibit C. For, while this statement may not be evidence in his own favor, as was argued, it is quite sufficient to show, as his own admission, that he had set apart the fund due to himself as trustee, and it amounted to an acknowledgment that he held that money as trustee and not as executor, just in the same way that an administrator, who is also the guardian of one of the distributees, by making a return in which he credits his administration account with so much money paid to himself as guardian, transfers his liability from his administration bond to his guardianship bond.

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—*Schnell v. Schroder, Bail. Eq., 334; Crenshaw v. Crenshaw, 4 Rich. Eq., 15. The re-

sult, therefore, is, that so far from the plaintiff being liable as executor, neither one of the executors were liable, as such, but the liability was transferred to B. T. Brockman as trustee.

This view of the case disposes of what seemed to be the main ground relied upon in the argument, to fix a liability upon the plaintiff, viz., that the legacy to Mrs. Earle was a charge upon the whole estate, including that which had been given to the widow for life, and which, upon her death, was sold and went into the hands of the plaintiff as executor of Thomas P. Brockman, and that until such legacy was paid the plaintiff could not lawfully divide the proceeds of such sale, as he did do, amongst the legatees provided for by the ninth clause of the will, for this argument rests necessarily upon the supposition that the legacy of two thousand dollars had not been paid; and if, as we have seen, there is no foundation for such a supposition, but that, on the contrary, the legacy had been paid, whether in actual cash or by operation of law can make no difference, the argument must necessarily fail.

The next question is, whether the plaintiff can be held liable for the one thousand dollars which he, as executor, paid over to B. T. Brockman, as trustee for Mrs. Earle, on the 22d November, 1862. While it may admit of a question whether, even assuming the plaintiff to have accepted the office of trustee for Mrs. Earle, he could be held liable, under the circumstances of this case, we prefer to rest our decision upon the ground that there is no evidence to show that the plaintiff ever did accept the trust, and, on the contrary, that there is at least one circumstance which would indicate that he declined to accept. The mere fact of his having qualified as executor is not sufficient evidence that he accepted the trust. (Ashe v. Ashe, Rich. Eq. Ca., 383,) for as Johnson, J., in that case says: "If a legacy be left to an executor and he qualify, I apprehend there is no doubt he may, notwithstanding, say: 'I will discharge my duty as executor, but will not accept the legacy.'" Here these legacies were given to the plaintiff and another. "I give to my executors, in trust for Henrietta and Eloise," and we see no reason why the plaintiff may not say, as we think he in effect did say: "I will discharge my duty as executor, but will not accept the legacy." When he practically repudiated the trust by paying over the portion which he estimated was due to Mrs. Earle to the person whom, as we have seen, had accepted the trust, and taking his re-

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ceipt as trustee to him*self as executor, there is no fact or circumstance in the case indicating any intention on the part of the plaintiff to accept the trust, and we do not think he should be held to have so done.

If, then, being merely the executor, he made this payment to the trustee of Mrs. Earle, he did exactly what his duty required him to do, and of course cannot be held liable.

The judgment of the Circuit Court is, therefore, reversed, in so far as it conflicts with the views herein expressed, and the case is remanded to the Circuit Court for such further proceedings as may be necessary.

Motion granted.

WILLARD, C. J., and HASKELL, A. J., concurred.

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9 S. C. 465

SINGLETON v. LOWNDES.

(Columbia. Nov. Term, 1877.)

[*Trusts* ⇐217.]

It is a breach of trust to invest trust funds upon the security of encumbered property where it is probable that the trust estate will be called upon to redeem.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 308; Dec. Dig. ⇐217.]

[*Trusts* ⇐222.]

Investment of trust funds in personal security merely can only be sustained by proof of the necessity and prudence of such investment.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 319; Dec. Dig. ⇐222.]

[*Trusts* ⇐217.]

An investment of trust funds upon the security of a mortgage of land and negroes sustained, though part of the property was subject to prior encumbrances.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 308; Dec. Dig. ⇐217.]

[*Slaves* ⇐7.]

Slaves, it seems, especially those engaged in agriculture, when included with the land in the same mortgage, were a real and not a personal security.

[Ed. Note.—For other cases, see Slaves, Cent. Dig. §§ 20–29; Dec. Dig. ⇐7.]

[*Trusts* ⇐234.]

Confederate currency was not money in a legal sense, but a commodity to be taken at its actual value. It was, therefore, a breach of trust to convert a trust security into such currency at its nominal value.

[Ed. Note.—Cited in Hyatt v. McBurney, 18 S. C. 217.

For other cases, see Trusts, Cent. Dig. § 342; Dec. Dig. ⇐234.]

[*Trusts* ⇐321.]

A trustee who committed a breach of trust by turning over trust funds to a tenant for life *held* not to be entitled to commissions.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 466; Dec. Dig. ⇐321.]

[*Trusts* ⟸217.]

[A trustee who has invested the trust funds in incumbered property is not excused by the fact that such property is amply sufficient to meet all obligations upon it.]

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 308; Dec. Dig. ⟸217.]

Before Reed, J., at Charleston, May, 1876.

This was an action of Martha R. Singleton against Charles T. Lowndes.

The case was referred to Charles H. Simonton, Esq., as Referee, and will be fully understood from his two reports therein.

The first report is as follows:

The case, as made out in the pleadings and by the evidence, is as follows:

The plaintiff is the niece of the defendant, being the only child of his sister, Mrs. Mary I'on Kinloch.

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*On 21st of March, 1816, a marriage settlement was made between Frederick Kinloch and Mary I'on Kinloch, to which Cleland Kinloch and Jacob Bond I'on were trustees, whereby certain property was settled to the joint use of the husband and wife during their joint lives, then to the survivor for life, and at the death of the survivor to the issue of the marriage then living, in fee. Cleland Kinloch, one of the trustees, departed this life, and in 1837 proceedings were had in the Court of Equity whereby the surviving trustee was discharged, and the defendant, Charles T. Lowndes, was substituted as trustee under the settlement in his stead.

It further appears that Thomas Lowndes, the father of Mrs. Kinloch, departed this life in July, 1843, leaving in force his last will and testament, whereby he gave and bequeathed certain property to his sons, Rawlins Lowndes and Charles T. Lowndes, and his son-in-law, William Aiken, in trust for the sole and separate use of his daughter, Mary I'on Kinloch, for life, with power of appointment thereof by an instrument under her hand and seal, to take effect during her life, or by an instrument in the nature of a last will and testament, to take effect after her death, and in default of such appointment to her issue living at her death in fee. Rawlins Lowndes and William Aiken declined to accept the trusts, which however, were assumed by the defendant, Charles T. Lowndes. He took charge of the trust estate and has administered it.

Frederick Kinloch died in August, 1856, and Mrs. Mary I'on Kinloch on 29th of September, 1865. The plaintiff is the sole surviving issue of the marriage. She has been a widow for many years.

Upon the death of her mother she was not aware of the existence of the trusts, and being under the impression that the property from which her mother had derived her income was her absolute estate, she, with the advice and assistance of the defendant applied for and obtained letters of administration on the estate of her mother and took charge of the assets. She soon found that the choses in action stood in the name of the defendant, and that his assignment of them was necessary. Being thus put on the inquiry, she examined more carefully among the papers left by her mother, and, with the aid of counsel, for the first time became aware of the existence of the trusts and of the fiduciary character which the defendant bore to her. She has filed her complaint calling him to an account for his actings and doings as trustee.

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*The answer of the defendant admits that he was trustee both under the marriage settlement and the will, and asserts that he managed the estate with care and advantage. It avers that in 1855, at the request of Mrs. Kinloch, the life tenant, he transferred to her agent, Mr. Petigru, assets of the trust estate to the value of nineteen thousand three hundred and forty-seven 78–100 dollars, and that on the 3d July, 1855, he transferred the remaining assets of the trust estate, under the direction of Mrs. Kinloch, to Adams & Frost, the factors and agents of the plaintiff, and that these gentlemen received them for Mrs. Kinloch. It insists that this transfer divested him of his office as trustee. The answer does not assert positively that this was effected with the consent and concurrence of the plaintiff, but it claims that the transfer of the assets was made to Adams & Frost with her sanction. He admits that afterwards, at the request of Mrs. Kinloch, he did receive the assets from Adams & Frost, but he insists that this was in the character of her agent, and only from motives of kindness and affection for her. The answer further states that on 30th January, 1865, the defendant fully accounted with Mrs. Kinloch for these assets so held by him as her agent; that she received them and ratified and confirmed his acts.

While, however, denying his liability to account, the answer proceeds to detail the investments made by him so far as he is able to do so without his books, which were destroyed during the war, and he justifies these investments in every instance. He maintains that, even if his position was that of a trustee, he has "administered the trust, not only faithfully and honestly, not only with prudence and care, but with zeal and skill, and that the losses which have befallen the estate are the result of extraordinary events which no trustee could be held to anticipate or to provide against."

He files this account:

Funds in his hands in 1853, which constituted the value of the only assets he ever had as trustee, and exceeded the sum originally received, the excess growing out of his administration of the estate.....	$42,434 78	
Less amount transferred to Mr. Petigru in 1855	19,347 78	
Balance	$23,087 00	

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*Transferred to Mrs. Singleton, the plaintiff:

Bond of Mr. Thomas Milliken, secured by mortgages of realty and of slaves	$10,000 00	
Bond of J. P. Earle	5,000 00	
Bond of W. B. Pringle	7,787 00	
Confederate bond in the hands of C. T. Lowndes	300 00	
	$23,087 00	

Both parties have testified. No claim whatsoever is made for the sum of $19,347.78 transferred to Mr. Petigru. The plaintiff ratifies this, because the transfer was made to pay the debts of her husband. She, however, positively denies that the assets were transferred to Adams & Frost with any intent or agreement to release the defendant from his duties as trustee. She denies that she had knowledge of the trust, and denies that the transfer was in any sense her act. I am of the opinion, from the evidence, that the plaintiff was not aware of the existence of her interest under the trusts of the settlement and of the will, and that she cannot be held as sanctioning the act of the life tenant. In any event, I am satisfied that some more formal and solemn act is necessary to discharge a trustee than that stated by the defendant; and it is also clear that the action of the life tenant could not divest the rights of the remainderman under the provisions of the instruments creating the trusts, such remainderman taking under these instruments independently of the life tenant.

The plaintiff objects to the account as erroneous and attacks some of the investments as irregular, insecure and improper.

As to the account:

A letter of the defendant, dated 29th October, 1853, addressed, it is said, to the late Thomas L. Wragg, the near relative of the defendant, and of Mrs. Kinloch, gives a statement of the trust estate at that time, as follows:

Bond given by the father of the defendant for the purchase of all the property of Mr. and Mrs. Kinloch upon their separation.....	$15,000 00	
This having been paid in full was invested in the United States loan of 1847	14,700 00	
Add premium on loan 2 per cent. ..	300 00	
	$15,000 00	

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*In 1858 the United States Government called in the loan, giving a premium as follows:

Amount of principal	$14,700 00	
Premium	3,087 00	
	$17,787 00	

Invested as follows:

Bond of Thomas Milliken, secured by E. P. Milliken, on mortgage of plantation and slaves on Cooper River		$10,000 00
Bond of J. J. Pringle, secured by W. B. Pringle		5,050 00
Bond of the same		2,737 00
		$17,787 00

Under the will of her father Mrs. Kinloch had a legacy	$10,000 00	
Also a further sum given her for the bequest of Mrs. Champneys.....	6,550 00	
This last was invested in United States bonds and was sold at a premium	797 00	
	$17,347 00	

Invested as follows:

Bond of Manigault.....	$3,000 00	
Bond of Alfred and Benjamin Huger	2,550 00	
Bond of Joseph and D. E. Huger	2,450 00	
Bond of J. J. and W. B. Pringle	2,263 00	
(All secured.)		
Amount left with Herckenrath, Wragg & Co. to be invested	7,082 00	
		17,347 00
Besides these, Mrs. Kinloch had 18 shares in the State Bank, also half interest during the life of Mr. Kinloch in 53 shares,—one-half going to her credit and the other half for the benefit of other parties. The letter estimates this at.....		8,000 00
Total		$43,134 00

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*Another paper was introduced in evidence bearing on this subject. It is an envelope of the kind used for holding large papers. On this is endorsed, in the handwriting of the defendant, the following words and figures:

1861.

Property of Mrs. Kinloch:		
Thomas Milliken bond.....		$10,000 00
W. B. Pringle bond		7,787 00
		$17,787 00

Originally joint property of Mr. and Mrs. Kinloch. State Bank stock not paying good interest, sold and invested as follows:

James P. Earle		$5,000 00
Alfred and Arthur Huger		2,383 00
		$7,383 00

Of the Huger bond, the same paper says: "Delivered to D. Lesesne, to receive payment in Confederate stock."

To this is added a statement of other assets received from estate of Col. Con, with which the case has no connection.

From these memoranda it would appear that in 1861 the defendant had in his hands for the trust estate:

Bond of Mr. Milliken	$10,000 00
Bond of Mr. Pringle	7,787 00
Bond of J. P. Earle	5,000 00
Bond of the Messrs. Huger, afterward put in Confederate bonds...	2,383 00
	$25,170 00

As to the investments:

The plaintiff objects to three of these:

The bond of Mr. Milliken	$10,000 00
The bond of Mr. Earle.....	5,000 00
The bond of the Hugers, and its investment in Confederate bonds...	2,383 00

Thus far the evidence and argument have been directed to the last two.

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*The Earle bond:

With regard to the Earle bond, the defendant, in his answer, which he adopts as a part of his testimony, says: That when he lent the money to Earle he took from him, as security, his bond for the amount, ($5,000,) and a mortgage of certain real estate in the city of Charleston, and of six negro slaves; that the real estate was worth, at the lowest valuation, $6,000, and the slaves, who were, as he believes, trained mechanics, were worth, at a moderate estimate $7,200. The testimony of several witnesses shows that these valuations were not excessive. The defendant also says, in his answer, that at the date of the loan Earle "was a person enjoying excellent credit in Charleston with the mercantile community, and particularly with the banks, and so impressed was the defendant with this that he would not have felt any uneasiness in lending that sum of money to Earle from his own means." In corroboration of his testimony respecting Earle's credit the defendant has called witnesses to speak to it, and also introduces in evidence a statement from the books of the Bank of Charleston, of which the defendant was at the time a leading director, showing that at that period the bank had discounted paper, on which Earle was maker or endorser, for nearly $100,000, and, beside this, had accepted him as surety on the bond of one or more of its agents.

Upon examining the bond, it appears that it was intended to serve a double purpose, not only as an investment but also the protection of the defendant himself against sundry endorsements for Earle. There can be no doubt that the defendant thought the investment a good one. I apprehend, however, that although we may be satisfied that the trustee had perfect confidence in the safety of the investment, we are not thereby precluded from examining into the grounds of his confidence or from inquiring into the steps which he took in order to satisfy himself. The investment must not only be such as a prudent man would make; it must be such as a prudent man, exercising prudence, had made. As Chief Justice Moses says, in Mayer v. Mordecai. (1 S. C., 394 [7 Am. Rep. 26],) "what will constitute the care and diligence" exacted from a trustee "will depend on the attendant circumstances. If the act itself was an incautious and imprudent one, it will not be sustained, and no aid derived from the fact that the trustee was countenanced in it by the participation of prudent men will give it sanction or support."

There can be no question as to the ability, sagacity and prudence of the defendant in the management of his own affairs. Upon ex-

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*amining into the mortgage, we find that the real estate was a lot on Calhoun street in this city. On this lot it appears from the evidence that there was a row of small houses, rented principally to colored persons, a class of houses commanding a rent much disproportioned to their selling price. The property cost Earle on its purchase $6,000. At the date of the mortgage there was an existing valid lien on all the property of Earle in the shape of a judgment in favor of Thomas O'Brien, on which was due $11,445.83. This judgment had been obtained on a bond given by Earle for the purchase of the Mills House stables in Chalmers street, a valuable property, which cost Earle eighteen thousand dollars, and was then owned by him, and bore date April 19, 1856. Earle owned other parcels of real estate, more or less under mortgage. The testimony shows that he owned

Real estate, at cost prices.....	$73,460 00
Amount of mortgages, including those to C. T. Lowndes, trustee...	40,280 00
Surplus	$32,180 00

When this mortgage was given there was on record, not marked satisfied, another mortgage of the same property for five thousand dollars, which, however, was in fact paid; it does not appear that the defendant was aware of the existence of this mortgage. It appears from the evidence that when the defendant accepted the security he was under the impression that he was receiving a mortgage of a lot on Calhoun street more valuable than this on which was Mr. Earle's residence. The slaves mortgaged were all males—mechanics—and would, if sold, have commanded high prices, as much as two thousand dollars each. The mortgage was dated 22d May, 1860, and, as far as appears from the evidence, was executed on that day. It was recorded in the office of Register of Mesne Conveyance and in that of the Secretary of State, on 28th July, 1860, more than sixty days after the execution. At that time Earle was in full business, owed debts, and contracted debts afterward.

Earle died soon after the end of the war. His estate, greatly diminished by the emancipation of slaves and by the results of the war, was settled in this Court.

The debts proved against his estate were	$66,031 85
The gross assets were...$16,409 00	
Less costs, taxes, etc. ... 3,808 87	
	$12,600 13

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*In fact, the assets were not sufficient to pay two mortgages held by other persons and O'Brien's judgment. The plaintiff succeeded in collecting from Earle in his lifetime, on this bond, the sum of five hundred dollars

on 4th May, 1867, and a further sum of five hundred dollars on 9th September, 1867. The balance upon the bond can never be paid.

From this statement it appears that the defendant, as trustee, lent trust funds upon the security of a mortgage of real estate, supposing at the time that the lot mortgaged was another much more valuable than the one really bound by the lien; that he lent upon it a sum of money five-sixths of its cost value; that he accepted it with a valid subsisting lien upon it of $11,445.83, and with a cloud upon its title in the shape of a mortgage for five thousand dollars, unsatisfied on the record; that he strengthened the security with a mortgage of six slaves—all of them males—who could not increase in value, and were exposed to diminution in value from death, disease or casualty; that by failure on his part to record the mortgage within sixty days, it became void as against creditors, and that Earle was the customer of the Bank of Charleston, of which defendant was a director, and at the time of the loan and afterwards was under obligations to the bank in the sum of nearly one hundred thousand dollars.

The Huger bond:

We now come to the investment of the proceeds of the Huger bond in Confederate bonds.

On this point, referring, however, only to the investment of a sum of $300, the defendant says that they were "bonds bought in the market in the ordinary way of business, and were not taken in aid of the Confederacy;" that he acted in accordance with the views and with the approval of Mrs Kinloch; that, also, he acted in accordance with the known opinions of the plaintiff, who was conspicuous in her devotion to the cause of the Confederacy,—had herself accepted payment of debts in Confederate notes, and had censured the conduct of other persons who refused to receive payment in these notes. In his testimony he confirms these statements of his answer.

Besides this, he proves that both of the obligors on the Huger bond were reduced to insolvency by the result of the war.

On the other hand, the plaintiff introduced in evidence the testimony given by the defendant, as a witness in a cause entitled

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*Lowndes v. Robertson et al., tried in this Court, in which he stated that during the war he would not make a sale of certain realty, the inheritance of his wife, until he had first provided the means of investing the proceeds of such sale in other than war securities; that he had refused to invest the money of his wife in such war securities, preferring to put the investment in obligations payable in good money after the war.

There is no evidence that when the original loan was made of the trust money to the Hugers any other security or evidence of debt was taken by the trustee than their personal bond.

I respectfully report as my finding on questions of fact:

I. That the defendant was duly appointed trustee of Frederick Kinloch and Mary I'on Kinloch, his wife, under the marriage settlement of 1816, by way of substitution in the place of the surviving trustee, and that he accepted the trust.

II. That under the terms of this settlement the property was held for the use of the husband and wife during their joint lives, then of the survivor for life, and at the death of the survivor, for the use of the issue of the marriage, in fee.

III. That the plaintiff was the sole surviving issue of the said marriage and the only person entitled to demand an account from the trustee.

IV. That the defendant, with others, was duly appointed the trustee of Mrs. Mary I'on Kinloch under the will of her father, Thomas Lowndes; that he alone accepted the trust.

V. That under the terms of this trust the property was held to the sole use of Mrs. Kinloch during her life, with power of appointment by deed or will, remainder in default of such appointment to her issue living at her death.

VI. That Mrs. Kinloch departed this life on 29th of September, 1865, without having exercised her power of appointment, leaving the plaintiff her sole surviving child.

VII. That the defendant has never been discharged or released by the plaintiff from liability to account to her as trustee under the deed of settlement and the will aforesaid.

VIII. That of the capital originally in the hand of the trustee, the plaintiff ratifies and confirms the expenditure of $19,347.78.

IX. That the capital of the trust estate in the hands of the trustee was the sum of twenty-five thousand one hundred and seventy dollars, and for this he must account.

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*X. That a part of this sum is an investment in the bond of J. P. Earle for ($5,000) five thousand dollars, secured by a mortgage of a lot of land in Calhoun street and of six slaves.

XI. That the security for the bond was insufficient, the mortgage recorded after the time allowed by law, and void as to the creditors of Earle, of whom there were many then in existence and subsequent thereto, and that the investment was not made by the trustee with necessary prudence and care.

XII. That a portion of this capital was invested in the personal bond of Alfred Huger and of Arthur Huger for two thousand three hundred and eighty-three dollars, without further security.

XIII. That this bond was paid to the trustee during the war, presumably in Confederate treasury notes, and that these notes

were invested by the trustee in Confederate bonds purchased in due course of business and not with intent to aid the Confederacy.

XIV. That Alfred Huger and Arthur Huger were made insolvent by the results of the war.

XV. That the plaintiff, of full age and sui juris, lived during the war within the limits of the Confederacy, sympathized with its cause, made use of Confederate money, received it in payment of dues to her, and disapproved and condemned the conduct of others in refusing so to receive it.

XVI. That the defendant refused to make sale of certain property of his wife until he had secured the investment of the proceeds of sale in certain securities, payable after the war in good currency, and for such proceeds refused to accept securities payable during the war.

As conclusions of law:

I. That the defendant must account to the plaintiff for his actings and doings as trustee.

II. That in the account filed by him he has failed to justify the investment in the bond of J. P. Earle of $5,000.

III. That he must pay the plaintiff the amount invested in this bond, with interest from the death of the life tenant, that is to say, the sum of five thousand dollars, less the sum of five hundred dollars paid on 4th of May, 1867, and of five hundred dollars paid on 9th of September, 1867, calculating interest from 29th of September, 1865.

IV. That inasmuch as the breach of trust arose from want of prudence and care and

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was not willful, as the trustee did not *use the trust fund for gain or for his own purposes, or employ it in trade, and as there was no direction in the instrument creating the trust that the increments of interest should accumulate, it would not be proper to charge the trustee with annual rents, and he is liable only for simple interest.—Perry on Trusts, 432, 433; Wright v. Wright, 2 McC. Eq. 202; Myers v. Myers, 2 McCord, Eq. 266 [16 Am. Dec. 648]; Baker v. Lafitte, 4 Rich. Eq., 394.

V. Before stating the conclusion of law which I have reached upon the facts connected with the Confederate investment, I ask leave to state some of the difficulties which I encountered in coming to that conclusion. It appears to me that the cases which have been decided upon questions made as to such investments, especially those discussed before our Supreme Court, have all been attended by circumstances which do not exist in this case. In these cases the cestui que trust was either under age, or under disability, or absent from the limits of the Confederacy, and so were free from the taint of rebellion. In the present case the plaintiff was sui juris, resided within the Confederacy, and shared to the fullest extent in the hopes and purposes of her own people in the war.

After careful consideration, however, I am of the opinion that the broad principle laid down in our cases binds the Referee, and that a modification of this principle, if any will apply to this case, can only be made by the Court which will review his report.

Mayer v. Mordecai (1 S. C., 383 [7 Am. Rep. 26],) held it a breach of trust for a trustee to receive Confederate money upon a bond made before the war, and past due, secured by a mortgage of real estate.

In Creighton v. Pringle, (3 S. C., 96,) a trustee was held liable to account for a bond, secured by a mortgage of slaves, made before the war, which he had permitted the obligor to pay in Confederate money and then invested the proceeds in Confederate bonds.

In both cases it was ruled that, inasmuch as the trustee was not bound to receive the Confederate money, he had no right to receive it.

In Pickens v. Dwight, (4 S. C., 366,) Moses, C. J., uses this language, speaking of a breach of trust by a trustee in the change of an investment: "More especially would the breach be without excuse if the new security was of the class least favored by the Courts for investment, and it would be without the shadow of extenuation if the change was made for Confederate notes, which, when compared with gold and silver coin or nation-

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al bank notes, had not *only a depreciated value, but one daily fluctuating with the probable success or failure of the government which had issued them, and, to any ordinary understanding, ultimately entirely worthless, unless the civil war which it was waging could resist the arms and powers of the United States which were brought into requisition for its suppression."

It may be said, however, that, inasmuch as the obligors were made insolvent by the results of the war, the trustee parted with a security which was valueless and the trust estate has lost nothing. But this itself arose from a breach of trust. A trustee has no right to invest the funds of a trust estate without security. The trustee should not have placed the money of his trust estate in this bond without requiring other security.

In Nance v. Nance, (1 S. C., 209,) Mr. Justice Willard made an exhaustive examination into this subject, and sums up the conclusion as follows: "The trustee will be held responsible for losses of trust funds through loans to private persons, unless securities are taken collateral to such loans. Such securities should primarily consist of mortgages of unencumbered real estate of a value sufficient to guarantee the debt against all contingencies liable to occur or capable of being foreseen. Bonds of individuals should not be taken in lieu of real securities, unless un-

objectionable investments cannot, in the exercise of reasonable diligence, be procured. When personal securities are taken in lieu of real, it will devolve upon the trustee to make the necessity and propriety of such investment appear upon an accounting with the cestui que trust."

As a conclusion of law, I respectfully report that the defendant must account to the plaintiff for this sum invested in the Huger bond, to wit, two thousand three hundred and eighty-three dollars, ($2,383,) with interest from the death of Mrs. Kinloch, 29th September, 1865.

The testimony upon the Milliken bond has not yet been concluded. Upon this branch of the case I ask leave to make a further report.

The second report is as follows:

At the conclusion of the preceding report I asked leave to make a further report upon the only one of the investments made by the defendant as trustee which had not been discussed.

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*The bond of Thomas Milliken:

On this point I have taken testimony and find these facts:

The defendant had invested fifteen thousand dollars, part of the trust estate in his hands, in the six per cent. loan of the United States, issued in 1847. In the year 1853 the United States, being desirous of calling in this loan, which was not yet due, offered to the holders a large premium as an inducement, amounting nearly to twenty-five per cent. of the principal. The defendant accepted the offer for the amount held by him. Of the sum received by him from the United States he invested ten thousand dollars in the bond of Thomas Milliken, with the personal security of E. P. Milliken, and secured his bond by a mortgage of North Mulberry, a rice plantation on Cooper River, and also by a mortgage of sixty-five slaves in families, working and residing on the said plantation. The bond was originally made by Mr. Thomas Milliken, in the year 1847, and the mortgages had been executed by him at that time. The defendant purchased the security in 1853, and he required the guaranty of Mr. E. P. Milliken. The latter was a merchant, doing business in Charleston, and, as the maker resided in the country, his guaranty was required in order to secure the prompt payment of the interest. The plantation mortgaged had been purchased by Mr. Milliken in 1836 for eighteen thousand ($18,000) dollars. There was due on the purchase money two bonds, one of twelve thousand dollars and one of six thousand dollars, both secured by a mortgage of the land. When the defendant purchased his securities, the first named bond, that of twelve thousand dollars, was unpaid as to the principal, certainly to the sum of ten thousand ($10,000) dollars. The evidence does not show distinctly when the other bond, that of six thousand dollars, was paid. It came into the possession of Alexander Mazyck, as trustee of Mrs. Elizabeth Broughton, and on the death of Mrs. Broughton, in 1857, was transferred by him to her children. T. Alexander Broughton, one of these children, took an affidavit, dated 22d July, 1863, stating that this bond had been paid. He does not fix the date of payment.

The interest on the bond in question had all been paid when the defendant purchased it, and was paid regularly afterward.

The defendant, in his answer and in his own testimony, says that the plantation was worth from twenty to thirty thousand dollars, and a witness of great accuracy, who has

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known the plantation for *many years before and after the war, concurs in this estimate of its value. Shortly after the end of the war the holder of the first mortgage foreclosed it, and the plantation sold for about seven thousand dollars. The slaves mortgaged to secure this debt, sixty-five (65) in number, were worth from five hundred to six hundred and fifty dollars each on the average. At the date of the loan and of the purchase of the security by the defendant, no apprehension whatever was felt in the community at large that the institution of slavery would be abolished at any early period. The emancipation of slaves, consequent upon the war, rendered the security valueless and made the estate of Thomas Milliken insolvent. I have no evidence as to the solvency of Mr. E. P. Milliken.

No testimony has been introduced as to the special circumstances under which the investment was made by the trustee. No evidence as to the necessity of this particular investment has been offered, and none as to its propriety, other than the value of the securities, has been adduced.

I have had no evidence that the trustee, either before or after the redemption of the loan by the United States, sought for the investment of the fund a mortgage of unencumbered real estate.

The only reason given for the sale of the public funds was the premium offered by the government, and the only motive given for the investment in the Milliken bond by the trustee himself is his conviction that it was an investment of the first class.

Upon these facts I respectfully submit my conclusion of law and the reasons which have led me to this conclusion.

The plaintiff makes two objections to this investment:

1. She contends that the trustee changed an investment already made in the public debt of the United States—the highest class of investments.

2. That he invested the money thus received in a bond, secured by an insufficient mortgage of real estate, and further secured by a mortgage of personal property, without any proof of the necessity or propriety of such investment.

As our conclusions upon the first objection will depend very much upon the result of our examination of the second objection, I will discuss the latter before addressing myself to the former.

The plaintiff relies upon the cases of Nance v. Nance (1 S. C., 220,) and Cureton v. Watson, (3 S. C., 456).

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*There can be no doubt that if in these cases the learned Judges who delivered the opinions of the Court meant to include in the term "personal securities" all investments secured by a mortgage or pledge of personal property, and if they did not confine the expression to personal obligations, that is, to security on the names of persons, without any pledge or mortgage of property, the position of the plaintiff is sustained by very high authority.

Let us examine the cases. In Nance v. Nance the suit was brought against the executors of a guardian seeking an account of the estate of the wards in the hands of their testator. It appeared that the estate, consisting originally of money and of choses in action, had been invested in the joint and several obligations of individuals, without further security, except in one instance in which a mortgage of realty was taken, which realty, however, was covered by liens prior to the mortgage. The Chancellor who heard the case on circuit sustained these investments.

The strict rule respecting the investments of trust estates prevailing in England had been greatly modified in South Carolina so as to suit the circumstances of this country, and the impression had grown up in the profession that want of good faith and gross negligence on the part of the trustee were the only grounds on which he could be held responsible in the event of the loss of trust funds. This impression had been deepened and intensified by the misfortunes which beset our people after the war and had extended itself to the bench. The Court in Nance v. Nance, demonstrated in an unanswerable argument that this impression was a false one, not sustained by any of the cases from which it was supposed to be derived.

On the contrary, the Court ruled that it is the primary duty of the trustee to obtain a secure investment of the trust fund, secure against all contingencies liable to occur or capable of being foreseen. "The more difficult question," says Judge Willard in this able opinion, delivered by him as the organ of the Court, "the more difficult question is as to the degree of security requisite. This is to be determined in part by settled rules of law and in part through the discretion of the trustee. The Courts have gone no further in limiting the discretion of the trustee than to indicate certain classes of investments as admissible and to reject others as unsuitable. Within the limits of this imperfectly-defined jurisdiction, the trustee has been entrusted

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with a large discretion and *treated with great liberality, while acting in good faith and chargeable with no culpability or gross imprudence."

In the cases cited by him he indicates the objectionable modes of investment—the loan of trust funds by a trustee to himself; the purchase of real estate with trust funds; the employment of trust funds in trade or in any speculative undertaking without an express authority.

In Nance v. Nance the trust funds had been invested in the obligations of individuals without further security. The Court held such investments improper unless the trustee could show that unobjectionable investments could not be procured in the exercise of reasonable diligence, and could prove the necessity and propriety of these investments. This is the full scope of the decision.

After a very elaborate and able examination of our cases on the subject of the investment of trust funds by a trustee, the learned Judge sums up his conclusion in these words: "The trustee will be held responsible for losses of trust funds through loans to private persons unless securities are taken collateral to such loans. Such securities should consist primarily of mortgages of unencumbered real estate of a value sufficient to guarantee the debt against all contingencies liable to occur or capable of being foreseen. Bonds of individuals should not be taken in lieu of real securities unless unobjectionable investments cannot, in the exercise of reasonable diligence, be procured. When personal securities are taken in lieu of real, it will devolve on the trustee to make the necessity and propriety of such investments to appear upon an accounting with the cestui que trust." He contrasts "bonds of individuals" with real securities, and says that the former must not be taken unless the latter cannot be had. He says that when personal securities are taken in lieu of real, that is when the bonds of individuals are taken in lieu of real securities, the trustee must show the necessity and propriety of such investment. So, in the beginning of his discussion of this question, he quotes Hill on Trustees, p. 380, that if a trustee "finds the estate in his hands to consist wholly or in part of personal obligations, it is his duty to call them in and properly invest the fund." It seems to me that the decision in Nance v. Nance goes to this extent and no further. The investment by Nance, the guardian of the funds of his wards, was not in that class of securities which would at once be recognized as proper; nor were they of such a character as would, under

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our decisions, be at once consid*ered inadmissible. They were within the limits "of that imperfectly-defined jurisdiction in which trustees have been entrusted with large dis-

cretion," and would therefore be examined by the Court in order to discover whether this discretion was well exercised. When the guardian could show no necessity for the investment of the trust funds in personal obligations without other security, he was held liable for such investment. But when, as in the case of the Butler note, it appeared that a mortgage of real estate was taken, beside the personal obligations of individuals, the charge of negligence against the trustee was dismissed, although the security was imperfect.

In Cureton v. Watson, (3 S. C., 457,) the Court approved and reaffirm Nance v. Nance. In both cases the question arose upon investments in personal obligations, and such investments were contrasted with real estate securities. It would seem, therefore, that neither of these cases decide that an investment of trust funds upon bond or other obligation, secured by the pledge or mortgage of personal property, is a breach of trust.

We will examine the present case.

"The duty of trustees," says Judge Willard, in Nance v. Nance, (1 S. C., 220,) "in relation to investments is defined by the objects prompting the creation of the trust, namely, to place the fund in a state of security and in a condition to yield increase. The resulting duty is to seek, with reasonable diligence and prudence, investments affording both security and increase."

The defendant, in order to invest $10,000 of trust funds in his hands, purchased the bond of Mr. Thomas Milliken, secured by a second mortgage of a plantation worth between $20,000 and $30,000. And this bond was also secured by a mortgage of sixty five slaves in families, worth from $32,500 to $39,000. There was a prior lien on the plantation of $18,000. The personalty was unencumbered. I am of the opinion that the mortgage of the realty alone would have been an improper security.—Morris v. Wright, 14 Beav., 291. Was the mortgage of the personalty such an investment as would place the fund in a state of security against all contingencies liable to occur, or which could be foreseen, and would it be in a condition to yield increase?

The bond and mortgages were dated in 1847. At the date of the purchase of the defendant, in 1853, the interest had been paid in full to that time. To secure the prompt

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payment of the interest in *the future he required and procured the additional security of the name of Mr. E. P. Milliken, and the interest continued to be paid to 1865. The security was thus in a condition to yield increase.

Was the fund in a state of security against all contingencies liable to occur or capable of being foreseen?

The value of the security was over three times the amount of the debt. The security consisted of families of slaves residing on the plantation, increasing steadily in number, and as steadily increasing in value. At the date of the purchase of this security, no one, however opposed to the institution of slavery, dreamed that there was any hope of its speedy extinction or of its abolition, except after conflicts through a long series of years, and then by legislative enactment providing for the compensation of the owner. The war, in fact so near, was anticipated by none but the wisest of the nation, and not even the most wise could foresee or confidently predict its results.

The mortgage held by the defendant vested the legal title of the mortgaged property in him, and his remedy against the mortgagee for a breach of the condition of his bond was short and speedy, easy, inexpensive and safe. Against third persons he had his action of trover, and all the remedies and security afforded him by this form of action. To every appearance, the trust fund was as safe as if it was a first lien on the plantation itself; as safe, because every one supposed that the value of this rice plantation depended altogether on the right to use slave labor; and more desirable, because the delay and expense of a foreclosure through the Courts was not incident to it. When it is considered that the mortgage of real estate was "added thereto for what it might prove to be worth," it seems impossible to avoid reaching the same conclusion at which the Court, in Nance v. Nance, arrived respecting the Butler bond: "The charge of negligence against the trustee on this investment is not sufficiently made out."

We are now prepared to consider the first objection—

That the trustee changed an investment in the loan of the United States, the highest class of securities.

This loan was in the six per cent. stock of the government, was not yet due, and the government offered and paid a premium of nearly twenty-five per cent. upon it.

The rule as stated in Nance v. Nance is this:

Trustees are not called upon to obtain for the funds in their hands a greater rate of increase than that which is afforded by the

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*most secure investments of the country. If they seek to enhance the product of the fund by assuming speculative risks, they do it at their peril. If they take securities of an inferior class while better can be obtained, without any profit therefor to their cestui que trust, they clearly disregard the plainest dictates of duty.

In Cureton v. Watson, (3 S. C., supra,) it was held a breach of trust to exchange a bond secured by mortgage of realty for a personal note with one security, and to invest the proceeds of that note in Confederate securities, the collection having been made

"without any necessity for the immediate use of the money, and without the purpose of obtaining a higher rate of interest, and for no conceivable object having in view any advantage to the ward."

In the present case the loan paid six per cent. per annum on the face of the debt. The government proposed to add nearly one-fourth to the capital if the holder would consent to its redemption. The trustee obtained, as he had every reason to believe, a good investment of ten thousand dollars of the money, at the lawful rate of interest, seven per cent. It does not appear to come within the objections stated in these cases cited.

As a conclusion of law, I find that the defendant is not chargeable for the loss of the investment in the bond of Thomas Milliken.

The defendant excepted to the first report of the Referee on the following grounds:

I. That the conclusions and findings of fact by the Referee, numbered VII, IX, XI, XII, XIII, are erroneous.

(a.) That the plaintiff being sui juris, and taking and administering as her own the securities which her mother had received in 1865, having her own counsel, not vouching the defendant and not casting them back upon him for seven years or thereabouts, must be assumed to have accepted them, and he is not in any event bound by her administration of them where he was not a party.

(b.) That the remainder of the trust fund after 1855, when plaintiff and her mother appropriated $19,347.78 of it, was not $25,170, but $23,087.

(c.) That the Earle bond, with mortgage of real estate and personal property of the actual value of $18,000 to secure $5,000, was a good and lawful investment, abundantly well secured at the time of investment, and the loss that has happened—if any need have happened thereon—has not been by reason of

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any fault, careless*ness, neglect or error of defendant, but by reason of events over which he had no control and could not foresee and was not bound to foresee.

(d.) That as to the bond of Alfred and Arthur Huger for $2,383, supposed and reported to have been an investment of the trust fund and to have been paid to and received by the defendant in Confederate treasury notes or bonds, said Huger bond, if it ever existed, was no part of the trust estate, the whole trust fund that came into defendant's possession being accounted for otherwise and without such investment.

(e.) That a balance of $512 only was transmuted into Confederate funds by events which he could not control and the consequences of which he is not responsible for.

II. Defendant also excepted to the conclusions of law numbered I to V inclusive, that they are erroneous in law, and mainly so because founded on errors of fact.

III. No loss has occurred by reason of the alleged unaccountable failure to record Earle's mortgage within the statutory time, and a trustee cannot be made liable for more than actual loss happening by his negligence, and especially when only accidental negligence and not bad faith is charged against him.

IV. That the O'Brien judgment did not impair the value of the security taken from Earle, because said judgment was on a bond for less than two-thirds of the purchase money of real estate, and the bond was secured by mortgage of the property itself, worth at the time, and, except for the war, at any and every time since, more than the amount of the judgment, which property was to be first exhausted before the property mortgaged to defendant could be subjected to its execution.

If the defendant may be chargeable at all, it is only for the actual loss suffered in this respect, and not for the depreciation in value of the property caused by the war. Such actual loss has not yet been ascertained by any proceeding to which defendant was a party or had the opportunity to be a party.

The law contemplates and requires from an unfortunate trustee who is the victim of accident, and not of fraud, no more than restoration—compensation for actual loss caused by his mistakes—and not punishment or vindictive damages.

V. That during the war, while the property was depreciating in value, the Courts were closed, and defendant could not enforce and

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*protect the rights of the trust estate by sale of the property, and he is not chargeable with the effect of stay laws any more than of the war.

VI. That all the circumstances and relations of the parties to one another, as developed by the testimony, create the irresistible presumption that the plaintiff is mistaken; she must have known there had been a trust, and her uncle the trustee of the property of her mother and herself.

That, being sui juris in 1855, she joined her mother in the application of a large part of the funds to her own use, and the remainder having been placed, the same year, in the hands of her own agents, in the expectation that she would use a considerable part of it, the presumption is that she knew and recognized, as her mother had done, the discharge of her uncle, when, upon the death of her mother, in 1865, she took, as her mother's and her own, the securities she now seeks to make him liable for.

When she found the securities in the possession of her own agents—Adams & Frost—and thought them her mother's and her own, it is more natural to conclude that her convictions had been impressed upon her ten years before, than that she was misled by her uncle, as seems to be claimed.

VII. It is error of the Referee to assume

that the trustee sold the United States bonds in which the $15,000 was invested.

The bonds were paid by the government under the provisions of the law by which they were created.

VIII. If the defendant, misled by the united approval of Mr. Petigru, Mrs. Kinloch and Mrs. Singleton, in 1855, as to his investments, and the continued acquiescence of the two first so long as they lived, and of the plaintiff for seven years after the death of her mother, is, notwithstanding, "to be held liable for the mischances of the fund," then he is entitled to be credited with the commissions (percentage) he is by express law entitled to have, and an account of such commissions should have been stated and reported by the Referee, as claimed by the answer.

The plaintiff excepted to the second report on the ground that the Referee erred in holding that the investment in the bond of Thomas Milliken should be sustained.

His Honor the Circuit Judge overruled the exceptions to the two reports and made a decree confirming the same.

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*Both parties appealed.

Simons & Simons, with whom was Lord, for plaintiff.

Campbells & Whaley, for defendant.

March 30, 1878. The opinion of the Court was delivered by

WILLARD, C. J. The report of the Referee fully explains the nature of the present case and the facts and circumstances out of which it has arisen. The findings of fact of the Referee will be first considered.

The proposition advanced by the defendant, that the plaintiff had lost her right to call him to account as trustee, and also to dispute the character of certain investments on the ground of acquiescence and laches, is met by a finding of the fact that the plaintiff was not, during the time to which such allegation relates, sufficiently informed of the nature of the trust and of her interest under it to be subject to the charge of acquiescence or of laches. To disturb that finding of fact, we must conclude that it is unsupported by the evidence, either as a fact not proved or as an improper inference from facts proved, or we must conclude that the clear weight of undisputed evidence is against it. We find no ground for such a conclusion. It was incumbent on the defendant to establish facts of that character by clear proof.

The interest of the plaintiff during the lifetime of her mother was that of one in remainder, having no present right to control the fund, directly or indirectly, or to enjoy the income of the trust estate. She had a right to hold her hands off from the estate until her right became vested in interest by the happening of the contingencies on which her right of possession depended. She had no duty to discharge in compelling the trustee to a proper discharge of his duty and keeping him within the strict line of that duty. The duty of keeping the trust estate in a safe condition, so that it might come in due time to the hands of the plaintiff, devolved upon the defendant and not upon the plaintiff. Under such circumstances, very clear evidence of an intention on her part to authorize a clear departure from the terms of the trust would have to be produced to warrant the conclusion contended for by the defendant. It is equally clear that the absence of a defined duty of watchfulness and objection

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on the part of the plaintiff during the *period of time referred to prevents the application of the principles upon which laches is charged.

The conclusion of the Referee as to this part of the case must be affirmed.

The findings of the Referee were objected to on the ground that he had included in his statement of the assets of the trust estate in the hands of the trustee to be accounted for a bond of A. & A. Huger for $2,283, while it is alleged that no part of the assets went into that bond. The statement of the account made by the Referee is largely derived from memoranda coming from the defendant's custody. These memoranda appear to be necessary in order to state the account of the trustee, as it appears that his books and papers were destroyed through casualties of the late war, and no more direct proof of the accounts being offered by defendants. The character of these memoranda justifies their employment as means of stating the account. Indeed, no objection is made as to their sufficiency as proof of the accounts, but the objection is as it regards the conclusions to be derived from them. We do not find any evidence that the Referee has misinterpreted these proofs or given them undue weight. Certainly the conclusion he has drawn is a fair and reasonable one to derive from the face of the memoranda. The circumstance that the defendant, although a witness in the case on his own behalf, did not give any testimony as to any such objection to the memoranda, affords strong reason to assume that there was no substantial ground of objection to their statements. The fact stated, that length of time had rendered the memory of the defendant indistinct as it regards the state of accounts, cannot help the defendant, for the burden of disputing the representations that appear on the face of the memoranda was upon him. The finding of the Referee as it regards the Huger bond, holding it to have been part of the trust estate to be accounted for, must be sustained.

We find no ground for disturbing the remaining findings of the Referee. We can neither say that they are unsupported by evidence nor that they deny the due force of evi-

dence. It remains to consider the questions of law raised in the findings of the Referee.

We think that the reasoning and conclusion of the Referee as it regards the Earle bond were correct.

It is certainly a breach of trust for a trustee to place trust funds in encumbered property, where it is probable that the trust es-

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tate *may be called upon to redeem from such encumbrance and may be seriously embarrassed, if not unable, to effect such redemption. This manifest inconvenience lies at the foundation of the rule stated in Nance v. Nance, (1 S. C., 209,) as it regards investing in encumbered property. In the present case the real property mortgaged was affected by the lien of a large judgment. Whether the negroes that constituted part of the mortgage security were subject to the lien of execution on the judgment does not appear. It is said that property sufficient existed, bound by such judgment, without resort to the property mortgaged: but there was no legal means of compelling the judgment creditor to look to any particular fund, bound by his judgment, and, if there was, still the trust estate would be in the position of having purchased a law suit. It is hardly conceivable that circumstances could exist justifying investment by a trustee in property bound by a judgment. It is not enough to justify an investment that the property bound by a security is amply sufficient to meet its obligation. The nature of the security, and the circumstances affecting its availability, must be such as to afford means, consistent with the nature of trust estates, as well as with the circumstances of the particular estate, of obtaining security for the trust fund and reasonable productiveness. As was said in Nance v. Nance, the highest rate of productiveness is not required, because ordinarily inconsistent with the requisite security. As to what is a sound investment, in point of availability, is not a question to be determined wholly by the judgment of the trustees as to the degree of risks attending a particular investment, but is determined, in part at least, in accordance with the rules that are the results of general business experience, to some extent recognized as fixed rules of legal administration. Nothing is of greater public importance than that that portion of the stored-up wealth of the community which usually falls into fiduciary custody should be wisely and prudently guarded and employed, not only as securing economic results, but in order to discharge a responsible duty to those who have claims upon the guardianship and protection of the State.

To hold that the investment as to the Earle bond was justifiable would tend to destroy the safeguards surrounding the discharge of fiduciary duties and leave the security of trust estates to the uncertainty of irregular business transactions and to the inaccuracy of speculative authorities.

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*Other circumstances affecting the value of the investment are stated by the Referee that need not be considered. His conclusion as to the insufficiency of that part of the property not bound by the judgment, and which we find no reason to question, is fatal to the support of the investment.

The Huger bond appears to have been a personal security merely. Such securities are not in themselves admissible, and can only be made so by evidence of the necessity and prudence of such investment.—Nance v. Nance and Allen v. Gaillard, 1 S. C. 279. No attempt was made by the trustee to explain such unsecured investment. It was no doubt the duty of the trustee to call in such improper investment at the earliest practicable moment.

It is not necessary to consider whether he had the right to convert that bond into Confederate currency, considering that it was inadequately secured, and, on the other hand, that the only medium of effecting such change of securities at the time was Confederate currency.—See Mayer v. Mordecai, 1 S. C. 383 [7 Am. Rep. 26]. Confederate currency was not money, in a legal sense, and therefore, receiving Confederate currency at a nominal value was not payment in a legal sense. In legal contemplation, Confederate currency was a mere commodity, used by the community as a matter of necessity or convenience as a medium of exchange. In converting a security into Confederate currency the same rules were required to be observed as in case of barter or exchange of one kind of property into another not having the legal character of money—that is to say, regard must be had to its actual value and not to its nominal value. It appears that the Confederate currency was not at the time worth its nominal value, and, therefore, could not properly be taken at such value.

It was, therefore, a clear breach of trust for the trustee to convert the Huger bond into depreciated Confederate currency at its nominal value.—Mayer v. Mordecai, 1 S. C., 383 [7 Am. Rep. 26]; Sanders v. Rogers, 1 S. C., 452; Womack v. Austin, 1 S. C., 421; Cureton v. Watson, 3 S. C., 451.

Inasmuch as the trustee both invested in and converted the Huger bond improperly, he is properly chargeable with the value of the assets represented by the security converted at the time of such conversion. It does not appear that any actual value has been derived from the conversion; accordingly the trustee should stand charged with the amount of that bond.

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*We are equally satisfied with the conclusion of the Referee as to matters of law as it regards the Milliken bond. His conclusion of fact that the security afforded by that invest-

ment was sufficient in point of fact, independent of that portion of the property mortgaged that was subject to prior liens, we are constrained to adopt as subject to none of the objections that are allowed as sufficient to disturb findings of fact. The question of law arises, from this state of facts, whether a mortgage security taken upon slaves is admissible under any circumstances and whether authorized in the case in hand. Slaves at the time constituted an important element of landed securities, at least so far as they were permanently connected with agricultural pursuits. No other kind of personal property stood in like relation to land. While land possessed the value due to the highest indestructibility, slaves had the advantage of increase.

The plantation and its slaves were usually considered together as it regarded the value of agricultural lands. It would be stating the rule with too much attention to technical considerations to lose sight of this fact. The habits and customs of the country must be allowed weight, and it is clear that investments in land and slaves engaged in their culture was regarded as the highest security of a private nature and appropriate and safe for the purposes of security. We are thus constrained to treat the land and the slaves as constituting a single subject of investment in the present case, for in their union lay the element of landed value to which security should look and as substantially a real security.

It appears that one part of the property mortgaged was subject to prior liens, but another part was free from such prior liens, and, by the finding of the Referee, that part not affected by prior liens was sufficient in itself to put the money loaned in a reasonable state of security. The objection of a prior lien in such case does not go to the sufficiency of the security but presents merely a question of technical compliance with the formal requirements of such investments, and as such it must yield to the evidence of substantial compliance with the requisites of good investment.

As it regards the claim for commissions by the trustee, we need not consider the abstract question raised. The defendant came before the Court, in his answer, denying the existence of the trust, and contending that, contrary to the intent of the trust, he had turned over all the assets of the trust estate,

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many years ago, into *the hands and exclusive control of the life tenant, without regarding the claims of those entitled to take by way of remainder after termination of the life estate. He claims that the trust itself was terminated by that act. This was a clear breach of trust. The defendant claims to have acted since that time as the agent of the life tenant merely—in other words, that he has not acted from the responsibility imposed by the duty of a trustee for that time. It is not a case for the allowance of commissions, assuming that they could be allowed. Such a claim must rest upon the due performance of the duties imposed by the trust, and when these duties are unperformed it is not demandable either at law or in equity. The answer only demands commissions in case the defendant "is held liable for the mischances of the fund." The defendant has not been held liable for "mischances," but for a departure from a clear line of legal duty. No equity exists to extend the demand of the answer beyond its direct sense.

The report of the Referee and the decree of the Court upon it must be affirmed and the cause remanded for further proceedings.

McIVER, A. J., and HASKELL, A. J., concurred.

9 S. C. 492

DE SAUSSURE v. LYONS.

(Columbia, Nov. Term, 1877.)

[*Powers* ⇐30.]

Testator devised and bequeathed all the rest, residue and remainder of his estate, real and personal, to six persons by name, "my executors and executrix, as hereinafter named, and to the survivors and survivor of them, upon this special trust and confidence, nevertheless,—that is to say, that they, my said trustees, or the survivors or survivor of them, do and shall * * * as they shall think advantageous to my estate, sell and dispose of, on such terms and conditions as they may think fit, all of such real and personal estate, and call in and receive all such debts, sum or sums of money as shall be due or owing unto me at the time of my death, and apply the proceeds thereof (and of the rents, issues and profits of said real estate until sold and disposed of as aforesaid) as hereinafter mentioned—that is to say, to invest thereout and keep invested" a sum sufficient to produce annually a specified amount, to be paid to his wife during her natural life, the residue (together with the amount so invested at the death of his wife) to be distributed as the will thereinafter directed. The six persons mentioned were in a later clause appointed executors. They all survived the testator, but three only qualified as executors: *Held*, That such three had full authority as executors to execute the power to sell the real estate.

[Ed. Note.—Cited in Reeves v. Tappan, 21 S. C. 8; Smith v. Winn, 27 S. C. 598, 4 S. E. 240; Dick v. Harby, 48 S. C. 527, 530, 531, 26 S. E. 900.

For other cases, see Powers, Cent. Dig. § 89; Dec. Dig. ⇐30.]

Before Reed, J., at Charleston, March, 1877.

Action by Wilmot G. DeSaussure and others, as executors of Etienne Poincignon, against Thomas J. Lyons for specific perform-

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*ance of a contract for the sale of a lot of land in the city of Charleston.

The case is as follows:

On the 28th of February, 1876, the plain-

tiffs, as executors as aforesaid, agreed with the defendant to sell to him the said lot of land at a certain price. The defendant refused to accept the title which plaintiffs offered on the ground of an alleged defect therein. It appeared that the plaintiffs claimed under Mrs. Bedelia L. Touhey, who held under a deed of conveyance from Mary E. Ursula Schmidt, Mary Selina Arnold and Daniel Webster Schmidt, as heirs of Dr. J. W. Schmidt, the elder, and by Ambrose C. Kingsland, Cornelius K. Sutton and Ella D. Schmidt (now Goodrich) and her husband, Frank Goodrich, executors and executrixes of the last will and testament of J. W. Schmidt, the younger, and the only objection made by the defendant was that the conveyance to Mrs. Touhey was not a valid execution by the three executors of J. W. Schmidt, the younger, of the power contained in his last will and testament. The facts as to that matter were that J. W. Schmidt, the younger, was the owner at the time of his death of one undivided fourth part of the lot in question, and that he died in New York on the day of , 1860, leaving a last will and testament, which provided, inter alia, as follows:

"Sixth. All the rest, residue and remainder of my estate, real and personal wherever the same may be, and of whatsoever nature and kind, which I may possess or be in any way entitled to at the time of my decease, I give, devise and bequeath unto my friends Ambrose C. Kingsland, of New York, merchant; Cornelius K. Sutton, of the same place, merchant; Edmund S. Hamilton, of the same place, merchant; my sister, Ursula Schmidt; my wife, Mary Elizabeth Schmidt, and my daughter, Ella D. Schmidt, my executors and executrix, as hereinafter named, and to the survivors and survivor of them, upon this special trust and confidence, nevertheless, —that is to say, that they, my said trustees, or the survivors or survivor of them, do, and shall, at such time or times after my decease as they shall think advantageous to my estate, sell and dispose of, on such terms and conditions as they may think fit, all of such real and personal estate, and call in and receive all such debts, sum or sums of money as shall be due or owing unto me at the time of my death, and apply the proceeds thereof (and of the rents, issues and profits of said

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real estate until sold and *disposed of as aforesaid) as hereinafter mentioned,—that is to say, to invest thereout and keep invested, upon bond and mortgage of real estate in the city or State of New York, (said mortgages not to exceed in amount two-thirds of the value of said real estate,) a sum of money sufficient to produce an annual interest or income of seven hundred and fifty dollars, and apply the said interest or income to the use of my said wife, Mary E. Schmidt, during her natural life, in satisfaction of the above mentioned annuity in her favor, and upon the further trust, after the decease of my said wife, to pay and apply the said principal sum in the same manner as the rest, residue and remainder of my estate, as hereinafter directed to be paid and applied, it being my will and intention that said principal sum, after the decease of my said wife, shall go into and form part of said rest, residue and remainder of my estate."

The sixteenth clause of the will was as follows:

"Sixteenth. And lastly, I hereby nominate, constitute and appoint my said trustees, the said Ambrose C. Kingsland, Cornelius K. Sutton and Edmund S. Hamilton, executors, and Ursula Schmidt, Mary Elizabeth Schmidt and Ella D. Schmidt, executrixes of this my last will and testament."

The original will was admitted to probate in New York and a copy thereof afterwards (in May, 1860,) proved in the Court of Ordinary for Charleston County, South Carolina.

Three only of the six persons named as executors by the sixteenth clause of the will qualified as executors in this State.

The lot of land belonged originally to John W. Schmidt, the elder, who devised one undivided fourth part thereof to John W. Schmidt, the younger. After the death of John W. Schmidt, the younger, his three executors who had qualified in South Carolina and the heirs of John W. Schmidt, the elder, conveyed the lot in question to Mrs. Touhey, through whom the plaintiffs derived their title.

His Honor the Circuit Judge held that the power contained in the will of John W. Schmidt, the younger, had been well executed by the conveyance to Mrs. Touhey, and he made a decree for specific performance of the contract.

The defendant appealed.

Simons & Simons, for appellants.
DeSaussure, contra.

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*April 13, 1878. The opinion of the Court was delivered by

WILLARD, C. J. The decree directs the specific performance of a contract for the sale of land. The question is as to the sufficiency of the vendor's title. This title is derived under the alleged execution of a power to sell lands contained in the will of Dr. J. W. Schmidt, who resided in New York at the time of making his will, and at his decease the will was proved in that State and subsequently proved in Charleston. Part only of the persons named as executors qualified in this State. The power was executed by the qualifying executors alone, and the question is whether it was well executed.

The principal question is whether the power was to executors as such. It is contended that it is either a personal confidence in the

persons named or a power to trustees as such, and, therefore, does not follow the office of executor so as to be capable of being exercised by qualifying executors without uniting others named but not qualifying.

The will, after making certain specific devises and bequests, devises "all the rest, residue and remainder of my estate, real and personal," to "my friends Ambrose C. Kingsland, of New York, merchant; Cornelius K. Sutton, of the same place, merchant; Edmund S. Hamilton, of the same place, merchant; my sister, Ursula Schmidt; my wife, Mary Elizabeth Schmidt; and my daughter, Ella D. Schmidt, my executors and executrix as hereinafter named, and to the survivors and survivor of them, upon this special trust and confidence, nevertheless,—that is, to say, that they, my said trustees or the survivors or survivor of them, do and shall, at such time or times after my decease as they think advantageous to my estate, sell and dispose of, on such terms and conditions as they may think fit, all of such real and personal estate, and call in and secure all such debts, sum or sums of money as shall be due or owing unto me at the time of my death, and apply the proceeds thereof (and the rents, issues and profits of my real estate until sold and disposed of as aforesaid) as hereinafter mentioned,—that is to say, to invest thereout and keep invested, upon bond and mortgage of real estate," &c. The income derived from such investment, and finally, the corpus itself, is disposed of by various legacies that need not be particularly considered. In a latter part of the will the persons nam-

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ed above were nominated as executors *and executrixes. The object of the will was to mix together realty and personalty in a common fund, out of which the various purposes of the will were to be satisfied. The power in question in terms embraces the collection and conversion of the personal assets as well as the conversion of the land into money. It directed the sale of lands and the investment of the proceeds of such sale, and the change of such investments from time to time.

The power to sell the realty is intimately and inseparably connected with that to call in, convert and apply the personal assets, as well by the terms used as by the devotion of the united proceeds to one common object, namely, the creation of a single fund to satisfy all the objects of the will, including that of paying debts. Although the direction to pay debts is in a separate and distinct clause from that creating the powers over realty and personalty, yet the fund out of which they are to be paid is the direct subject of the clauses creating these powers. Again, although the executors, as such, are nominated in a clause distinct and separate from that conferring the powers to sell realty and personalty, yet their duties as executors are the subject of the clauses creating these powers as well as the creation and mode of disposition of the means of performing such duties.

A stronger case for holding that the testator, in giving authority to convert the realty into money, was consciously dealing with the powers and duties of the executors, as such, can hardly be conceived. It will not be necessary to go beyond this view and examine the nature of the duties cast upon the persons named as executors, as it regards the investment of the fund created and the administration of such investments, for the present case calls in question merely the power to sell the property of the testator devised to the persons named as executors. But if that question required solution, it would be found in the fact that the personal assets as well as the proceeds of the realty entered into that common trust fund, and as the personal assets must be realized by the executors, as such, and no authority is conferred on executors, as such, to transfer such assets to others for investment, on the supposition that the trusts might come into different hands than those of the executors, it is clear that it is necessary to hold the trusts as incident of the office of executor in order to carry out the purposes of the will.

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*The argument against this view is derived from particular expressions in the will, supposed to indicate an intent that the persons named, both as trustees and executors, shall, as to selling the realty, exercise the office conferred by the former title and not by the latter. In other words, that the office of trustee must be regarded as independent of and distinct from that of executor, and the power to sell the realty must be referred to that character. Such expressions must be clear from doubt and convey an unmistakable intent in order to give rise to a conclusion obviously inconsistent with the general objects and contradictory of the general sense of the will. The fact that the persons are named in connexion with the expression "upon this special trust and confidence" is of little importance. The office of an executor is a special trust and confidence, in the sense clearly intended by the testator, and his words can have full force consistently with the idea that the duties imposed were for executors.

Chancellor Dunkin, in Mallet v. Smith, (6 Rich. Eq., 12 [60 Am. Dec. 107],) uses the words "personal trust and confidence" as indicating an intention to place powers conferred by a will on higher ground than that of the ordinary duties of executors. The word "personal" there derived particular significance from the fact that the power granted in that case was to revoke a legacy on certain contingencies. As the subject in question, namely, revocation of legacies, as for forfeiture, was, in itself, apart from the ordinary duties of executors, describing it

as a personal trust and confidence, clearly indicated that the testator did not intend to attach it to the office at large. In the present case the special trust and confidence is not declared to be "personal," and the subject-matter is clearly, in part, within the office of executor, and in all respects consistent with it.

The mere fact that the persons named are in one place called executors and another trustees, is, in itself, indecisive, and, as such, must yield to the manifest intent of the testator. The law wisely relieves a testator from drawing nice distinctions as to the classification of official powers at a time when his mind is fully occupied with the expression of his desires and purposes, effectuating those purposes, if admissible, by appropriate means.

It is clear that the two offices cannot have separate and independent existence, for in that case the purpose of a single fund and single administration, so clearly conveyed, would be defeated. One must, therefore, become accessory to the other and follow it as

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an *incident. The office of executor cannot become an incident to that of trustee, while that of trustee naturally and conveniently unites itself as an incident to that of executor. It follows that the trusteeship in the present case must be regarded as incident to the office of executor, and, as we shall presently see, following it as that office is transmitted by operation of law.

It was said by Lord Abingdon, C. B., in Forbes v. Peacock, (11 Mees. & Wels., 630,) "that when a power is given to sell property for the purpose of either paying debts or legacies or of converting them into a residuary fund, that power must from its nature belong to the executors."

That proposition is indisputable and directly applicable to the power under consideration, which, as we have seen, lies at the foundation of all that concerns the duties of executors. It was a power coupled with an interest, or, perhaps, more accurately speaking, a power in trust, and as such the question arises whether it followed the executorship into whosoever hands that office might fall.

Powers, in the largest sense of the term, enter into all transactions through which rights are affected in their nature or incidents; but that class of powers that involves the disposition of interests in lands has received especial attention in the adjudicated cases and has been the subject of much learned interpretation. The fundamental principle has been recognized that when one possessing dominion over lands delegates authority to others to act in his name or interest in a manner that presupposes the right of dominion to give validity to such act, the authority is to be exercised in the manner in which it was delegated and in no other. And this principle is equally applicable whether such power is to be exercised under instructions from the grantor of the power or at the discretion of the one in whom the power subsists. The application of another principle, equally fundamental, has enlarged the sphere and efficacy of such powers, and that is that an accessory should follow its principal and be moulded by it. Every power must have its object, as every act, to be rational, must have its appropriate reason. The object in view is necessarily the principal and the power the accessory, for otherwise it would be to declare that the thing done was of less importance than the mere act of doing. It follows that when the grantor of a power creates a right in a third party as against himself, and a power to support that right, such power is no longer exercised in the name or interest of its cre-

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ator *but in the interest of him who holds such derived right. The right and the power that supports it may meet in the same person, and in that case it is, strictly speaking, a power coupled with an interest; or the right may reside in one person and the power in another. In this case, while the power is still coupled with an interest, yet, as the power is in one and the interest in another, the former holds the power for the use of the latter, and it may accurately be called a power in trust, or, as it is sometimes called, a power coupled with an interest in trust.

Powers of the first class, exercised wholly in the name or interest of the creator, are designated naked powers, and, following the principle first above stated, not being attached to any interest by which they can be moulded, they can only be exercised in the manner authorized by their creator. And so the authorities hold.—Franklin v. Osgood, 4 John., 527, by Pratt, J.; Berger v. Bennett, Caine's Cases, 15, by Kent, J.

The cases that will be presently noticed fully illustrate the principle upon which powers attached to interests take their mould from the character of such interests. It would follow that when such powers form a material part of the means placed in the hands of executors by their testator for carrying out the provisions of his will, they become blended with their duties and attached to the office of executor. But here a difficulty arose from the nature of the common law, which looks to matter of form, and can, unaided, only deal with the substantial purposes of transactions within the limits of form, for power to convert realty into personalty was not among the ordinary powers of executors, and being in form, when granted to more than one, joint powers, their legal nature could not undergo a change in that respect. As it regarded the ordinary duties of the executors, joint action was not necessary, and such as might qualify possessed all the authority conferred upon the

persons named for that purpose by the will. To enable the power to be conveniently moulded in the office of executor, the statute of 21 Henry VIII. c. 4, was adopted conferring such powers upon such executors as should qualify under the will, although others nominated by the will should fail to qualify. This statute was made of force in this State.—2 Stat., 457; Britton v. Lewis, S Rich. Eq., 276; Gen. Stat., 469.

As will be seen hereafter the Courts did not confine themselves, in further conforming powers of that class to the object they

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were *intended to secure, to the mere exposition of the statute in relation to the cases embraced in it, but acted upon the principle that was fundamental to it. Carrying out this principle, they held that the powers to convert realty passed to and could be exercised by the survivors of several qualifying executors. This ultimate conclusion fully justifies the assertion that the legal idea of the nature of express powers subsisting in the hands of executors for the conversion of realty into personalty rests on the fundamental principle of moulding the power to conform to the nature of the office to which it is attached.

We will now look at some of the numerous cases bearing on the subject:

Cooke v. Crawford, 36 E. C. R., 91, 13 Sim.: Here was a devise to three, naming them trustees, with power to them and their survivors to sell, at their discretion, by public or private sale. One alone proved the will and entered into possession of the real estate. Shadwell, V. C., states the law to be "that when two or more persons are appointed trustees, and all of them except one renounce, the trust may be executed by that one." The case turned upon another point, not material to be examined. Nothing appears to have been said as to whether the power was to executors as such, but the rule was laid down as applicable to trustees. To that the statute of 21 Henry VIII could not apply, nor was there any difficulty in the application by the Court of Equity of the principle of moulding the power to its substantial characteristics in the case of trustee independently of the statute.

Adams v. Taunton, 5 Madd., 435: Sir J. Leach, V. S., lays down the same rule in this case, except that in Cooke v. Crawford renunciation was referred to, while in this case it is applied to nonacceptance merely.

Tilden v. Hide, 1 E. C. R., 238, 2 Sim. & Stu.: Sir J. Leach, V. S., said: "Where there is a general discretion to sell, but it is not stated by whom the sale is to be made, then, if the produce of the sale is to be applied by the executors in the execution of their office, a power of sale will be implied to the executors." Such implication being possible in equity, with greater facility would that Court mould an express power created by the testator for that very purpose to suit the exigencies of the administration.

Bentham v. Wiltshire, 4 Madd., 44: Here the same general rule was stated as in Tilden v. Hide.

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*Forbes v. Peacock, 11 Mee. & W., 636: In this case there was a devise to testator's wife for life, with power to sell in fee and invest for the general purposes of the will. The will contained the following language: "I appoint my dear wife to be my executor, and I request the favor of my good friends, John Hopton Forbes, of, &c., and Robert Cooper, of, &c., will, jointly with my aforesaid dear wife, become my executrix and trustees to this my will." Testator's wife and Forbes qualified, and the wife died, leaving Forbes sole acting. Cooper had died without qualifying. Forbes sold under the power of sale. The question of the sufficiency of Forbes's authority to sell was sent from Chancery to the Exchequer, and it was there held that such authority was sufficient. Lord Abinger, C. B., with whom Gurney, B., concurred, placed the decision of the case on the ground that it was a power to executors as such, and as such survived to the sole surviving executor. He says: "It appears to me, upon the authority of the cases cited by Mr. Parker, that where a power is given to sell property for the purpose of either paying debts or legacies, or of converting into a residuary fund, that power must from its nature belong to the executors." Rolfe, B., thought that it was to be treated as a case of implied powers, but reached the same conclusion as it regarded the authority of the sole executor to sell.

This was a strong case for holding that the power was personal in the wife, acting in concert with designated trustees, but the majority of the Court saw no difficulty in moulding it to conform to the objects which were purely administrative and for the estate at large. It shows how intimately related in principle are the rules for moulding express powers and implying them when not expressly granted.

Putnam v. Fisher, 36 Maine, 523: In this case there was a devise to three persons appointed executors in trust; only one of the three qualified. Shepley, C. J., held that "when an estate, as in this will, is devised to executors eo nomine in trust, this devise is made to the official, not the individual, person, and the whole trust vests in those who accept it and become executors of the will." He also holds that when an estate is so devised, or when the executors have by the will a power to sell, coupled with an interest in trust, a conveyance by survivors, or by those who alone accept the trust, will be good. He holds that when it is made necessary to convert the realty into personalty for the purposes of the will, the executor has an im-

plied power of sale. The sufficiency of the execution of the power was sustained.

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*Treadwell v. Cordis, Gray, 341: It was held here that when three persons were made both executors and trustees under a will making settlements, two of the executors qualifying could exercise the powers conferred on trustees as well as those conferred on executors.

Warden v. Richard, 11 Gray, 277: Shaw, C. J., says: "When the power to sell is given to executors as incident to the execution of the appropriate duties of executors, and as executors, if one declines the other may execute." This conclusion is not referred to the operation of any statute of Massachusetts such as existed in England and this State.

Franklin v. Osgood, 14 Johns., 527: This case was heard in the Court for the correction of errors, and the leading opinion was by Platt, J. It holds that the particular expressions granting a testamentary power must be harmonized with the object of granting the power as gathered from the will at large. It also holds that the powers granted to executors for the purpose of administration are powers coupled with an interest, and, as such, subsist in the hands of a surviving executor. The doctrine of powers is very fully illustrated in this case, as well as in the opinion of Kent, J., in Bergen v. Bennett, Caine's Cases, 15.

Mallet v. Smith, 6 Rich. Eq., 12 [60 Am. Dec. 107]: No question of a power to sell realty was before the Court in this case. The question was whether power conferred on executors to revoke legacies, when the object of that power was to prevent the legatees from disputing certain dispositions made for slaves in contravention of the statutes, could be exercised when only one of the executors named qualified. The decision was put upon the ground that such authority must be regarded as conferring a strictly personal power, and, as such, did not follow or conform to the office of executors. That case was clearly one to which the statute did not extend.

It is seen from the foregoing cases that the propositions already advanced have received abundant judicial support. It must be concluded that the power of sale in the present case was well executed by the executors who qualified as such in this State, and the appeal must be dismissed.

McIVER, A. J., and HASKELL, A. J., concurred.

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[End of Volume 9 S. Car.]

REPORTS OF CASES

HEARD AND DETERMINED BY

THE SUPREME COURT

OF

SOUTH CAROLINA

VOLUME X

FROM NOVEMBER, 1876, TO APRIL, 1879, INCLUSIVE

BY J. S. G. RICHARDSON

STATE REPORTER

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JUDGES AND OTHER LAW OFFICERS

DURING THE PERIOD COMPRISED IN THIS VOLUME

JUSTICES OF THE SUPREME COURT.

Hon. A. J. WILLARD, Chief Justice.
Hon. HENRY McIVER, Associate Justice.
Hon. A. C. HASKELL, Associate Justice.

JUDGES OF THE CIRCUIT COURTS.

1st Circuit—Hon. J. P. Reed and Hon. B. C. Pressley.
2d Circuit—Hon. P. L. Wiggin and Hon. A. P. Aldrich.
3d Circuit—Hon. A. J. Shaw and Hon. T. B. Fraser.
4th Circuit—Hon. C. P. Townsend and Hon. J. H. Hudson.
5th Circuit—Hon. R. B. Carpenter and Hon. J. B. Kershaw.
6th Circuit—Hon. T. J. Mackey.
7th Circuit—Hon. L. C. Northrop and Hon. W. H. Wallace.
8th Circuit—Hon. T. H. Cooke and Hon. Thomas Thomson.

ATTORNEY GENERALS.

JAMES CONNOR and L. F. YOUMANS, Esqs.

CLERK OF SUPREME COURT.

A. M. BOOZER, Esq.

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REPORTS OF CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT OF SOUTH CAROLINA

JUSTICES OF THE SUPREME COURT DURING THE PERIOD COMPRISED IN THIS VOLUME.

HON. A. J. WILLARD, CHIEF JUSTICE.
HON. HENRY McIVER, FIRST ASSOCIATE JUSTICE.
HON. A. C. HASKELL, SECOND ASSOCIATE JUSTICE.

*STATE OF SOUTH CAROLINA v. MOSELEY.

(Columbia. Nov. Term, 1877.)

[*Execution* ⟸348.]

On 17th of July, 1863, a Sheriff received on an execution in his office which was not under stay, and about which no instructions had been given by the plaintiff as to the kind of currency in which it should be paid, payment in Confederate currency: *Held*, That the execution was satisfied and that the Sheriff was not liable for receiving the Confederate currency.

[Ed. Note.—Cited in Johnson v. Henagan, 11 S. C. 114; Koon v. Munro, Id., 150; Black v. Rose, 14 S. C. 274, 279; Wilson v. Braddy, 16 S. C. 521; Hyatt v. McBurney, 18 S. C. 217, 220.

For other cases, see Execution, Cent. Dig. § 1072; Dec. Dig. ⟸348.]

[*Payment* ⟸9.]

In the absence of specific instructions to the contrary, a Sheriff may always receive payment of an execution in the then common currency of the country.

[Ed. Note.—For other cases, see Payment, Cent. Dig. §§ 34, 38, 40, 41, 45, 49, 53; Dec. Dig. ⟸9.]

[This case is also cited in Bull v. Rowe, 13 S. C. 370, as to the question of laches.]

Before Mackey, J., at Laurens, September, 1877.

This was an action in the name of the State of South Carolina against George F. Moseley, Sheriff, and the sureties on his official bond.

The case is fully stated in the opinion of the Court.

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*Evins & Baxter, for appellants:

I. The Sheriff is exclusively an executive officer of the Court, without either administrative or judicial functions or duties. His only duty in the case of B. F. Cleveland against Samuel Flemming was to execute the writ of fieri facias according to its terms and exigency, wherein he was not the agent of the parties and without discretion.—Thomas Griffin and Hugh Ervin v. Robert Thompson, 2 How., 244; Farrow & Hayes v. Wingate, 4 S. C., 35.

II. By the writ of execution the Sheriff is commanded to collect so many dollars, meaning gold and silver dollars.—Given v. Breedlove, 2 How., 39; Rice v. McClintock, Dud., 356.

III. If the Sheriff should be held to be the agent of the parties plaintiff, the writ of execution limits the scope of his agency, and he would be held responsible for his collections made thereunder in good money, as any other agent would be with limited authority.—Hand v. Smith, 7 Wall., 452; Mangum v. Ball, 5 Am. R., 493; 43 Miss., 288.

IV. The writ of execution required the collection of good money, and the Sheriff's entry of satisfaction is in accordance therewith, behind which the Sheriff should not be allowed now to go.

Ball & Ferguson, contra:

1. The Sheriff is bound to execute a writ addressed to him, according to its mandate, or according to plaintiff's instructions.—Swansy v. Hunt, Sheriff, 2 N. & McC., 211; Farrow & Hayes v. Wingate, 4 Rich., 35; Perry v. Williams & Jones, 1 Bail., 10; Farr v. Sims, Rich. Eq. Ca., 122; Rice v. McClintock, Dud., 354.

In the case of Farr v. Sims, O'Neall, J., delivering the opinion of the Court, says: "It is true every creditor has a right to demand and coerce payment in specie; but this, like all other legal rights, must be ex-

ercised in good faith, and not with a view of sacrificing a debtor's property, and thus obtain an unconscientious advantage. Every one to whom a debt is due has a right to be paid; but if this legal right is used to obtain the debtor's property at enormous sacrifices, this might be considered as a fraudulent abuse of the rights of the creditor and the debtor and might avoid the transaction."

2. A Sheriff is the agent of the plaintiff in execution, to perform in good faith its mandate, and, the mandate being to collect money, the collection of Confederate currency is a compliance with the mandate.—3 Mass., 405; 14 Mass., 122; 2 N. H., 333; 17 Mass., 560.

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*In the above cases it is decided that bank notes, negotiable notes and promissory notes, for many purposes, are considered as money.

3. In times of great embarrassment an agent will not be held to the strict accountability demanded in ordinary times, and he is not liable for depreciated currency which perished in his hands.—Bellinger, Executor of Scottowe, v. Gervais, 1 DeS. Rep., 174.

This case was heard in 1790 by Chancellors Hutson and Matthews, and they say: "This case related to the settlement of the affairs of the late Mr. Scottowe, which had been in the hands of Mr. Gervais, as his agent, during the war. The principal question related to some depreciated paper money which sunk in his hands. The Court was of opinion that as the defendant swore positively he never had applied to his own use any of the money received for Scottowe he ought not to be accountable for it in any other way than the depreciated paper in his hands. He could not loan it during the war, and the times were such as to embarrass every man in deciding what was best to be done with funds."

Chancellor Matthews adds: "That the above be the standing rule with regard to attorneys or agents."

4. A Sheriff receiving worthless currency and entering satisfaction, the same is void, and the plaintiff has his remedy to have the entry canceled.

April 13, 1878. The opinion of the Court was delivered by

McIVER, A. J. This was an action on a Sheriff's official bond. The breach assigned was that the Sheriff, on 17th of July, 1863, had collected thirty-one hundred and sixteen 31-100 dollars under an execution in favor of B. F. Cleveland v. Samuel Flemming, which was lodged in his office on 13th November, 1861, and had refused to pay over the same. The facts were that the Sheriff did receive the amount stated, at the time stated, in Confederate treasury notes, in full satisfaction of the execution, and reported promptly the receipt of the Confederate currency to the plaintiff in the execution, who refused to receive the same in satisfaction of his judgment. There was no endorsement of any stay upon the execution, nor were there any instructions given to the Sheriff not to receive Confederate currency, nor did the Sheriff confer with the plaintiff or his attorneys as to the propriety of receiving such currency.

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*Upon this state of facts a motion for a nonsuit was made and granted upon the ground that "the receipt of the Confederate money by the Sheriff was a nullity and in no wise changed the relation of the plaintiff, Cleveland, and the defendant, Flemming, existing before the payment of Confederate money, nor diminished the liability of Flemming to Cleveland."

This motion is now made to set aside the judgment of nonsuit and for a new trial.

While it may be true that a creditor has a right to demand and coerce payment in gold or silver in those cases not affected by the Act of Congress prescribing what shall be legal tender, it is none the less true that a debtor may, in the absence of any objection liquidate his debt by payment of that which, while it may not possess the legal attributes of money, is yet, by common consent, so regarded and treated in ordinary business affairs. Hence it has been held that where bank notes are the ordinary currency of the country, a sale by a Sheriff under execution, at which he refused to take bank notes and required specie, without giving notice in the advertisement of sale that specie would be required, whereby the property was sold for less than its real value, would be set aside.—Farr v. Sims, Rich. Eq. Ca., 122 [24 Am. Dec. 396].

In that case O'Neall, J., in delivering the opinion of the Court, uses this language: "The usual terms of Sheriff's sale are cash. The term cash has two meanings—one a payment in current bills, the other in specie. The first is the popular, the latter the legal meaning. The former has, in common parlance, entirely supplanted the latter." The reasoning in this case, as well as in that of Rice v. McClintock, (Dud., 354,) well warrants the conclusion that, in the absence of specific directions to the contrary, a Sheriff would be authorized to receive in payment of an execution lodged with him for collection bank notes which constitute the currency of the country at the time and place they are so received. This seems to be the rule not only here but elsewhere.

In the United States Bank v. Bank of Georgia, (10 Wheat., 333 [6 L. Ed. 334],) Story J., says: "Bank notes constitute a part of the common currency of the country and ordinarily pass as money. When they are received as payment the receipt is always given for them as money. They are a good tender as money, unless especially objected to, and, as Lord Mansfield observed in Miller v. Race, (1 Burr., 457,) they are not, like bills of ex-

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change, considered as *mere securities or documents for debts." Nor do we think that this doctrine is to be qualified as contended for in the argument: that it is true only where such bank notes are redeemable in specie on presentation at the counter of the bank which issued them, because, besides the fact that the case of Rice v. McClintock arose during the suspension of specie payments by the banks of this State, consequent upon the panic of 1837, in which no such qualification is even hinted at, such a qualification would so narrow the doctrine as to deprive it of all practical efficiency. For if it is only to be applied when bank notes and specie stand upon exactly the same footing, and the former is readily convertible into the latter, it is difficult to conceive of a case in which the doctrine would be of any practical use. The true foundation for the doctrine is the implied consent of the creditor. For when bank or other notes constitute the only currency, and is in universal use as such, while Courts will still recognize the constitutional right of the creditor, when asserted at the proper time, to demand payment of his debt in that which is established by law as a legal tender, they will, in the absence of any such assertion, conclude that he assented to or authorized payment to be made in that currency which every one regarded and used as money. Applying this doctrine to this case, there would seem to be no doubt but that the Sheriff, in the absence of instructions to the contrary, was justified in receiving in payment of the execution Confederate treasury notes, which then constituted the only currency in use, and was recognized not only by individuals but by the government in all of its departments as the only standard of values, and had in every practical aspect all the attributes of money, except where its use or employment as such was distinctly objected.

The principles established by this Court in the case of Pickens v. Dwight (4 S. C., 360,) apply with great force to the case now in hand. In that case the effort was to hold defendant liable for receiving payment in Confederate currency of a bond which was in his hands as Master in Equity under the following circumstances: Dwight contracted for the purchase of a plantation, in 1858, for the sum of five thousand dollars; but it being necessary to apply to the Court of Equity for the purpose of procuring good titles, the transaction was not perfected until the 4th June, 1861, when Dwight executed his four bonds, secured by a mortgage of the premises, to the Master for three thousand dollars, the balance of the purchase money, he

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*having on that day, and previously, made payments amounting to two thousand dollars. On the 29th April, 1863, Dwight paid the bond remaining in the hands of the Master to that officer in Confederate currency, the other three bonds having been otherwise disposed of. The Court declined to hold the Master liable, and in their decision, after repudiating the idea that Tupper was a trustee, they use this language: "A Master in Equity, in regard to the bonds committed to his charge, is the ministerial officer of the Court, the custodian of the treasury, holding it under its supervision. * * He does not hold the money as a trust, in the technical sense of the word, but is the financial agent of the Court; and where he has received it on a sale, under proper authority, he stands in no different relation to it than a Sheriff or a Referee who has made it under proceedings in a Court of law. * * * The Master was the officer of a Court in a State which satisfied all its obligations and engagements with Confederate currency, and accepted it in payment of debts due to it, without question as to the time when they were contracted. * * * The notes accepted by Mr. Tupper 'were used as money in nearly all the business transactions of many millions of people. They must be regarded, therefore, as a currency imposed upon the community by irresistible force by a government, obedience to whose authority in civil and local matters was not only a necessity but a duty. They were the only measures of value which the people had, and their use was a matter of almost absolute necessity.'—Thorington v. Smith, 8 Wall., 11 [19 L. Ed. 361]. Should the Master, the mere officer of the Court, be held liable for doing that which had the implied sanction of the Court in its own mode of dealing with such notes? Was not the recognition of the currency, by receiving it at par value, on the sale of even the estates of minors, a sanction for the act of the Master in the case before us? * * * The Court, of which he was the officer, had prescribed the course which, under the like circumstances, he should adopt, by commending it through its own example." All this applies with equal force to the conduct of the Sheriff in receiving Confederate currency in payment of this execution, in the absence of any instructions to the contrary from those who owned or controlled the execution.

As to the ground taken in the argument that the Sheriff was liable because he neglected to enforce the execution immediately after its lodgment, "when the bills and notes constituting the circulating medium of the country were current at their par value," it is

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sufli*cient to say that no such breach of the bond is alleged, the only breach assigned being the collection of the money and the refusal to pay it over. If such breach had been alleged and the Sheriff thus notified that this was a ground of complaint against him, it may be, for aught that the Court can know, that he may have been able to show that such delay was authorized by the plaintiff or his attorneys or in some other way

have successfully met the charge. We may add, however, that as the execution was not lodged until 13th of November, 1861, he had but barely one sale day, if indeed that, in which he could levy and sell before the passage of the Act commonly called the Stay Law; and though that Act, having been decided to be unconstitutional, null and void, cannot be regarded as ever having had any legal force or effect, yet, in questions involving good faith or laches, it may, perhaps, be worthy of consideration that such a law was not only spread upon the statute book but was universally acquiesced in and treated as of binding force until the question of its constitutionality was raised in 1866, in the case of the State v. Carew [13 Rich. Law, 498, 91 Am. Dec. 245].

The defendants may, however, still be liable for the value of the Confederate currency at the time it was received, but of that we are not now prepared to judge, as the facts are not all before us.

The judgment of the Circuit Court is, therefore, set aside and a new trial ordered.

Motion granted.

WILLARD, C. J., and HASKELL, A. J., concurred.

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10 S. C. *8

*LOWRANCE v. ROBERTSON.

(Columbia, Nov. Term, 1877.)

[*Covenants* ⇐130.]

In an action to recover damages for the breach of a covenant of warranty in a sale of lands, brought by a purchaser from the covenantee, the measure of damages is the consideration money paid by the covenantee, with interest thereon from the time of the sale and the costs of the action to eject the plaintiff, and not the price paid by the plaintiff for the land.

[Ed. Note.—Cited in Bath South Carolina Paper Co. v. Langley, 23 S. C. 146; Aiken v. McDonald, 43 S. C. 32, 34, 20 S. E. 796, 49 Am. St. Rep. 817; Hunt v. Nolen, 46 S. C. 553, 24 S. E. 543; Hiller v. Bank of Columbia, 92 S. C. 448, 75 S. E. 789.

For other cases, see Covenants, Cent. Dig. §§ 249, 250; Dec. Dig. ⇐130.]

[*Covenants* ⇐108.]

In an action by a purchaser of land from the covenantee against the covenantor to recover damages for a breach of the covenant, voluntary payments made by the covenantor to the covenantee and to the owners of the land for the use thereof, *held* to be no defense to the action.

[Ed. Note.—Cited in McCrady v. Jones, 44 S. C. 410, 22 S. E. 414; Hiller v. Bank of Columbia, 96 S. C. 77, 79 S. E. 899.

For other cases, see Covenants, Cent. Dig. § 175; Dec. Dig. ⇐108.]

[This case is also cited in Givins v. Carroll, 40 S. C. 413, 18 S. E. 1030, 42 Am. St. Rep. 889, and distinguished therefrom.]

Before Kershaw, J., at Richland, August, 1877.

This was an action by Rufus N. Lowrance, William B. Lowrance and Joseph R. Black against Thomas J. Robertson, executor of John Caldwell, deceased.

The case will be fully understood from the report of the Referee, the exceptions thereto and the judgment of the Circuit Judge.

The report of the Referee is as follows:

The complaint alleges:

1. That on March 24, 1851, John Caldwell, in consideration of five thousand dollars paid to him by Samuel Pearse, conveyed by deed to said Samuel Pearse, in fee simple, the premises described in the complaint, and that the said John Caldwell, then and there, by the said deed, covenanted for himself, his heirs, executors and administrators to warrant and forever defend all and singular the said premises unto the said Samuel Pearse, his heirs and assigns, against all persons whomsoever lawfully claiming or to claim the same or any part thereof.

2. That on August 27, 1869, Daniel B. Miller, Clerk of the Court of Common Pleas for the County aforesaid, by virtue of certain proceedings in the Court of Equity and Court of Common Pleas, upon a bill filed by Susannah M. Pearse, on or about the day of , 1867, at Columbia, in said County and State, against Andrew W. Lewis, Elizabeth Lewis and others, praying among other things the sale of said premises as the property of said Samuel Pearse, did convey by deed to the plaintiffs in fee simple, for the sum of four thousand dollars, the premises aforesaid, and also the estate, right, title, interest, dower, possession, property, benefit, claim and demands whatsoever of the devisees, and of the

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*heirs-at-law of said Samuel Pearse, who had died in possession of said premises, after having devised them, and of all the parties to said proceedings, and all other persons rightfully claiming or to claim the same or any part thereof, by, from or under them, or any of them.

3. That Olivia R. McGowan, Henrietta McGowan, Agnes Hydrick, her husband, Jacob Hydrick, William B. McGowan, Sallie F. Drennan, her husband, John Drennan, and Mary McGowan, the lawful owners of said premises, on May 12, 1873, entered into the said premises and ejected and removed the plaintiffs by action in the Court of Common Pleas, at Columbia, in said County and State, and due process of law, from the occupation and possession of the same, and have ever since kept them out of the same.

4. That by reason thereof the plaintiffs have not only lost the said premises, but have been obliged to pay, to wit, on July 3, 1873, the sum of five hundred and sixty-seven dollars and ninety-four cents, taxed costs in the action aforesaid, prosecuted against them for the recovery of said premises.

5. That before the commencement of said action, John Caldwell died, leaving Oscar A.

Caldwell and Thomas J. Robertson executors of his will, both of whom duly qualified thereon, and that said Oscar A. Caldwell died, leaving said Thomas J. Robertson sole surviving executor.

6. That plaintiffs gave due notice to said surviving executor of the pendency of said action, and to come in and support their title and defend said action.

7. And the plaintiffs demand judgment against Thomas J. Robertson as such surviving executor, for five thousand dollars, with interest from March 24, 1851, and for five hundred and sixty-seven dollars and ninety-four cents, with interest from July 3, 1873, and for costs and disbursements.

The answer:

1. Denies knowledge of the truth of the 1st, 2d, 3d and 4th paragraphs of the complaint.

2. Admits the truth of the 5th paragraph.

3. Denies the truth of the statements contained in the 6th paragraph of the complaint.

At the hearing the defendant admitted the truth of each and every allegation of the complaint.

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*The defendant introduced the following evidence:

1. The paper herewith filed and marked "A," which was a receipt bearing date March 2, 1876, signed by McMaster & LeConte, attorneys for Olivia McGowan and others, the children of Sarah P. McGowan, deceased, to Thomas Robertson, executor of John Caldwell, deceased, for "one thousand dollars in full of all claims for mesne profits, rents and damages of every kind against the said John Caldwell, deceased, and all others claiming title immediately and subsequently, directly and indirectly, as his grantees, and as grantees in succession of his grantees" of the premises in question, to which receipt I desire that reference shall be had.

2. The bond and mortgage of the plaintiffs to D. B. Miller, Clerk of the Court. The bond bears date August 27, 1869, penalty $8,000; condition, $4,000 payable five years from the ninth day of January, 1869, with interest on the whole, payable semi-annually from said ninth day of January, 1869.

Upon this bond are the following endorsements:

"$140. The interest on this bond to 9th day of July has been paid to me and remitted to the life tenant.

"W. S. Monteith, Solicitor."

"Received, Columbia, September 20th, 1869, $90.44, city taxes, 1868 and 1869.

"D. B. Miller, C. C. P."

"$163. Received, Columbia, September 20th, 1869, $163 on within bond, being for State taxes, $110; Commissioners, $40; costs, $10; titles, $3. D. B. Miller, C. C. P."

"$139.40. Received, Columbia, January 9th, 1870, of R. N. Lowrance $139.40, in full to this date. D. B. Miller, C. C. P."

[It was here shown that the principal, at the last date, was reduced to $3,840.]

"$139.40. Received $139.40 on this bond this day, November 12, 1870.

"W. S. Monteith, Solicitor."

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*"$139.40. Paid by W. B. Lowrance, November 1st, 1871, by check on Central National Bank. W. S. Monteith."

The foregoing payments were made by the plaintiffs. There then follows the following endorsement on the bond:

"$1,500. This bond is this day satisfied in full by the payment of $1,500 by T. J. Robertson, executor of John Caldwell, who was the grantor and warrantor to Samuel Pearse of the land which was the consideration of this bond, the same being so received in accordance with the order of Court of date March 10th, 1876. W. S. Monteith,

"Attorney for D. B. Miller, Clerk and Solicitor of Estate. March 11, 1876."

The whole of this evidence was objected to by the plaintiffs on the grounds—

1. That it could not be introduced under the pleadings; and

2. That it was irrelevant, and therefore, inadmissible. It was, however, admitted that the papers were genuine, and that the bond and mortgage constituted the consideration for the purchase of the land by the plaintiffs from Miller. The evidence was introduced by way of puis darrein continuance, having been discovered and performed since the commencement of the action, but without any formal plea. I overruled the objection and admitted the evidence. The proceeding under which the payment of fifteen hundred dollars in satisfaction of the bond is purported to have been made was not in evidence before me. It was agreed at the hearing that the complaint should be regarded as amended so as to change the payment by the plaintiffs of thirty-two dollars and fifty cents costs, paid July 3, 1873. I have stated the pleadings and evidence with great particularity in order that any errors may be the more readily corrected by the appellate tribunal.

The issues of law presented are—

1. What is the measure of damages or other compensation to which the plaintiffs are entitled on eviction by paramount title?

2. To what extent have these damages been discharged by the defendant? And, as, subsidiary to the latter,—First, whether the payments were not voluntary payments of

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the debt of another, and *such as could not be recovered against the plaintiffs? Secondly, whether under the circumstances the defendant can set off the mesne profits paid against the interest to be paid by him. Third, whether in case the payments are admitted the defendant should not be restricted to the fifteen hundred dollars actually paid by him in satisfaction of the bond, and to the pro

rata part of the mesne profits in proportion to the period of their occupation of the land?

The first question is, I think, settled by the rule of the common law, declared by the Act of Assembly of this State. This rule I take to be "the measure of value is that of the land at the time of the warranty made," with interest from that date.—Rawls on Con. for Titles, p. 233, and note 3 for authorities; Rev. Stats., 562, § 18; Earle v. Middleton, Chev., 130.

The difficulty presented in this case is that the action is not brought against the immediate alienor to the plaintiffs, but against an antecedent covenantor, the benefit of whose covenant is vested in the plaintiffs. The plaintiffs' alienor made no covenants, but transferred to them with the land the covenants which they received with it, so that the plaintiffs acquire all the benefits of the covenants of Caldwell to Pearse. Any other doctrine, it appears to me, would lead to most inequitable, if not absurd, conclusions. If the plaintiffs in their action against Caldwell are limited to the price paid by them to Pearse, then it follows that Caldwell, who sold with warranty land which did not belong to him and from which the purchaser has been ejected by paramount title, retains the possession of one thousand dollars and interest of money which he had no right to receive; in other words, he retains a part of the price of his illegal and wrongful conveyance. Pearse cannot recover it from him, for he has sold without warranty and has transferred to the plaintiffs all the benefit of the covenants of Caldwell to him. But it may be said that, although Caldwell would be liable to Pearse, if he were the plaintiff, for the larger sum, still he is not responsible to the plaintiffs, because they purchased from Pearse for a smaller sum. This view, I think, proceeds upon a misconception of the meaning of the word "damages" as applied to the subject. It is not, in fact, damages, but compensation,—in the language of the ancient law, "recompense,"—which is demanded. The great object of the rule of law was uniformity and to avoid the confusion and perplexity which would arise from a consideration in each case of the ever-varying value of the land at different times. Hence the

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*rule stamps upon the land its value at the time of each alienation in so far as that alienor is concerned, and the price paid to him is the measure of his covenant in an action brought against him. Any other view would, as already said, be most inequitable. Suppose a voluntary conveyance by the first or any subsequent alienee and ejectment of the tenant to whom the land was given,—could the first covenantor in an action against him say: You have sustained no damage and are entitled to no redress? I think not. The plaintiff has lost his land, not his purchase money, and he is entitled to recover what the covenantor received and what by his covenant he agreed to pay in case of eviction by paramount title. By this interpretation of the rule the covenantor suffers no wrong—he pays only what he agreed or covenanted to pay, and satisfaction to the person evicted is satisfaction to all who preceded him in the chain of covenants.

The second question is somewhat embarrassing. Although I do not perceive the propriety of the assumption by the defendant to settle the debt of the plaintiffs without their concurrence, or to purchase their claims at a time when he was a party to a suit in which those claims were in course of adjustment, or rather in which the amount of his liability was involved, yet I cannot regard him in the light of a mere voluntary payer of the debt of another. He paid to another that which he owed to the plaintiffs, but which the plaintiffs must have paid to the same persons if they had received it from the defendant. I cannot resist the conclusion that it would be inequitable to repudiate the payment by the defendant when that payment has been in relief of the plaintiffs. In regard to the payment on the bond, I with much hesitation allow more than the fifteen hundred dollars actually paid; but inasmuch as I have allowed the full amount of the covenant to the plaintiffs, and inasmuch as the payment has discharged the plaintiffs from their liability on a bond which they must otherwise have paid in full, unless, indeed, they could have made for themselves as good a bargain as the defendant has made for himself, I shall allow the offset to the full extent of the plaintiffs' liability at the date of the satisfaction of the bond by the defendant.

In regard to the payments of mesne profits: Interest was due by the defendant on the covenant from its date, and the plaintiffs were liable to the owners of the land for the mesne profits from the date of their entry on the land. The defendant has discharged

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by the *payment of one thousand dollars the mesne profits running through a period vastly longer than that of the occupation of the land by the plaintiffs, and that without the concurrence of the plaintiffs and without reference, so far as appears, to the value of the mesne profits at the several periods. No evidence was adduced to show the condition of the property or the value of the mesne profits at the respective periods, but it is matter of history that Richardson street was a well built street in the city of Columbia in 1851, and that not a vestige of a building was left standing upon it after the fire of 1865, since which period the occupation by the plaintiffs commenced, so that, in the absence of proof, it would be impossible to fix and apportion the share of mesne profits, if any, for which the plaintiffs would be liable. I shall, there-

fore, set off the payment of mesne profits against the interest accruing anterior to the purchase by the plaintiffs. The defendant has paid a sum in gross for mesne profits, and has not shown what mesne profits were chargeable to the plaintiffs. I do not think, therefore, that his payment can be set off against the interest since the purchase by the plaintiffs. The plaintiffs are further entitled to the costs paid by them, to wit, six hundred 44-100 dollars, with interest from July 3, 1873, the day of payment by them.

Setting off, therefore, the $1,000 paid for mesne profits against the interest for the covenant from March 24, 1851, to August 27, 1869, the date of the purchase by the plaintiffs, the account will stand thus:

Principal debt	$5,000 00
Interest from August 27, 1869, to March 11, 1876	2,289 58
	$7,289 58
Then paid by satisfaction of bond	3,840 00
	$3,449 58
Interest from March 11, 1876, to March 13, 1877	242 79
	$3,692 37
Costs paid by plaintiff	600 44
Interest from July 3, 1873, to March 13, 1877	155 27
	$4,448 08

It is, therefore, adjudged that the defendant, Thomas J. Robertson, as executor of the last will and testament of John Caldwell,

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*deceased, do pay to the plaintiffs the sum of four thousand four hundred and forty-eight and 8-100 dollars, together with the costs and disbursements of the action.

The plaintiffs excepted to the report as follows:

1. To so much thereof as overrules the objection of the plaintiffs to the evidence offered by defendant and admits the same.

2. To so much thereof as allows offsets to the defendant and the amounts allowed as such offsets.

Defendant's exceptions:

I. For that the said Referee made the five thousand dollars the amount of the purchase money paid in 1851, by Samuel Pearse, the basis of his calculations, instead of the four thousand dollars, the amount of the purchase money agreed to be paid by the plaintiffs at the sale made in 1869 to them.

II. For that the said Referee allowed to the plaintiffs more than the amounts of their payments on the bond given by them for the purchase money, with interest on such payments from their dates, in addition to their costs incurred in defense of their title and interest thereon.

III. For that the said Referee allowed, in addition to the costs incurred by the plaintiffs in defending their title and interest thereon, more than the amounts of their payments on the bond given by them for the purchase money.

IV. For that the said Referee allowed, in addition to the costs incurred by the plaintiffs in defending their title and interest thereon, more than the excess of the payments by the plaintiffs on the bond given by them for the purchase money, in each year, over the amount of a year's interest on that bond, (whenever in any year there was such excess,) with interest on such excess.

V. For that the said Referee allowed the plaintiffs a greater amount of damages than they actually incurred or were in equity or justice entitled to.

Kershaw, J. The exceptions to the report of the Referee make the following questions:

1. What is the measure of defendant's liability and plaintiffs' recovery in this action?

2. What offsets shall be allowed defendant against such liability?

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*In determining these questions, I have availed myself of the able and learned arguments of the counsel on both sides, but do not find it necessary in this judgment to follow their exhaustive researches into the law of warranty, pronounced by Lord Coke to be "one of the most curious and cunning learnings of the law." I shall confine myself to the consideration of so much of the law and the learning accessible to me as will enable me to ascertain the true meaning of the Act of 1824 fixing the rule of damages in cases like this and the consequences that flow from it. "At common law, upon voucher or upon a writ of warrantia chartæ, the demandant recovered of the warrantor or heir other lands of equal value with the lands from which the feoffer was evicted, the value of which was computed as it existed when the warranty was made," without reference to any increased value it might have attained at the time of eviction; and when personal covenants were introduced as a substitute for that ancient remedy, "the established measure of compensation was not varied or affected; the buyer on the covenant of seizin recovers back the consideration money and interest and no more."—4 Kent, 474.

"In most of the States the measure of damages on a total failure of title, even on a covenant of warranty, is the value of the land at the execution of the deed, and the evidence of that value is the consideration money, with interest and costs."—Ibid, 476.

In thus laying down the rule of damages the learned Chancellor followed his own able opinion in the case of Staats v. Ten Eyck, (3 Caine's Cases, 111,) a leading authority cited approvingly by the Judges of this State in the cases hereafter to be cited.

The same rule of the common law is declared by Mr. Washburn, in his treatise on the law of Real Property, thus: "In some of the States the covenant of warranty is assumed to take the place of the ancient warranty of the feudal law. * * * As the thing recovered is money instead of land, the

same idea is carried out by giving to the party who has lost his land the money he paid for it and interest, so as to restore him to his original condition in that respect."—3 Wash. Real Prop., 422, § 41.

"In other States," he adds, "this covenant is regarded as one of indemnity, and the rule of damages is to restore to the covenantee what he shall have lost by the failure of the other party to keep his covenants, and, therefore, the measure of damages is the value of the premises at the time of eviction."—Ibid.

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*This was acknowledged to be a departure from the common law in order to approximate the rule of the civil law, which, in the language of Chancellor Kent, "has the appearance of refined justice," and allowed a recovery of the increased value of the premises, arising from the general appreciation of property or from any other causes.

This departure from the common law was participated in by the Courts of this State in their infancy.—Liber v. Parsons, 1 Bay, 18; Eveleigh v. Stitt, 1 Bay, 92; Guerard v. Rivers, 1 Bay, 265; Witherspoon v. Anderson, 3 DeS., 245.

But Judge Brevard, in the case of Furman v. Elmore, (2 Nott & McC., 189,) in an elaborate opinion, reviewed the decisions in these cases and demonstrated that the common law rule was obligatory upon the Courts of South Carolina. He concludes "that the only legal standard of damages or compensation in a case like the present is that rule which was established in England at the time when the common law of that country was adopted in this, and that it has always remained the same." He states that rule in these words: "The value of the subject of the sale, at the time of the contract of sale, or the price or consideration paid, and interest thereon from that time, together with the costs of eviction when the purchaser has been legally evicted." In support of this rule, as there laid down, the learned Judge cites many authorities, English and American, and among them the case of Staats v. Ten Eyck.

This decision was in conflict with all the previous cases here on this subject, but was followed and affirmed by the cases of Henning v. Withers, (3 Brev., 458 [6 Am. Dec. 589].) and Ware v. Weathnall, (2 McC., 413,) decided in 1823, and Bond v. Quattlebaum, (1 McC., 586 [10 Am. Dec. 702], decided in 1822. In these cases the rule was still made the subject of discussion, and Judge Brevard himself, in the opinion in Furman v. Elmore, suggested action by the Legislature to settle the law.

Accordingly, in 1824, the General Assembly did enact a law which it was supposed would determine the rule so plainly that it could not thereafter be misunderstood. That law as transcribed into the Revised Statutes, without alteration of the sense, is in these words: "In any action or suit for reimbursement or damage, upon covenant or otherwise, the true measure of damages shall be the amount of the purchase money at the time of alienation, with legal interest."

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*It is said by Judge O'Neall, in Earle v. Middleton, affirming the rule as laid down in Furman v. Elmore and the other cases decided at law, that the Act was in affirmance of the law as laid down in those cases, which had settled the rule long before it was enacted.—See Case, Chev., 130.

The question really is, what alienation is to be referred to as fixing the "amount of purchase money," which is the "true measure of damages."

When the question arises between the last grantee and his immediate grantor, no doubt can ever arise. In that case it must be the purchase money paid by the plaintiff when the land was alienated from his grantor to him. But here there is an intervening grant between the deed of the defendant's testator, upon which the action is brought, and the purchase by the plaintiffs. The testator, Caldwell, conveyed to Pearse with warranty, and Miller, as the officer of the Court, conveyed Pearse's title without warranty to plaintiffs. The purchase money in the former alienation was five thousand dollars, and in the latter four thousand dollars. Which sum is to be the measure of damages?

As has been said, the State merely affirmed the common law rule, and the question, therefore, is resolved into the inquiry, what is the common law rule as applicable to this case?

Although the rule is arbitrary which adopts the purchase money at the time of alienation as the measure of the recovery, the principle upon which it proceeds is that of compensation for the loss sustained by the party evicted.—Sedg. Meas. Dam., 174.

At common law, as we have seen, the feoffer recovered of the lord under whom he held other lands of the value of that he lost, whenever evicted, that value to be recovered "as the land was when the warranty was made." That is to say, upon his investiture with the fend.

For investiture we have now substituted the usual form of conveyance of real estate, and for lands of equal value we have the consideration paid, which is made the value of the land at the time of alienation; and as in the case of the ancient feudal warranty the feoffer had his voucher or writ of warrantia chartæ, whereby he recovered land of equal value from his immediate lord, so now the purchaser has his remedy upon all his covenants to recover the value of the land, for which the price is made the standard, as it was when it came to him at the last alien-

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ation. All the covenan*tors are bound to make good to him this value, which, once satisfied, all claim of the grantee on the cove-

nants is discharged; but no covenantor is compelled to pay a greater amount than the consideration paid to him at the time of his warranty or the value of the land at that time, with interest and costs, because he is held to have contracted with reference to that value, and the question is one of intention.—Ware v. Weathnall, 2 McC., 415.

"Measure of damages" is the limit to which the law allows the party to recover, (3 Wash. Real Prop., 423,) and for this purpose the price paid at each alienation is the limit of the recovery against that particular alienor; but the last grantee is held to be fully compensated when he shall have recovered the price or value of the land at the time of the last alienation, though it may be far short of the limit of some anterior grantor's liability.

Such are the conclusions to which I have been led upon this question, after a careful consideration of the cases and authorities. No case has been found, and none has been cited by the counsel, presenting distinctly this point. The question seems never to have been raised in this State, all the cases appearing to have been against the immediate grantors of the plaintiffs. I think, however, the position is not without authority. I find a case to this effect: A held a paramount title to land; he recovered it in an action against B, the grantee of C. A then sold the land to B for a specified sum, and took in payment an assignment of B's right of action against C on the covenants of his deed to B.

This assignment was held equivalent to the payment by B of the specified sum to A. And the measure of the damages of A, as assignee, in his action against C on the covenants, was the same that B's would have been, namely, the consideration named in C's deed to B and interest, subject to the limitation that the assignee, A, could recover no more than the consideration or price, the specified sum agreed between him and B, with, perhaps, the costs of the ejectment suit paid by B added.—Eaton v. Lyman, 24 Wis., 438; 26 Wis., 629, stated in note to Sedgwick Meas. Dam., 6th ed., p. 224.

There the measure of damages was the price of the land at the time of the alienation to the evicted purchaser; but the recovery was limited to the amount paid by him to secure the title, upon the principle of compensation for the loss sustained, which, in the eye of the law, is the money value of the

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land at the time it was con*veyed, or so much thereof as the party may have lost by reason of the failure of title.

In like manner it is said to be well settled in New Hampshire, that in a suit brought on a covenant of warranty, where the grantee has purchased in the paramount title, he can receive no more than the amount paid, with compensation for his trouble and expenses.—Sedgwick Measure of Damages, 195.

It would follow from this principle, that if any one of several successive warrantors should satisfy the claim of the last grantee, which would be done by paying him the purchase money, with interest and costs, such warrantor could recover no more from the previous warrantors than it had cost him to satisfy the last grantee; which is as much as to say that the measure of damages is the value or price of the land at the time of the last alienation.—3 Wash. Real Prop., 402.

Any one in the line of warrantors would have the right to redeem, and it could not cost one more than another, and the last grantee would be satisfied by the refunding of the money paid by him, or the value of the land at the time of alienation to him, no matter from whom it came, of all the covenantors. The engagement of the first covenantor is only "to indemnify all subsequent covenantors from all damages arising from the breach of the covenants."—Borth v. Starr, 1 Conn., 244; Rawle on Cov., 340, in note. Hence, he could only be liable to make good the warranty of the last alienor.

In Rawle on Covenants, (p. 335,) it is said: "A covenantee may sue simultaneously each and all of his previous successive covenantors and recover several judgments against each of them, * * * although, of course, he can have but one satisfaction; and the payment by any covenantor of a judgment thus recovered against him by a subsequent covenantor, who has himself paid a judgment also recovered against him, and for a larger amount, is a satisfaction of his liability." In a note he refers to the case of Wilson v. Taylor, 9 Ohio, 595.

In that case Taylor conveyed land to Wilson, who conveyed to Legget, who conveyed to Weiss, all with covenants of general warranty. The latter, being evicted of part of the land, recovered judgment against Legget for $414, against Wilson for $284.43, and against Taylor for $280.23. Taylor paid the judgment of $280.23, and Wilson also paid the judgment of $284.43, and then sued Tay-

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*lor, who pleaded the recovery and payment in bar, and the plea was held good. As the remarks of the Judge who delivered the opinion in the case elucidate the principles here discussed, they are transcribed as follows: "Weiss, the last covenantor, and who suffered damage by reason of partial eviction, was entitled to his several actions against all the prior covenantors. Not only was his right of action perfect against all, but the same rule of damages would apply as to all; and although he could have but one satisfaction, yet he was entitled to recover the full amount of damages against each. If he failed to make the proper showing to recover the full amount of his damages against each, it was his own fault; and, having collected and received the amount recovered against the first covenantor, who occupied the posi-

tion in law of a guarantor of all the subsequent grantees, it seems to us that Weiss's claim under all the covenants must be held satisfied, and that all enforcements of the judgments against the other intermediate covenantors was wrongful and in violation of the principle that he should have but one satisfaction. Taylor ought not to be subjected to different actions and liable to several recoveries for the same breach of the same covenant."

If the construction of the law contended for by the plaintiffs in this case prevailed, it would follow that in case of several successive covenants of warranty upon as many successive alienations at different prices there would be as many different measures of damages, though the loss of the evicted covenantor to be compensated would be but one and the same in each and every case. An incongruity so manifest as this cannot be sustained. I conclude, therefore, that the measure of damages of the plaintiffs in this case—the limit of their recovery—is the price or consideration contracted to be paid by them for the land in question upon their purchase from Miller, with legal interest from the time of their purchase, and the cost of the ejectment suit whereby they were evicted.

2. As to the offsets to be allowed defendant against this recovery, I agree with the Referee that defendant is entitled to the benefit of so much of the plaintiffs' bond to Miller as was extinguished by him, and (all technical objections to the time and mode of pleading the same having been waived at the hearing) that he is entitled to a set-off to the full amount canceled by his payment. There was such a privity in relation to the subject matter of the debt as to authorize the interference of defendant in order

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to protect the es*tate of his testator, and it cannot be treated as a voluntary payment.

I also agree with the Referee in his conclusion that the sum of one thousand dollars paid by defendant in extinguishment of the claim for mesne profits cannot be brought in here and set up against the recovery of plaintiffs. Plaintiffs were ejected by action May 12, 1873, and this payment was made by defendant after the eviction, to wit, March 2, 1876. The action for recovery of real property, by the Code of Procedure, (Section 190) may be joined with the claim for damages and rents and profits as in the action of trespass formerly prevailing here as a substitute for ejectment; accordingly we find that it is usual to frame the action now with that aspect (1 Abbott's Forms, § 23, p. 513,) and to pray judgment for damages or mesne profits or both. It is, so far as I am aware, the universal practice here to include such claim in actions for the recovery of real estate under the Code. I assume, therefore, that the action under which plaintiffs were ejected was so framed. In that case the recovery by the owners of the fee in that action concluded any further claim against these plaintiffs for rents and profits.—Lehie v. Sumter, 1 Tr. Con. Rep., 102; Coleman v. Parish, 1 McC., 264. There was, therefore, nothing due by them at the time of such payment by defendant, and plaintiffs cannot be charged therefor. It must be treated as having been paid on account of his testator's liability or that of Pearse for mesne profits.

The report furnishes the means of ascertaining the amount for which judgment should go for the plaintiffs without the necessity of recommitting, and I will proceed to state the same according to the principles of this decision.

Amount of purchase money of the land, Aug. 27, 1869	$4,000 00
Interest to March 11, 1876	1,830 87
	$5,830 87
Then paid satisfaction of bond	3,840 00
	$1,990 87
Interest to Aug. 11, 1877	197 42
Costs in ejectment suit	600 44
Interest from July 3, 1873, to Aug. 11, 1877	186 33
Balance due plaintiffs	$2,975 06

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*It is, therefore, adjudged that the defendant, Thomas J. Robertson, as executor of the last will and testament of John Caldwell, deceased, do pay to the plaintiffs the sum of two thousand nine hundred and seventy-five dollars and six cents, together with the costs and disbursements of this action.

The exceptions of the plaintiffs are overruled. The fourth exception of the defendant is overruled; the other exceptions of the defendant are sustained. The report is reversed so far as it conflicts with this judgment and is confirmed in all other respects.

Both sides appealed.

Bachman & Youmans, for plaintiffs:

1. Plaintiffs submit that the whole matter is settled by statute, A. A., 1824, 65 to 238; Consart, 5, § 3, A. A., 1869; 14 Stat., 209, § 6, initial paragraph of the Code of Procedure; A. A., 1870, 14 Stat., 423; and that the alienation there referred to is the alienation which contains the covenant of warranty by the warrantor or his representative, who sued thereon for its breach, either by his direct grantee or some subsequent assignee, and that interest accrues from this alienation. This, we contend, is the obvious and apparent meaning of the enactment, founded in equity, that the warrantor of land who has not title to it shall pay back the amount received, with interest from its receipt, and supported by all the decisions of the State since its enactment.—2 N. & McC., 186, 199, 202, 497; 2 Tread., 584; 3 Brev., 458; 1 McC., 467; 1 McC., 586; 2 McC., 413; Cheves, 130; 1 McM., 38; 1 N. & McC., 101; 13 Rich. Eq., 238; Jeter v. Glenn, 9

Rich., 374; 5 Co., 16; Rawle on Covenants for Title, 4th ed., 318 to 324; 2 Rob. Pr., 73 to 103; 1 N. & McC., 184; Sedgwick on Damages, 39, note 3. If the opposite construction, that alienation in the Act refers to the alienation to the party bringing the action on the warranty, and not to the alienation by the warrantor, then the heir-at-law, the devisee and the grantee for natural love and affection of the grantee of the warrantor can recover nothing from the warrantor. Reductio ad absurdum.

We are aware of no such principle of law prevailing in paper, commercial or uncommercial, sealed or unsealed, or in any of the obligations which men assume, the right to recover on which can be transferred.

2. The plaintiffs, as to the defense arising from the payment of the $1,000, rely on what is said in the circuit decree.

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*3. The plaintiffs insist that there was no such privity in relation to the subject matter of this or of plaintiffs' bond to the Clerk, Miller, as to authorize the interference of defendant, and submit that it was a voluntary payment, and, therefore, plaintiffs are not liable.—2 Rob. Pr., 434; 8 T. R., 310, 613; 1 Tread., 473; 3 Strob., 532; 8 Taunt., 268; 4 E. C. L., 140; 33 Man., Gr. & Scott, 54; 68 E. C. L., 206; 9 Rich., 515.

4. Even if defendant is entitled to the benefit of this payment, he can be entitled to the benefit of it against plaintiffs only to the amount actually paid by him, $1,500, and not $3,840. This is all he would be entitled to if he stood in such privity as that of plaintiffs' surety.—Wynne v. Brooke, 5 Rawle, 109; Bonney v. Seeley, 2 Wend., 482; 2 Rob. Pr., 449. The bond was satisfied, not assigned.

Rion, for defendant:

I. We distinctly admit that Caldwell's warranty runs with the land, and that we occupy exactly the same position as if, on the 27th August, 1869, Caldwell had conveyed the premises to the plaintiffs for $4,000 and given them full covenant of warranty.

We claim that Caldwell is to be held to the same responsibility that Pearse would have had to meet, had he (as the Clerk did for his distributees) on 27th August, 1869, conveyed the premises to the plaintiffs for $4,000 and with warranty.

The plaintiffs claim that Caldwell's responsibility is the same as if he had conveyed to them on the 24th March, 1851, for $5,000.

The position of the plaintiffs amounts to this: that the damages which they are entitled to recover is not what is sufficient to compensate them for all the loss they have sustained, but the loss Pearse would have sustained had he never sold the premises.

This is against the theory of the law, which always looks to the loss which the plaintiff has sustained, and not what the defendant might have been made to pay other plaintiffs.

II. The proposition of the plaintiffs and its results are against right reason. According to it, had Caldwell sold Pearse a lot with a fine brick building upon it for $5,000 in 1851, in the burning of Columbia, February, 1865, that building been burnt, after which Pearse had removed and sold $900 worth of brick from the old walls, and then in 1869 sold the vacant lot to the plaintiffs for $4,000, it would then follow that the

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plaintiffs could recover the *same amount as if Pearse had remained in possession, the building been unhurt, and he, Pearse, sold off none of the bricks. My picture is, however, true to nature, and the facts are as pictured. But the burning of the building and the sale of the brick were matters not relevant to plaintiffs' case, and their proof would promptly have been met by an objection by their attorneys that they were inadmissible as having nothing to do with the property after plaintiffs bought it in 1869, all having transpired prior to such purchase.

Our proposition is, that the plaintiffs are to have the benefit of Caldwell's warranty, but it is to be applied to the property bought by plaintiffs at the time they purchased, and at the value it then had as measured by the price they gave.

We have acted on this and hedged the plaintiffs around by paying off every one who could have a claim on them, then offered them to pay back every cent they have paid out, all their costs and damages, with interest on the whole. The plaintiffs are, however, not satisfied with this, (although the result is that they for years occupied the premises for nothing,) but claim the benefit of a price which they never gave, from a time when they never bought, and for property that had in part ceased to exist before they purchased.

III. The plaintiffs say: But suppose Caldwell's warranty to Pearse had been for only $3,000, then they could have received only the $3,000, although they had paid $4,000; hence the value at the time of warranty should govern as well when it is greater as when it is less than the price given by a subsequent purchaser. This reasoning is not sound. The plaintiffs are entitled to recover the amount which they have been damnified by property being sold to them the title of which was defective; their right is ordinarily to recover this from the one who sold to them. But in this case, that one did not warrant. Then the equitable rule of law allows them to have the benefit of any warranty made to the one who sold them the land. Now, if that warranty is sufficient to cover the value of the land when plaintiffs purchased it, (as in this case,) then plaintiffs can recover to the extent of that value;

but if, as in the supposed case, (of Caldwell having only warranty for $3,000.) that warranty is not sufficient in amount, then that is plaintiffs' misfortune, just as when one has property burnt that is not fully insured.

Again, the plaintiffs want interest on the value of the land, not from the date of their purchase, but from the date of Pearse's purchase. That is, they want what the law pro-

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vides as an equivalent *for rent, for the years that transpired before they had the least interest in, or claim to, the land. If Pearse had purchased when very young, and lived to a good old age, the plaintiffs might have set up a claim for many years' rent that accrued before they were born.

IV. In order, as far as practicable, to provide for a measure of damages in a case like the present, our Legislature provided (7 Stat., 238,) that "the true measure of damages shall be the amount of the purchase money at the time of the alienation, with legal interest." The plaintiffs read this: "The true measure of damages shall be the amount of the sale money at the time of warranty, with legal interest, without regard to the amount of the purchase money given by, or the time of the alienation to, the party who is entitled to, and brings the action for, breach of warranty." They would make the Legislature to have provided a measure of damages not dependent upon the rights or wrongs of the one complaining at the time when injured, but upon the responsibility that the defendant may have assumed respecting other persons, at another time, and for a consideration different in amount from what the plaintiffs ever had any concern in.

V. What damages have the plaintiffs sustained, applying the "true measure" provided by our statute?

They have paid a certain amount of the purchase money, and we have paid all the balance for them. Now, are they to recover more than what they have paid or ever can pay? If so, when the statute said measure of damages, it meant amount of damages. A yard stick may be a measure of cloth agreed on, yet the parties may buy and sell a half yard, or more or less. Nothing should be measured but what there is to measure. Suppose, in addition to all we have done, we had also paid the parties who held the paramount title for that title also,—would this not have left the plaintiffs with no damages to measure, except their costs in defending the action against the McGowans? Caldwell's contract was to warrant and defend, and is he not entitled to a full credit to the extent he does protect the plaintiffs from loss? and ought the measure to be applied not only to the damage which the plaintiffs have sustained, but likewise to such damage as the defendant has, in carrying out his contract of warranty, interposed and prevented them from sustaining?

VI. What interest are the plaintiffs entitled to? Applying the statute mutatis mutandis, they are entitled to interest on all

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of the *purchase money which they have paid, and can be made to pay, from the time of payment, and from the time what they can be made to pay will draw interest. But we have saved them harmless from all except what they have already paid; hence, that alone can draw interest, and from dates of payments. The Court will observe that many of the payments were of interest, and hence the same result is reached by allowing them with interest from date of payment, or by rebating interest and reducing all to value at time of alienation, and then calculating interest on such amount from date of alienation up to the present time.

This mode of computation makes the amount due the plaintiffs on the 11th of August, 1877, $1,999.76 instead of $2,975.06, as estimated by His Honor the Circuit Judge.

VII. The error of His Honor is in applying the measure to what did not exist to be measured. For instance suppose the plaintiffs had paid only one-half of the purchase money, and left exactly one-half with interest thereon due, and the defendant, in carrying out his testator's contract to defend, had paid off this balance of $2,000 due on the bond, together with the interest due on this $2,000. In such case, ought the $2,000 of the purchase money we have paid to be measured, or ought the interest on that much to be measured? These are items of what damage the plaintiffs have not sustained. When His Honor allows the interest to be computed on the whole $4,000 instead of what the plaintiffs actually paid, he is applying the measure both to the damage the plaintiffs have sustained and what we have saved them from sustaining.

Had we paid off all the interest as well as all the rents and profits claimed by the McGowan children, the plaintiffs would, as a necessary logical result, be entitled to no interest on any sum. In Bond v. Quattlebaum, (1 McC., 586,) Judge Nott, in delivering the opinion of the Court, says: "There may perhaps be cases where the rents and profits in the meantime, will take away the claim of the party to interest. In Earle v. Middleton, (Cheves, 129,) Judge O'Neall, with his usual boldness says of this: "There is no case of eviction, actually or constructively, by paramount title, where the party's right to interest would be defeated by the reception of the rents and profits. The defect reaches back to the beginning of his title, and the rents and profits which he has received are not those of his vendor but those of a third person having the paramount title. The damages recovered in a

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case of actual eviction, *or which may be recovered by an existing paramount title outstanding, are in the place of rents and profits and represent them in legal contemplation." But His Honor never could have contemplated a case like ours, while Judge Nott had some such case in his mind. These rents and profits, which are represented by the damages recovered by way of interest, and which belong to that third person having the paramount title, have been paid for by us, and we hold a receipt therefor! It would be a gross travesty of law for the plaintiffs to have enjoyed the rents and profits, we paying those to whom of right they belonged, and repaying the plaintiffs all possible expenses attending their enjoyment of these rents and profits, and then for us to be compelled to pay the plaintiffs the value of these rents and profits which they have enjoyed at our expense.

February 13, 1878. The opinion of the Court was delivered by

McIVER, A. J. On the 24th of March, 1851, John Caldwell, the defendant's testator, in consideration of five thousand dollars paid to him by one Samuel Pearse, conveyed to said Pearse a certain lot of land in the city of Columbia, with full covenants of warranty. On the 27th of August, 1869, Miller, as the Clerk of the Court of Common Pleas, under an order passed in proper proceedings for the settlement of the estate of Samuel Pearse in the Court of Equity and Court of Common Pleas, conveyed, without warranty, the same lot to the plaintiffs for the consideration of four thousand dollars. On the 12th of May, 1873, Olivia R. McGowan and others recovered by title paramount this lot from the plaintiffs in an action of which the defendant was duly notified. This action is now brought on Caldwell's warranty, and the plaintiffs claim that the true measure of damages is the amount of the purchase money paid to Caldwell, with interest thereon from the date of his alienation, together with the costs of the action of ejectment brought by the McGowans.

The defendant, on the other hand, contends that the measure of damage is the amount of the purchase money contracted to be paid by the plaintiffs, with interest from the date of the alienation to them, together with the costs of the action of ejectment. The defendant also claims that he has liquidated the damages to which the plaintiffs were entitled to a partial extent, and, therefore, that they are only entitled to recover

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the balance, in support of which *they produce a receipt to the defendant, dated 2d of March, 1876, signed by the attorneys of the McGowans, for "one thousand dollars, in full of all claims for mesne profits, rents and damages of every kind against the said John Caldwell, deceased, and all others claiming title immediately and subsequently, directly and indirectly, as his grantees and as grantees in succession of his grantees," of the premises in question, and the bond to Miller as Clerk, which, after sundry credits, bears the following endorsement:

"$1,500. This bond is this day satisfied in full by the payment of fifteen hundred dollars by T. J. Robertson, executor John Caldwell, who was the grantor and warrantor to Samuel Pearse of the land which was the consideration of this bond, the same being so received in accordance with the order of Court of date March 10th, 1876.

"W. S. Monteith,
"Attorney for D. B. Miller, Clerk, and Solicitor of Estate.
"March 11th, 1876."

Both parties appeal from the judgment of the Circuit Court on grounds which are distinctly set out in the "case" as presented here, to which reference must be had for a detailed statement of the facts and of the grounds upon which each of the parties appeal. The questions raised by the appeal are: First, What is the measure of the defendant's liability? Second, Whether any offsets or payments are to be allowed defendant; and if so, how much?

As to the first question, it may be stated in a more precise form thus: Is the defendant liable for the amount of the purchase money ($5,000) mentioned in the deed from Caldwell to Pearse, or is he liable only for the amount of the purchase money ($4,000) mentioned in the deed from Miller, Clerk, to the plaintiff? It is conceded, and very properly conceded, that Caldwell's warranty runs with the land, and, therefore, that his estate is liable to respond in damages to the plaintiffs, who have been ejected by paramount title, and the only question is as to the measure of those damages.

The question as to what should be the proper measures of damages in an action like this is one which has troubled the Courts of this State from the commencement of our judicial history down to the time when the Legislature took the matter in hand and passed an Act which it was supposed, vainly as the event has proved, would finally settle the contro-

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versy. In the earlier cases our Courts *seemed disposed, in analogy to the civil law rule, to adopt the value of the land at the time of the eviction as the measure of the damages.—Liber v. Parsons, 1 Bay, 19; Eveleigh v. Stitt, 1 Bay, 92; Guerard v. Rivers, 1 Bay, 265; Witherspoon v. Anderson, 3 DeS., 245. Subsequently, however, in the case of Furman v. Elmore, (2 N. & McC., 189,) the common law rule that the purchase money and interest was the true measure of damages was adopted; and although this case seems to have been followed in a number of

subsequent cases cited in the argument of this case, yet the question continued to be the subject of discussion until the passage of the Act of 1824, (6 Stat., 238,) incorporated in the General Statutes, Chapter CXXI, Section 18, page 562, in the following words, which are practically identical with those used in the original statute: "In any action or suit for reimbursement or damage upon covenant or otherwise, the true measure of damages shall be the amount of the purchase money at the time of the alienation, with legal interest." So that the precise question in this case is, what alienation is referred to?—the alienation by Caldwell to Pearse or the alienation by Miller (practically Pearse) to the plaintiffs? We are not aware of any case in which this question has been decided; and inasmuch as no such case has been cited in the very elaborate and able argument made in this case, it will be safe to assume that no such case can be found. The case from Ohio and Wisconsin and the New Hampshire cases, cited by the Circuit Judge, are, as he says, not directly in point; and if they were, they could scarcely be authority upon the construction of our Act of 1824, for, after all, the question turns upon the proper construction of the terms of that Act. We are left, therefore, to determine this question without the aid of any direct authority.

When we recollect that this is an action upon a contract, and that it is upon the contract of Caldwell and not that of Miller, it would seem necessarily to follow that we must look alone to Caldwell's contract for all its terms, and hence that the measure of damages would be the amount mentioned in Caldwell's deed and not the amount mentioned in Miller's deed. It is difficult for us to understand how, in searching for the measure of Caldwell's liability, we can go outside of the contract which he has made. Again, we presume there could be no doubt but that if Pearse had been the party evicted and had brought this action against Caldwell, that the measure of damages would

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have been the amount of the purchase *money mentioned in Caldwell's deed, with interest from the date of that deed. Now, by what right alone do these plaintiffs bring this action? Certainly as the assignees of Pearse, for, though the deed was not made to them directly by Pearse, yet Miller, as Clerk, under the order of the Court, conveyed to the plaintiffs all the right, title, interest and estate of Pearse, and this invested them with all the rights of Pearse, including the right of action on Caldwell's covenant, upon its breach, as fully and completely as if Pearse himself had conveyed directly to the plaintiffs. This was distinctly decided in the case of McCardy ads. Brisbane (1 N. & McC., 104 [9 Am. Dec. 676],) as to a purchaser at Sheriff's sale, and the doctrine has been repeatedly recognized since, down to the case of McKnight v. Gordon, (13 Rich. Eq., 222 [94 Am. Dec. 164]); and if this be true as to purchasers at an involuntary sale made by the Sheriff under execution, how much more true it would be as to a purchaser at a sale made by the proper officer, under an order of the Court for partition or some other purpose necessary to the settlement of an estate, where all the parties in interest are before the Court. The plaintiffs, therefore, were invested with all the rights which Pearse had; and if he could have recovered the sum of five thousand dollars, with interest from the date of Caldwell's deed, we see no reason why the plaintiffs, who stand in his shoes and are entitled to his rights, cannot do the same thing. Suppose the condition of things were reversed, and that the amount of the purchase money mentioned in Caldwell's deed had been one thousand dollars and the amount mentioned in Miller's deed had been two thousand dollars, would any one for a moment pretend that Caldwell could be made liable for the larger sum? Why not? Simply because it is outside of and beyond the terms of his contract. It seems to us that this is absolutely conclusive; for the question being what alienation is referred to in the statute, the moment it is admitted that under a reversed state of facts the plaintiffs could not recover the full amount of the purchase money which they paid, it necessarily follows that the construction contended for by the defendant, that the alienation referred to in the Act is the alienation to the person who brings the action, will, under some circumstances, not at all unlikely to happen, be in conflict with the terms of the Act, and cannot, therefore, be the proper construction. If, as the defendant contends, the words "amount of the purchase money at the time of alienation" refer to the purchase money paid by the

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plaintiffs when *they bought, then, in the case supposed, the result necessarily would be that the plaintiffs would be entitled to recover two thousand dollars; for that, according to the supposition, is the amount of the purchase money which they paid at the time of the alienation to them, whereas the defendant is obliged to concede that this could not be done, and hence it follows that this cannot be the proper construction of the terms of the Act. But if the construction contended for by the plaintiffs, which we think is the proper one, be adopted, then we have exactly what the act was designed to furnish—a fixed and invariable standard, applicable alike to all possible cases; for under the civil law rule the measure of the covenantor's liability was of an altogether uncertain character, dependent upon a variety of circumstances over which neither he nor his covenantee in many cases would have

any control, or be in any wise responsible for, and the main object of our Act of 1824 was to make that fixed and certain which was otherwise variable and uncertain, so that a person, when he first put his name to a covenant of warranty, might know precisely the extent of the liability which, under any possible circumstances, he was assuming. We think, too, that the rule established by this Act is, perhaps, the fairest and most just that could be adopted; for though, like all general rules, owing to the infirmities of human nature, not by any means perfect, and liable sometimes to operate some injustice, yet it has this very great advantage: that while it may sometimes, as in this very case, give to the covenantee more than in equity and good conscience he ought to have, it never takes from the covenantor more than he ought to lose. For if a person sells land for which he has no title to another, there is certainly no injustice, so far as he is concerned, in taking from him the purchase money and interest for the time which he has had the money, for it is simply taking from him that which, in equity and good conscience, was never his and which he ought never to have had. And, on the other hand, it is an entire mistake to suppose that the loss which the purchaser sustains is correctly represented by the purchase money which he pays.

What he really loses is the land. He may have been fortunate enough to buy it under circumstances which enabled him to procure it at a price much below its real value, or he may have greatly added to the value of it since his purchase, or it may have been given to him by a relative. We are, therefore, of opinion that "the true measure of damages" in this case is the amount of the

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pur*chase money mentioned in Caldwell's deed to Pearse, with interest from the date of that deed, together with the costs of the action by which the plaintiffs were ejected.

As to the second question, we are at a loss to perceive how the payment of one thousand dollars to the McGowans or the extinguishment of the bond of the plaintiffs to Miller can be regarded as either offsets to or payments on the claim of the plaintiffs under Caldwell's warranty. The rule of law is that "no man can by a voluntary payment of the debt of another make himself that man's creditor."—Richardson ads. McCray, 1 Tr. Con. Rep., 473. Or, as it is stated in Lewis v. Lewis, 3 Strob., 532: "No one by paying an account against another can maintain an action for the amount without a promise, express or implied, of the original debtor." And as it is said by Lord Kenyon in Exall v. Partridge, (8 T. R., 310,) it is an entire mistake to suppose "that when one person is benefited by the payment of money by another, the law raises an assumpsit against the former; for, as is said in the same case by Lawrence, J., "one person cannot by a voluntary payment raise an assumpsit against another." Test this case by these propositions of law, and take first the money paid by defendant to the attorneys of the McGowans in satisfaction of their claim for mesne profits. It will be remembered that this payment was made March 2, 1876, nearly three years after the judgment in the action of ejectment, in which no damages were recovered against the plaintiffs; there was, therefore, then no debt due by the plaintiffs, for, as the Circuit Judge very properly says: "The recovery by the owners of the fee in that action concluded any further claim against these plaintiffs for rents and profits. —Lehie v. Sumter, 1 Tr. Con. Rep., 102; Coleman v. Parish, 1 McC., 264. There was, therefore, nothing due by them at the time of such payment."

In addition to this, we may say that there was no evidence whatever showing the value of the mesne profits during the period for which the plaintiffs had possession of the premises, and hence this was not only a voluntary payment of what was not then a debt due by the plaintiffs, but, for aught that appears, may have been a payment of much more than the plaintiffs ever were liable for. Nor do we see any propriety in setting off, as the Referee has done, this payment against the interest which accrued on the purchase money from the time of Caldwell's sale to Pearse to the time of the purchase by the plaintiffs; for, besides the fact that the one very large-

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ly *exceeded the other, we are at a loss to discover any principle upon which the claim which the McGowans may once have had against Caldwell and Pearse for mesne profits during the period the premises were in their possession, (though no such claim, so far as we are informed, seems ever to have been asserted in any legal form,) for which it cannot for a moment be pretended that the plaintiffs were ever liable, could be set off against or extinguish the interest to which, as we have seen, the plaintiffs were clearly entitled under a proper construction of the Act of 1824. To this we may add that though Nott, J., in Bond v. Quattlebaum, (1 McC., 584 [10 Am. Dec. 702]), did intimate an opinion in somewhat doubtful terms that "there may, perhaps, be cases where the rents and profits in the meantime will take away the claim of the party to interest," yet, in the subsequent cases of Earle v. Middleton, (Cheves, 129,) O'Neall, J., comments on and disposes of this dictum of Nott, J., saying: "There is no case of eviction, actually or constructively, by paramount title, where the party's right to interest would be defeated by reception of rents and profits." His conclusion is based upon the terms of the Act of 1824; and as Bond v. Quattlebaum was decided before, and

Earle v. Middleton after the passage of that Act, it is but fair to conclude that the latter furnishes the true rule.

As to the effect of the extinguishment of the plaintiffs' bond to Miller, it must be borne in mind that the defendant did not purchase the bond and take an assignment of it, but by his payment he cancelled the bond. How can this give him any claim against the plaintiffs any more than if he had voluntarily extinguished a note for a horse or any other debt due by the plaintiffs? It may have benefited the plaintiffs, but that, as we have seen, in the opinion of Lord Kenyon and of Lawrence, J., supra, gave him no legal claim against the plaintiffs. He was under no sort of obligation to pay this debt, and was under no compulsion whatever so to do. It was a purely voluntary act, without consultation, with a request from the plaintiffs,—indeed, so far as appears, without even their knowledge. The right of the plaintiffs to recover in this action in no wise depended upon the payment of this bond. In fact, if the holder of the bond had entirely released the plaintiffs from all liability on the bond, their right to bring this action would not have been in the least affected thereby. Nor did the amount of their recovery—the measure of their damages—depend upon the amount of money they may have paid out or were liable for,

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or whether *they had paid or were liable for anything at all: for that measure was, as we have seen, fixed by the terms of the statute, and neither the bond nor money due or paid thereon constituted any of the elements which went to make up the amount of their damages. These damages were due by the defendant to the plaintiffs, and, under the principles of law above stated, the defendant cannot be allowed to liquidate them by paying them to any one else but the plaintiffs, or their order, or by volunteering to pay debts which the plaintiffs may have owed to others, and for which the defendant was not, and could not, be made responsible. The judgment of the Circuit Court, together with the report of the Referee, must be set aside, and a new trial had according to the principles established by the decision.

Motion granted.

WILLARD, C. J., and HASKELL, A. J., concurred.

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10 S. C. 35

STATE v. BLACKWELL.

(Columbia. Nov. Term, 1877.)

[*Contempt* ⇐54.]

It is a fatal objection to a rule to show cause why a party should not be attached for contempt for an offense not committed in the presence of the Court, that it was issued without affidavit.

[Ed. Note.—Cited in State v. Nathans, 49 S. C. 214, 27 S. E. 52.

For other cases, see Contempt, Cent. Dig. § 143; Dec. Dig. ⇐54.]

[*Contempt* ⇐37.]

Where certain acts are made an offense by statute, with a prescribed penalty, a party charged with the offense cannot be punished by rule to show cause, as for a contempt, but only by indictment.

[Ed. Note.—Cited in In re Moore, 79 S. C. 401, 60 S. E. 947.

For other cases, see Contempt, Cent. Dig. § 116; Dec. Dig. ⇐37.]

Before Townsend, J., at Darlington, October, 1875.

This case came before the Court upon the report of the presiding Judge, which is as follows:

"At the October Term, 1875, of the Court of General Sessions for Darlington County, Samuel J. Blackwell was indicted for retailing spirituous liquors without a license. During the progress of his trial, and while testifying on his own behalf, in response to a question propounded by the Solicitor on the cross-examination, he said that the evening before, after the case was commenced, he went to Pierce's bar-room, and while there gave two of the colored jurors trying his case drinks of whisky, and pointed to the two

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*jurors, adding that they were strangers to him. He was asked other questions relative to taking another juror to the bar-room, and instructing the clerk of Pierce to treat the members of the jury at his expense whenever they called for whisky. These he answered negatively.

"One of the witnesses for the State, in the same case, testified that he had been approached by Safety Layton, Esq., one of the attorneys of record for the defendant, Blackwell, and was requested to modify his testimony and to say that he had bought whisky for medical purposes only.

"After the case was submitted to the jury and they had retired, the information was communicated to me that Safety Layton, Esq., had said that he had been employed by S. J. Blackwell to manipulate the jury, and that he had accomplished his purpose, and there was no danger of the conviction of Blackwell.

"The admission by the defendant that he had given whisky to the jurors when he knew that they had been charged with his case, and the fact that his attorney had been engaged, according to his admission, in tampering with the witnesses for the State and manipulating the jury, induced me to issue the following rule:

"'It is ordered that Samuel J. Blackwell do show cause, on Monday, the 11th day of October instant, before me, in open Court, at 10 o'clock A. M., why he should not be attach-

ed as for a contempt of this Court in attempting to bias the opinion and influence the decision of R. F. Truett and two other jurors, who were charged with the hearing and decision of the case of the State v. S. J. Blackwell, for retailing intoxicating liquors without a license, by offering and giving to them intoxicating liquors, in the town of Darlington, during the trial of said case.

" 'It is ordered that a copy of this order be forthwith served upon Samuel J. Blackwell.

" 'October 9, 1875.'

"At the time appointed for the hearing of the rule, the respondent appeared by counsel. Mr. Spain interposed objections to the legality and regularity of the proceedings. It was insisted that the Judge had no jurisdiction to hear the matter, and that interrogatories should have been served upon the defendant. Other objections were also made. These were all overruled, and the Solicitor was instructed to examine a witness touching

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the charge contained in *the rule. Mr. Spain objected to the introduction of oral testimony. This objection was overruled.

"Miller Harrall was sworn and testified that on the evening the case against S. J. Blackwell was commenced, and after the adjournment of the Court, he went with Blackwell to Pierce's bar-room; that while there several persons came in; that they drank, and others with them; that a colored man stepped up and asked for a drink, and said he was on the jury; that Blackwell said 'very well,' and called for another half pint of whisky; that Blackwell did the treating, and that the party who walked up and asked for a drink said he was on the jury.

"After the introduction of this evidence, the respondent, Blackwell, submitted a return denying that he had given liquor to a juryman knowing or suspecting him to be a juryman, and submitted certain affidavits which sustained his denial.

"After hearing argument from Mr. Spain, the attorney of S. J. Blackwell, and the Solicitor, I made the following order:

" 'Upon hearing the return made in the above stated case, the testimony for and against said respondent, and the argument of counsel, it is adjudged that the said respondent, S. J. Blackwell, is in contempt of this Court by reason of the several acts charged against him in said rule. It is further ordered, adjudged and decreed that the respondent, S. J. Blackwell, as a punishment for said contempt, be confined in the county jail for one month, and also pay a fine of two hundred dollars.' "

The defendant appealed, and submitted the following grounds for the removal of his sentence:

The common course in ascertaining the fact of contempt, committed out of Court, was not observed in these particulars:

1. In adopting for such a contempt the mode applicable alone to contempts committed in facie curiæ.

2. The process was issued and served without any ground supported by affidavit.

3. The action was that of the Court, on its own motion, and not on the motion of the prosecuting officer, the Judge thereby overruling the discretion of the proper officer, and becoming a party to the proceeding as well as Judge.

4. No interrogatories were exhibited, though demanded, and hence there was no charge, either to be confessed or denied.

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*5. In taking parol testimony to sustain the statements in the process before the answer, and in reply, after it was heard.

6. In trying the case at all on evidence, instead of taking the answer as true, as it confessed nothing, and was not evasive, but direct in its denial of all charged.

The inference of guilt, on the facts in evidence, was strained in a criminal proceeding, and in which the party prosecuting and the Judge were identical.

There is no warrant in the law for such a proceeding.

Spain, for appellant.

McCall, Solicitor, contra.

April 17, 1878. The opinion of the Court was delivered by

WILLARD, C. J. The defendant was attached as for contempt, for "attempting to bias the opinion and influence the decision" of certain jurors "who were charged with the hearing and decision of the case of the State v. S. J. Blackwell, for retailing intoxicating liquors without license, by offering and giving to them intoxicating liquor, in the town of Darlington, during the trial of said case." The rule to show cause appears to have been made without affidavits. This is a fatal objection. All parties charged, otherwise than by the oath of the grand jury, with offenses, other than contempts committed in the presence of the Court, are entitled to have the matters charged stated under oath, the penalties for false swearing being regarded as a safeguard to the liberties of the citizen.

There is, however, another objection that is substantial in its character. The matters against the defendant are made an offense by the General Statutes, (725, § 11,) with a prescribed penalty. There being a formal remedy in the case, summary proceedings to punish, as for contempt, were inappropriate. Certainly no one can be punished twice for the same offense; and if the defendant should suffer penalties imposed at the discretion of the Court, as for contempt, and subsequently be indicted, it would happen that either the summary proceeding must be a bar to the indictment or the defendant must suffer ac-

cumulated penalties. In either case the object of the statute would be defeated. It would be defeated in the one case in the respect that it intended to substitute a certain and formal remedy for one deficient in form and the requisite safeguards. It

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*would, in the other case, be defeated in the respect that it intended to subject the punishment imposed to a certain measure, while the punishment resulting from a judgment in contempt is not subject to such standard of measurement.

The cases in which attorneys have been stricken from the rolls for matters constituting in themselves an offense punishable by law stand on a different principle.

The attorney is stricken from the roll, in such cases, as a protection to the community against an untrustworthy officer of the Courts. The cases distinctly recognize this distinction, and the impropriety of imposing punishment, in proceedings of a summary character, where there is a formal remedy by indictment, as for an offense.—Stephens v. Hill, 1 Mee. & W., 28; State v. Holding, 1 McC., 379; Anon., 2 Halst., 162.

The judgment of the Circuit Court must be set aside and the rule to show cause discharged.

McIVER, A. J., and HASKELL, A. J., concurred.

10 S. C. 39

SMITH v. MALLONE.

(Columbia. Nov. Term, 1877.)

[*Homestead* ⇐110.]

The law exempting homesteads from levy and sale does not affect the owner's right to sell or encumber the property as he sees fit.

[Ed. Note.—Cited in City Council of Charleston v. Caulfield, 19 S. C. 205; Youngblood v. Lathen, 20 S. C. 375; Hendrix v. Seaborn, 25 S. C. 484, 60 Am. Rep. 520.

For other cases, see Homestead, Cent. Dig. § 176; Dec. Dig. ⇐110.]

Before Cooke, J., at Pickens, March, 1876.

This was an action by R. Press Smith against John C. Mallone and W. N. Craig, Sheriff.

The case is as follows:

On November 1st, 1873, the plaintiff executed and delivered to the defendant, Mallone, a mortgage of real and personal property to secure the payment of $20,000. The mortgage was duly recorded, and on the—— day of September, 1875, the debt being due and unpaid, Mallone, by his agent, the defendant, Craig, seized under the said mortgage two mules and a wagon, part of the property included therein, and advertised the same for sale.

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*This action was then brought to restrain the sale on the ground that the mules and wagon were exempt from levy and sale under the provision of the Constitution and Acts of the General Assembly in relation to homestead exemptions.

His Honor the Circuit Judge granted a temporary injunction to restrain the sale, but upon the case coming upon its merits he dissolved the injunction and made a decree dismissing the complaint.

The plaintiff appealed.

McGowan & Thompson, for appellant.

Norton, contra.

April 18, 1878. The opinion of the Court was delivered by

HASKELL, A. J. The principal question involved in the appeal in this case has been recently determined by this Court in Homestead Building and Loan Association v. Enslow et al. [7 S. C. 1]. The law there stated is, that the homestead exemption does not deprive a man of the power to alien or encumber his real estate. The principles announced apply with even more force to the mortgage or sale of personalty, which is this case.

The second ground of appeal, that real and personal property cannot together in the same instrument be the subject of mortgage, cannot for a moment be sustained, and, indeed, seems to have been abandoned by the appellants.

The appeal is dismissed.

WILLARD, C. J., and McIVER, A. J., concurred.

10 S. C. 40

STATE, ex rel. BULL, v. COUNTY TREASURER.

(Columbia. Nov. Term, 1877.)

[*Costs* ⇐81; *Mandamus* ⇐190.]

Where, under a proceeding by mandamus to compel the County Treasurer to receive the bills of a certain bank in payment of taxes, the issues are tried by the Circuit Judge, the relator is not entitled to costs, though the judgment is in his favor.

[Ed. Note.—Cited in State ex rel. County Com'rs of Abbeville Co. v. County Com'rs of Edgefield Co., 18 S. C. 598.

For other cases, see Costs, Cent. Dig. § 339; Dec. Dig. ⇐81; Mandamus, Cent. Dig. § 438; Dec. Dig. ⇐190.]

[*Costs* ⇐3.]

[Cited in Sease v. Dobson, 36 S. C. 557, 15 S. E. 703, 704; Campbell v. Sanders, 42 S. C. 526, 20 S. E. 415, to the point that the right to costs is dependent on statutory provisions, there being no right thereto at common law.]

[Ed. Note.—For other cases, see Costs, Cent. Dig. § 1; Dec. Dig. ⇐3.]

[*Costs* ⇐4.]

[Cited in Kershaw County v. Richland County, 61 S. C. 78, 39 S. E. 263, to the point

that statutes allowing costs are penal, and must be construed strictly.]

[Ed. Note.—For other cases, see Costs, Cent. Dig. § 3; Dec. Dig. ⟸4.]

[*Costs* ⟸4.]

[Where an act defines the circumstances under which costs shall be recovered, and the course indicated is not pursued, the intention is plain that costs shall not be allowed.]

[Ed. Note.—For other cases, see Costs, Cent. Dig. § 3; Dec. Dig. ⟸4.]

[This case is also cited in LaMotte v. Smith, 50 S. C. 563, 27 S. E. 933; State ex rel. Kirven v. Scarborough, 70 S. C. 294, 49 S. E. 860, as to whether mandamus is a "civil action" under the Code.]

Before Carpenter, J., at Richland, December, 1876.

These were petitions by N. A. Bull and several others for writs of mandamus to compel

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the County Treasurer of Orangeburg *County to receive bills of the Bank of the State of South Carolina in payment of their taxes.

The issues were tried before His Honor at Chambers, who made an order directing the writ of mandamus as prayed for to issue, and he subsequently made an order that the County Treasurer "do allow and pay out" as costs out of the proper funds of his County to the attorneys in each of the cases the sum of $15.

The relators appealed on the grounds:

1. That the costs followed the judgments in each of the cases as of course.

2. Because His Honor erred in holding that the costs should be paid by the Treasurer out of the "proper funds;" whereas it is submitted the judgment for costs should have been against the respondent personally.

3. Because His Honor erred in undertaking to fix the amount of costs; whereas it is submitted, the issues being decided, the costs should have been referred to the Clerk of the Court for taxation.

DeTreville, Izlar & Dibble, Glover & Glover, for appellants.

Conner, Attorney General, contra.

April 17, 1878. The opinion of the Court was delivered by

HASKELL, A. J. The several cases above named were heard together and comprehended in one order in the Court below, and were so heard and will be decided together in this Court. The appeal brings up for review the order for costs in these cases. The conclusions arrived at will be briefly stated, reference being made to several cases in which the subject generally has been elaborately discussed.

Costs eo nomine did not exist at common law, but are the creature of statute, and originated in the statute of 6 Edward I, generally known by the name of the Statute of Gloucester. Costs were given to the plaintiff as expens. litis in certain actions therein named and in all other cases where damages were then recoverable either by common law or by precedent statutes.—2 Sell. Pr., 428; 3 Salk., 114.

The Statute of Gloucester has always been of force in this State and is the source whence a plaintiff's right to recover costs has proceeded except where derived from subsequent legislation.

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*By an Act commonly called the Code of Procedure, passed March, 1, 1870, it was enacted (Section 329): "All statutes establishing or regulating the costs or fees of attorneys, solicitors and counsel in civil actions are repealed, and hereafter the measure of such compensation shall be left to the agreement, express or implied, of the parties. But there may be allowed to the prevailing party upon the judgment certain sums by way of indemnity for his expenses in the action, which allowances are, in this Act, termed costs."

The Act is divided into two parts, which are called "Part I—Of the Courts of Justice and their Jurisdiction," and "Part II—Of Civil Actions." The Section above cited occurs in "Part II—Of Civil Actions," and the term "costs" as used in the Code of Procedure can only mean "allowances" as therein provided, and extends only to "civil actions" in the sense in which those words are used in the Code. Although the writ of mandamus has been removed from the Court of Sessions to the Court of Common Pleas by the Constitution, (Art. 4, Sec. 15: McIver v. The State, 2 S. C., 1,) it might still be a question whether mandamus is a "civil action" within the meaning of Part II of the Code of Procedure or a special proceeding (Section 3 of same Act, preceding both Part I and Part II,) to which Part II does not relate. But the question is settled by Section 475 of Part II, Revised Statutes, page 687, which provides that, "until the Legislature shall otherwise provide, the second part of this Act shall not affect proceedings by mandamus or prohibition." The question, therefore, of costs in mandamus, the amount and the taxation of the amount, are not to be determined by the Code but by the law as it stood when the Code was adopted, unless changed by subsequent legislation. There are no costs in mandamus by the Statute of Gloucester, and no costs were to be had in such proceeding until by the Statute of 9 Ann, Chapter 20, 2 Stat., 568, "An Act for rendering the proceedings upon writs of mandamus and informations in the nature of a quo warranto more speedy and effectual, &c.," made of force in this State by Section 11 of Act of 1712, 2 Stat., 415, which directs how the pleadings and proceedings shall be and allows damages and costs to be had. It will be seen by examining the Act that the measure of the damages and costs in a pro-

ceeding by mandamus at the time of the adoption of the Code was the damages and costs which might have been prior to the

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Code recovered in an action on *the case for a false return. The rule remained the same unaffected by the Code, regulated as to amount of costs by the fee bill as it then stood and as to the right to costs by the Statute of Ann.

It is true that in the republished laws contained in the General Statutes (p. 547, Rev. Stat.,) the words damages and costs, as in "civil action," are substituted for the words damages and costs, as in an "action on the case for a false return." But this cannot mean "civil action," as treated of in Part II of the Code, for Section 475 precludes this construction; nor do "costs," as the term is used in these republished and re-enacted provisions of the Statute of Ann, exist in a "civil action" under the Code, which is conducted by an entirely different system of pleading, and the "allowances" made for items which cannot occur in a bill of costs in mandamus. Civil action is an ancient term, and the civil action to which reference is made (p. 547, Rev. Stat.,) must be traced by going back to the Act from which the portion of the General Statutes in question derives its origin, and it is found to be an "action on the case" under the old practice. Section 475 of the Code is strong in its meaning, and is yet more forcible when considered in connection with Section 443 of the Code. Proceedings by mandamus and by quo warranto were formerly both regulated by the Statute of Ann. By Section 443 of the Code proceedings by quo warranto are abolished and the remedy made obtainable by civil action as prescribed in the Code, Part II. Thus one-half of the Act is abolished and the remedy under the Code substituted, while by Section 475 mandamus is expressly excluded from the Code and the law left unchanged. All these Sections recur in the General Statutes. Such a plain declaration cannot be overcome by implication. If the relator is entitled to costs in this case, it is under the statute which we have been discussing. Costs are in the nature of a penalty, and subject, therefore, to strict construction. It does not appear that the Judge imposed any condition for costs when he granted the writ.

The law in the case of The Town Council of Beaufort v. Danner, (1 Strob., 176,) in proceeding by writ of prohibition, is applicable to this case. If the relator looks outside of the statute for costs, he cannot recover costs under the statute, for costs are allowed to the plaintiff only in case a verdict be found in his favor or judgment be given for him upon a demurrer, or by default. There is here no judgment upon demurrer, none by default, nor a verdict, for there was no trial by jury; hence, no damages. The

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pleading *is confined to a petition and a return. It might be said in this case as it was said, mutatis mutandis, in The Town Council of Beaufort v. Danner et al. [1 Strob. 176]: "There has been in effect simply a motion made, inquiry had, and the motion refused." Here it was granted. The reference to the Clerk was by agreement; if under the Code, it was a mistake; if for the convenience of parties, without authority of law, it is no ground for costs. The costs allowed by law in mandamus are attached to proceedings which have not been carried out in this case; hence, no costs are due.

In the case of the Greenville and Columbia Railroad Company v. Partlow, (6 Rich., 286,) although a trial by jury was had, under the provisions of the charter, to assess the value of property, verdict and judgment rendered with the right of appeal, it was held that costs did not attach as a matter of right, and that it seemed to be the intention of the Act that costs should be omitted.

The converse is true. Where the Act defines the circumstances under which costs shall be recovered and the parties fail to pursue the course indicated, the intention is plain that costs shall not be allowed. But the case of Railroad v. Partlow is referred to chiefly because it discusses the entire subject. The case of the State, ex rel. Tavel, v. Jervey (4 Strob., 304,) was a case where prohibition was sought against a public officer. An issue was made up and a verdict had in favor of the relator. Costs were denied him upon the ground that a public officer could not be held personally liable for the consequences of honest mistake of judgment. We do not consider the cases as analogous, for the statute makes a line of distinction between the two proceedings, and allows damages and costs in mandamus when issue joined and verdict had or upon judgment.

But the separate opinions of Wardlaw, J., and O'Neall, J., strengthen the principles indicated by the conclusions arrived at in the present case. The one concurred in denying costs, not upon the ground above stated, but because, although there was an issue joined, which is the first essential, and damages found, yet the damages were not for sufficient amount to entitle the party to costs, (Act 1747, P. L., 214); the other, O'Neall, concurred because in his opinion there was no feigned issue, but a mere proceeding by declaration in prohibition.

A fortiori, when relator waives the issue, dispenses with the pleadings and the trial by jury, and goes to hearing on the merits and gets his order, he cannot get his costs for the trial which was not had.

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*It is unnecessary to dwell upon the second and third grounds of appeal.

The order to the respondent to pay the costs out of the proper funds of the County is a nullity. The Court has not power over either persons or property not properly before it as party or subject in the action; neither is the County a party nor are the County funds involved in the proceeding.

As to taxation of the costs, the third ground of appeal, that is immaterial after what has been decided. The Clerk, however, is the ministerial officer of the Court in the taxation of costs, and it does not appear that the Court would be precluded from performing the duties.

For the reasons above stated, the entire order is set aside.

WILLARD, C. J., and McIVER, A. J., concurred.

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10 S. C. 45

BOYD v. SATTERWHITE.

(Columbia. Nov. Term, 1877.)

[*Powers* ⇐36; *Wills* ⇐693.]

A devise to A for life of all testator's real estate, the same to be "sold and equally divided —one-half to" A, "to dispose of as she pleases at her death," with remainder over as to the other half: *Held*, That the power "to dispose of as she pleases at her death" could be executed by deed.

[Ed. Note.—For other cases, see Powers, Cent. Dig. §§ 137–149, 155; Dec. Dig. ⇐36; Wills, Cent. Dig. § 1657; Dec. Dig. ⇐693; Husband and Wife, Cent. Dig. Powers, § 191.]

[*Powers* ⇐19.]

Where the instrument by which a power is claimed to have been executed is the proper one and the question is whether the power was in fact executed by the terms therein used, such question is one of intention merely; and if that appears from recitals or a description of the property or otherwise, the power is well executed.

[Ed. Note.—Cited in Burkett v. Whittemore, 36 S. C. 438, 15 S. E. 616.

For other cases, see Powers, Cent. Dig. § 44; Dec. Dig. ⇐19.]

[*Powers* ⇐36.]

Testator devised to his wife L. all his real estate during her natural life, and directed that at his wife's death all his land should be "sold and equally divided—one-half to my wife L., to dispose of as she pleases at her death," and the other half to others: *Held*, that the power "to dispose of as she pleases at her death" was well executed by a marriage settlement, wherein L. recited that she was possessed of considerable property, both real and personal, to wit, a tract of land, &c., which she became possessed of by virtue of the last will and testament of her late husband, being thereby entitled to a life estate in the whole land and to an absolute estate in one-half," and then conveyed her whole estate of land and slaves to C. in trust for the use and benefit of herself and her intended husband, "and at her death the tract of land, as far as she may have any legal interest, to be divested of all trust and vested in fee simple in the said B., her intended husband, or his legal representatives, should he die before her."

[Ed. Note.—For other cases, see Powers, Cent. Dig. §§ 137–149, 155; Dec. Dig. ⇐36.]

[*Powers* ⇐36.]

Where the power is to dispose of the proceeds of a sale of land, it may be executed by disposing of the land itself.

[Ed. Note.—For other cases, see Powers, Cent. Dig. §§ 137–149, 155; Dec. Dig. ⇐36.]

Before Moses, J., at Newberry, December, 1875.

This was an action by William B. Boyd against John Satterwhite and another, as executors of John W. Payne, deceased, and others.

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*The facts are stated in the following brief, prepared by counsel for this Court:

I. The bill was filed in the Court of Equity for Newberry County on the twenty-eighth day of January, A. D. 1868, by the plaintiff, William B. Boyd, for the purpose of enjoining the sale of certain lands, formerly belonging to John W. Payne, by his executors, and for the purpose of procuring the share of those lands and other property, claimed by the plaintiff under a marriage settlement alleged to have been made by Lucinda Payne, the wife of John W., just before her marriage with the plaintiff.

II. John W. Payne, by his will, dated 17th March, 1857, left to his wife, the said Lucinda, all his real estate during her natural life, except the ferry and boat; and directed that at his wife's death all his land should be "sold and equally divided, one-half to my wife Lucinda Payne, to dispose of as she pleases at her death, and the other half to be equally divided between my brothers, James W. Payne, David Payne and Catherine Lark."

III. By the third clause of said will the testator bequeathed to his said wife a lot of negroes, furniture, &c., "to have and to hold the above named negroes and dispose of as she pleases at her death." By the fourth clause he bequeaths to his wife certain other negroes, and mules and wagons, &c., "to have and to hold during her natural life, and at her death to be sold, and one-half to go to my wife, Lucinda Payne, to dispose of as she pleases," &c. By the fifth clause he bequeaths her other personal property, "to have and to hold during her natural life, and at her death to be sold and divided as above mentioned." By the sixth clause he bequeaths her his "bank stock of money," and a judgment, "to dispose of as she pleases." By the eighth clause he directs that the remainder of his property, except that given away by the seventh clause, be sold at his death, "and one-half to go to my wife, Lucinda Payne, to do as she pleases with at her death, and the other half to be divided between" certain other persons therein named.

IV. Lucinda Payne survived her husband, and after his death, to wit, on 8th July, 1857, made her will, directing, among other things, that the half of the proceeds of the sale of

lands, in which she had a life estate, should, after the payment of certain legacies be equally divided between James C. Vaughan, Henry Chappell, John Hill, Dennis C. Hill and John C. Hill. The legacies referred to were pecuniary ones to Thomas Hill, John

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Hill, William Chap*pell and others, and "half the interest" she had "in the lands of" her "late husband" to Dennis C. Hill, on certain conditions.

V. Thomas Henry Chappell, the appellant, has received letters of administration, with the will annexed, of the estate of the said Lucinda.

VI. By marriage settlement executed by the said Lucinda on the 25th of May, 1858, she recites that she is possessed of considerable property, both real and personal, to wit, "a tract of land in Newberry and Laurens Districts, containing eighteen hundred acres," &c, "which said tract she became possessed of by virtue of the last will and testament of her late husband, John W. Payne, deceased, being thereby entitled to a life estate in the whole land, and to an absolute estate in one-half, and the following slaves," &c.; and she then conveys her whole estate of land and slaves to C. B. Griffin, in trust, for the use and benefit of herself and her intended husband, William B. Boyd, her intended husband to have control of the rents and profits of the property; "and at the death of the said Lucinda Payne, the tract of land, as far as she may have any legal interest, to be divested of all trust and vested in fee simple in the said William B. Boyd, her intended husband, or his legal representatives, should he die before the said Lucinda." She reserves the right to dispose of one-half of the slaves by deed or will; and in the event she does not do so, they are to be vested in the said Boyd, the other half to go to Boyd or his legal representatives.

VII. Lucinda Boyd died before the filing of the bill herein.

VIII. The case came to a final hearing at the July Term of the Court of Common Pleas for Newberry County, A. D. 1875. The only question left to be disposed of, and the only matter in which the appellant, Thomas H. Chappell, had an interest, was the point whether the plaintiff was, under the said marriage settlement, entitled to the funds arising from the sale of the property of John W. Payne, (which has all been sold by his executors,) in which Lucinda, his widow, had a life estate, and in connection with which she had certain powers of appointment; or, on the other hand, whether she had not failed to execute her power by the marriage settlement and had executed it by her will; and, therefore, whether the plaintiff or the legatees of her will should take the funds of which her husband's will gave her a power of appointment.

IX. The decree of His Honor Judge M. Moses decided that she had properly executed the power by her deed of marriage settle-

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*ment, and, therefore, that the plaintiff was entitled to half the proceeds of the sale of land, &c.

X. From this decree Thomas H. Chappell appeals, and insists that the deed of the said Lucinda Payne of the 25th of May, 1858, was not a proper and effectual execution of her power under the will of John W. Payne; that her will was the proper and effectual execution of that power, and, consequently, that the proceeds of the sale of the property of which she had the power to dispose, should pass to the appellant and others, the legatees under her said will.

Suber & Caldwell, for appellants:

I. A power of appointment provided to be executed by will cannot be executed by a deed, because "the intention of the power in its creation was to reserve an entire control over its execution until the moment of the death of the donee; and this intention would be defeated by any other instrument than a will."—Story Eq. Jur., § 173; Reid v. Shergold, 10 Ves., 378; Bentham v. Smith, Chev. Eq., 33.

II. The will of John W. Payne does not in express terms declare by what form of instrument or by what means the power shall be executed by the widow, Lucinda; but the forms of expression employed almost throughout indicate that she shall be able at the last moment of her life to make the disposition of property allowed her. Thus clause two provides that "all my lands be sold, and be equally divided, one-half to my wife, Lucinda Payne, to dispose of as she pleases at her death." Clause three provides that she is to dispose of negroes "as she pleases at her death." Clause eight provides that she is "to do as she pleases with" other negroes and property "at her death." The contest here is in regard to the funds derived from the sale of land referred to in clause two. Such a connection of words implies that her pleasure is to be exercised at the time of her death, and not that her pleasure is to take effect at her death. Now, no instrument is known by which she could have effected such disposition at her death, except a will, for that is the only instrument which remains ambulatory and ineffectual till death. A deed is a present, irrevocable instrument, which leaves no power to be exercised at one's death. And the construction of the power above given is the most natural and reasonable. It is most natural that a husband should provide that his wife should have that

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fullest con*trol in the disposition of her share which is only to be found in a will—an instrument to the last moment revocable. And it is most reasonable that he should seek to protect her against hasty and unwise action by giving her her whole lifetime to make up her mind and correct any errors she might

commit. And the individual here claiming against us—the second husband—is just the person, of the whole world, against whom the first husband would be most anxious to protect his wife.

III. The power conferred upon the widow by the will in connection with land, was that of disposing of half of the proceeds to arise from a sale of the same after her death. It is submitted that the deed of marriage settlement does not—conceding it to be a proper instrument for that purpose—make an appointment of that fund. The deed undertakes to convey the one-half of the land to Boyd in fee simple—a totally different property. This constitutes a case not of defective execution, which equity can perfect, but of non-execution, which equity never undertakes to supply. As solemn an instrument as a deed conveying property is presumed to mean what it says and to intend to convey just what it declares it does convey. And it is absurd to say that a deed should be held to convey a property never pretended to be conveyed by it, simply because it attempts to convey some other property which the grantor has no power to convey, and because these two properties have some natural or legal connection. And no opinion, no proof even of intention, can weigh anything in such a case. The deed must speak for itself. Thus, in a case where a party intended to secure the payment of money by mortgage, but by mistake executed a letter of attorney with power to sell, instead of a mortgage, it was held not to operate as a mortgage however intended. "Equity may compel parties to execute their agreements, but it has no authority to make agreements for them or to substitute one for another."—Story Eq. Jur., §§ 114, 115.

Cestui que vie having power to dispose of money, stock, plate, &c., and disposing in her will of "all my personal estate, securities, goods, chattels and effects whatsoever and wheresoever and of what nature, kind or quality soever, and all my estate and interest therein," held not to be an execution of the power.—Bradley v. Westcott, 13 Ves., Jr., 445.

"As a gift of one species of estate or interest cannot take effect on another of a different nature, the purchase money due on a

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sale *of land will not pass by a devise of the land itself."—2 Am. L. C., 722.

Where an estate in land was devised to trustee and his heirs, to the use of A for life, and a power of sale, with consent of life tenant, and the trustee, with such consent, sold without the timber, which was to be taken at a valuation, it was held that there was no execution of the power, for the power was not to sell without timber.—1 L. C. E., 189 (top).

A general devise of all lands of which the testatrix had power to dispose is not a good execution of a power to appoint moneys which were to arise from the sale of land.—Adams v. Austin, 3 Russ., 461.

Sullivan & Todd, contra:

1. The power given by the will of John W. Payne, deceased, to his widow, Lucinda, was well executed by the marriage settlement between her and respondent. 4 Kent's Commentaries, 346: "When a mode in which a power is to be executed is not defined, it may be executed by deed or will or simply by writing."

Porcher v. Daniel Reed and others, 12 Rich. Eq., 349: At page 353 of that case, Chancellor Dunkin says, in Reed v. Lamar, (1 Strob. Eq., 27,) the character of the antenuptial contract between William B. Reed and his intended wife, then Jane McKinney, was very fully considered. It was determined that it constituted a settlement of her property to her sole and separate use. In relation to her powers under it, Judge Johnson, who heard the case at circuit, uses the following language: "The deed here confers on the wife sole direction and the full and free disposal of the property—powers as ample as any owner can exercise over property in which he has an absolute and unqualified right; and it is not questioned that, under this power, she might have disposed of it by a parol or written contract, with or without consideration, or by will, or that it would be bound if she had mortgaged it for the payment of these debts."

At page 354 the Chancellor remarks: "In Wilson v. Gaines, (9 Rich. Eq.,) an instrument of this character executed by a femme covert was sustained by the Court. And see also the judgment of Lord Hardwicke, in Ross v. Ewer, 3 Atk., 156.

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*April 18, 1878. The opinion of the Court was delivered by

HASKELL, A. J. There can be no question as to the quantity of the estate held by the widow Payne in the property which is the subject of this litigation. The principles announced in the case of Pulliam v. Byrd, (2 Strob. Eq., 134,) and the authorities there cited, apply to the present case, and decide that the widow Payne had, by the will of her husband, an estate for life in the land, with a general power of appointment over the proceeds of the sale of a moiety of the land, which was directed by the will to be sold after her death.

It is argued by the appellants that this power could only be executed by will; that it was executed by a will drawn by the widow Payne in 1857; that if it could, however, be executed by deed, the deed of marriage settlement, which purports to have executed the power, has failed to execute, and is void as to the power, because it does not recite the power or describe the property, or in any wise clearly indicate an intention to execute

the power. It is further contended that the power conferred upon the widow by the will was a power to dispose, not of a moiety of the land, but of the proceeds of the sale of that part of the land; and that the deed of marriage settlement with Boyd, the plaintiff, if it disposes at all, disposes not of the fund to arise from the land, but of the land itself, and is, therefore, not an execution of the power.

These points will be considered in their order.

There is no provision, by direct words, in the will of John Payne that the power of appointment thereby created should be executed only by will, nor, we think, can such intention be deduced from the language used. The words are "to dispose of as she may please at her death." The expression "as she may please" naturally refers to the object of her bounty, and not to the time at which she is to make the disposition; while "at her death" relates not to the time at which the power is to be executed, but to the time at which the disposition is to take effect. In the case of Aaron v. Beck, (9 Rich. Eq., 411,) the language of the power is: "the half of which my wife shall die possessed to be disposed of at her death as she may think proper."

And she "made a deed," whereby, after reserving to herself "the enjoyment for life, she appointed and transferred the aforesaid" property in trust for the use, for life, of her

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married daughter, &c.; *and, while the point was not decided, it was not even questioned that the power was duly executed by deed.

By transposing the words the meaning is not changed, but the grammatical order is made more apparent. "To dispose, at her death, as she may please," is the same as "to dispose as she may please at her death," and is, in meaning and order, identical with the phraseology in Aaron v. Beck, "to be disposed of at her death as she may think proper." The words "at her death" relate, of necessity, not to the time of the exercise of the power, but to the time at which the execution takes effect, for it is only then that the "disposition" of the property takes place. The testator's principal object seems to have been to keep for his wife the enjoyment of the property during her life. The ultimate disposition he left to her, to go into effect at her death. The deed is not inconsistent with this view, for, although made in presenti, it can only take effect in futuro. The words "as she may please, at her death," are considered as not restricting the mode or time of the exercise of the power. And "if a power be given generally, without any restrictions as to the nature of the instrument by which it is to be executed, * * * it may, in such case, be executed by deed or by will."—4 Cruise on Real Property, 253.

The power may be executed by deed, but has it been executed by the deed of marriage settlement? Very brief extracts of the deed are all that the Court has to guide it, but it is to be presumed that all that is of importance has been presented.

Sir William Grant said it was always a question of intention whether the party meant to exercise the power or not.—1 Sugden on Powers, *372; 8 Ves. Jr., 616.

"All that is necessary is that the intention to execute the power should clearly appear in writing."—Story Eq. Jur., § 172.

"An act done not strictly according to the terms of the power, but consistent with its intent, may be upheld in equity."—Ibid, § 172.

"An instrument may operate as a revocation and appointment without any recital or mention of the power or any declaration that such instrument was intended as an execution of the power; for if the act done be of such a nature that it can have no operation unless by virtue of the power, and thereby give validity to the instrument upon the principle or rule of law that quando non valet quod ago, ut ago, valeat quantum valere potest."—4 Cruise on Real Prop., 257.

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*If the donee of a power either refer to the deed out of which the power arose or describe the property over which he has a power of disposition, it is sufficient to prove the intention.—Ibid, 259; Robert v. Morgan, 1 Atk., 441; Sugden on Pow., *357–367.

The words which confer the power upon the widow Payne are contained in a will which was thus described in a previous case between the widow and some of the same parties, (12 Rich. Eq., 494): "The testator was an uneducated planter, little acquainted with legal or commercial terms, and he employed a like person to draw his will." The opinion in the same case concludes with an order that the Commissioner, among other things, report, "distinguishing between the various bequests made to the complainant, Lucinda,—some absolutely, some for life with power of disposition in the whole, and some for life with power of disposition in part."

The obscurity of the unprofessional language of the will must be considered in connection with the terms used in the deed of marriage settlement, which alludes to the will as the source from which the rights disposed of by the deed are derived. There certainly had been no adjudication upon the will at the time the widow Lucinda drew her will (1857) or at the time she executed her marriage settlement, (1858,) and it may have been uncertain in her mind exactly what was the character of her estate or interest in these lands.

In the deed of settlement she recites, among other property in her possession, "a tract of land in Newberry and Laurens Dis-

tricts containing eighteen hundred acres," "which said tract she became possessed of by virtue of the last will and testament of her late husband, John W. Payne, deceased, being thereby entitled to a life estate in the whole land and to an absolute estate in one-half and the following slaves."

All this she conveys to C. B. Griffin in trust. The execution of the power, if at all, is in the following words: "And at the death of the said Lucinda Payne, the tract of land, as far as she may have any legal interest, to be divested of all trust and vested in fee simple in the said William B. Boyd, her intended husband." Whether the "tract of land" as used in the last clause means the "whole land" or the half in which she says she has an absolute estate is not stated, and we have not the entire deed from which to derive a conclusion; but as she had so definitely limited her estate to the whole to life, the inference is that she concludes in this

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clause *to the "one-half" which she had mentioned above. But this, perhaps, is not material.

It is possible that Lucinda Payne had a misconception of the character of her estate in that moiety. She may have thought or been advised, as so eminent a Chancellor had decreed in Pulliam v. Byrd, that a grant to her for life, with a power to her to dispose of one-half of it at her pleasure beyond her life, came within all the definitions of an absolute title. This opinion, however, had been corrected by the Court of Appeals previous to the time the deed was executed, and it must be observed that she uses this expression, "absolute estate." In the recital to the conveyance to the trustee, the terms used in the grant do not appear; it is merely said "she conveys her whole estate of land." It seems that the words "absolute estate" are used in the recital more to draw a distinction between the interests which she has in the whole and a separate interest in a moiety than to define her legal title to that moiety. But if she did mistake the character of her right to or over that moiety, that is not material, unless it further appears that she set up that title in defiance of the wish expressed in her husband's will and conveyed the property to Boyd by virtue of her title absolute and not under the power. It can hardly be said that this appears from the words used. She recites the will and refers to it as the source whence she derives any right she may have in the property. She describes the property and disposes of it by the following words: "And at the death of the said Lucinda Payne, the tract of land, as far as she may have any legal interest, to be divested of all trust and vested in fee simple in the said William B. Boyd." She thus refers to the will which contains the powers: she describes the property, and intended either to execute the power or to recite it and ignore it. If she meant the latter, we think the words of conveyance would have been more positive and absolute. The words descriptive of her right are "the land as far as she may have any legal interest." This cannot refer to the amount of land, whether the whole or the half, for of that there would be no doubt or question; it must refer to the character of her interest in that half. If that be the meaning of the words, and we think it is, her intention was to convey to Boyd, by any right or power that in her was, the land or whatever interest in the land that was at her disposal. This view is confirmed by the fact that in the will of 1857, which it is claimed was the execution of the power, the words by which she

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*seeks to execute it are by leaving "half the interest" she had "in the lands of her late husband." "Interest in land" is not different in such a case from "land as far as one may have legal interest" in it. Either expression would be enough to execute a power of appointment either of the land or of the proceeds to arise from the sale of the land, provided the words could not apply to any other than the property intended by the donor.

And this leads us to the last point—that the disposition of the land or "interest in the land" is not an execution of the power to dispose, where a sale of the land is also ordered by the donor; that appointor was bound to indicate or name the fund, and that alone could she appoint.

In the case of Standen v. Standen, (2 Ves., Jr., 589,) fully discussed in Sugden on Powers, *378, the circumstances are not very dissimilar. The husband, by will, directed his estate to be sold, and gave the money and his other personal estate to wife for life, with power of appointment as to one moiety. The land was not sold. The widow, by will, "gave all the residue of her estate and effects, whether real or personal, which she should be possessed of, interested in or entitled to at the time of her decease to her friend, J. H.:" Held, That the will was an execution of the power, from the fact that by the will she "gives all her estate and effects"—that this is of necessity included. But, in addition, held to be an execution, because the intention was manifest, from the fact that she had no other real estate. The present case is stronger than Standen v. Standen, because the property is specified and described.

The land in each case was ordered to be converted into money, but in each it had not been converted previous to the execution of the power, and the land was appointed.

In Sugden, *398, it is said by the Judge, in another case: "The case of Standen v. Standen had established that with regard to real estate the Court may examine whether the circumstances of the testator's property are such as to give effect to the will; and if

this will had given an unequivocal devise of realty, the Court must, in order to give operation to an instrument which would otherwise be inoperative, have reverted to the fund the subject of the power." The widow Payne had no other real estate capable of her disposition under the will, to which she refers her right, and the deed would be inoperative if it were not applied to her "interest" in this land. We consider the gift or appointment by which she directs that the

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*"land, as far as she may have any legal interest," sufficiently describes the property and applies to the land or the proceeds of the sale of the land when sold, and, as was intimated above, regard the adoption of the sort of double form to have been for the purpose of vesting the property in Boyd, under the title, or by the power, whichever it might be ascertained she had. And equity will regard the property as land or as money, as may be necessary to carry out the purposes of the donor. It would be strange if the execution of a power appointing to land, which it is ordered shall subsequently be sold, should be defeated because the appointor had, after fully describing the property, and referring to the power, should call it "land" instead of "the proceeds to arise from the sale of the land."

The judgment of the Court below is affirmed. Motion dismissed.

WILLARD, C. J., and McIVER, A. J., concurred.

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10 S. C. 56

BLUM v. EVANS.

(Columbia. Nov. Term, 1877.)

[*Wills* ⇐545.]

Testator having a wife and an only daughter, devised his entire estate, real and personal, to his wife for life, and then added: "I wish my wife to enjoy this estate during her life, and at her death to go to my daughter. Should my daughter die without issue, I wish my entire estate to be divided equally among the H.'s (my wife's family) and the B.'s (my family), one-half" to each. The wife and daughter survived the testator and the daughter survived the wife: *Held*, That the term "should my daughter die without issue" meant should she die without issue in the lifetime of the wife, the tenant for life, and consequently that she, having survived the wife, took an estate in fee simple absolute in the real estate devised.

[Ed. Note.—Cited in Mangum v. Piester, 16 S. C. 322, 323; Marshall v. Marshall, 42 S. C. 441, 20 S. E. 298; Bischoff v. Atlantic Realty Corp., 95 S. C. 276, 289, 290, 78 S. E. 988.

For other cases, see Wills, Cent. Dig. § 1174; Dec. Dig. ⇐545.]

Before Reed, J., at Charleston, February Term, 1877.

This was an action by Emma Julia Blum against William J. Evans for specific performance of a contract for the sale of a lot of land in the city of Charleston. The complaint was afterwards amended under an order of the Court, by making some fifty-three persons who were supposed to constitute the two families mentioned in the will of J. Charles Blum, deceased, hereinafter set forth, parties defendant. The case is as follows:

On October 19th, 1874, the plaintiff made a written contract with the defendant to sell to him a certain lot of land in the city of

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*Charleston. The only objection made by the defendant was as to the title. It appeared by the pleadings that on June 11th, 1857, J. Charles Blum, deceased, made his last will and testament as follows:

"I, J. Charles Blum, do make and declare this to be my last will.

"I give to my beloved wife my entire estate, real and personal, during her lifetime, under the control and management of John Horlbeck and G. W. Dingle, as trustees, substitutions to be made by the Court and approved of by the parties interested.

"I wish my wife to enjoy this estate during her life; at her death to go to my daughter, Emma Julia. Should my daughter die without issue, I wish my entire estate to be divided equally among the Horlbecks, (my wife's family,) and the Blums, (my family,) one-half to the Horlbecks, one-half to the Blums.

"I appoint John Horlbeck, G. Wesley Dingle and my wife, Ester, executors and executrix of this my last will."

That the testator's wife and daughter survived him, and that the wife had died before the said contract was made. The lot of land was part of the real estate of the said testator.

The decree of His Honor the Circuit Judge is as follows:

Reed, J. The late Colonel John Charles Blum, being seized and possessed of considerable estate, died in the month of June, 1857.

Being in extremis, (as is stated by one of the defendants and not denied,) he made his will, a copy of which is set out in full in the complaint, leaving his widow, Ester, and one only child, his daughter Emma Julia, the plaintiff, then about seven years of age, surviving him. Mrs. Blum, the life tenant, has since died, and her daughter survives.

The questions arise solely on the interpretation of the will, and involve the inquiry whether the executory provision for "the Horlbecks, (my wife's family,) and the Blums, (my family,)" is valid.

The complaint sets out, by name and in families, all the persons of the blood of the Horlbecks, and also all of the blood of the Blums, at the date of the death of the testator and at the date of the will, and all the persons of the blood of both who were in existence at the commencement of this action.

Miss Blum now desires to sell some of the property, as it is said, in order to enable her to renew and repair some of the buildings

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*which are decayed and out of order, so as to render them tenantable. There is a large property which has depreciated and is depreciating in value, and is unprofitable from want of reparations, and thus does not yield an adequate support for the plaintiff after the payment of insurance and taxes.

Under these circumstances, she has made a contract with the defendant, Evans, to sell a lot and buildings to him; and whilst he is willing to accept the purchase, if she have a right of disposition so as to give him a title in fee simple, doubt having been expressed by counsel as to the interpretation to be put on the will, he requires that her title should be submitted to judicial determination, and he will act in conformity thereto.

There are a great many parties on both sides, I am informed,—in the aggregate sixty-three. There are four or five of the adult defendants who have made default; four have filed answers affirming that, in their view of the will, the plaintiff took a fee simple, defeasible on her dying without issue living at the time of her death, and that at that time those persons who might then be living and who would have been then the next of kin of Mrs. Blum if she had then died, and those persons who might be then living who would have been then the next of kin of Mr. Blum if he had then died, would be entitled to the whole estate. There are infants whose answers are formal, and they are fully represented. There are adult defendants who have answered and fully concur in the plaintiff's interpretation.

The subject was fully and at large discussed and argued.

My opinion is that a life estate in the whole property was devised to Mrs. Blum, and a remainder in fee simple absolute, in no sense defeasible, was devised to the plaintiff on the death of Mrs. Blum. The subsequent limitation over on the death of testator's daughter without issue is merely precatory, and, according to Mr. Jarman, (1 Jarman on Wills, 338,) the Courts have of late in such cases insisted upon strict requisition of definiteness in regard both to the subject matter and the objects of the intended trust.

In [Lesesne v. Witte] 5 S. C., 450, the Supreme Court say: "However far the earlier decisions may have gone in construing as a trust the mere expression of a wish, entreaty or confidence attached to a devise or legacy, the inclination of the Courts in more modern times, as Mr. Story, in the second volume of his Equity Jurisprudence, Section 1069, says, 'is not to extend this doctrine of recommendatory trusts.'" Mr. *Jarman, in his work on Wills, (Vol. I, 329,) expresses himself to the like effect:

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"Though the language used may convey the wish or desire of the testator as to the use of the property devised, if it does not impose an obligation which can be enforced in a Court of equity, it cannot be held to control or qualify the absolute interest which is conferred by the previous disposition. Where an absolute right is given, words which are to annex a limitation to its pure and uncontrollable exercise must not only be mandatory but in themselves show the manner in which they are to operate, so that the purpose of the testator may clearly appear—how or in what degree he intended to affect the original gift by restrictions entirely inconsistent with the independent enjoyment."

"A mere general expression of affection and favor, even in regard to the children of the testator, has never been held, where by his will the estate in unrestricted terms was given to the wife to convert it into a life interest, unless such disposing intention in their favor is manifest from the words employed."

The requisitions, under these circumstances, are that the provision shall be expressed in words that are imperative "that the subjects should be distinctly designated and the objects clear, definite and certain."

In Williams v. Williams, (1 Sim., 357,) the word "family" was used, and the Vice Chancellor said: "The word 'family' is one of doubtful import."

If it be of doubtful import, how can it point out the subjects with clearness, definiteness and certainty?

Now, what can be more indefinite than the objects of this supposed trust? The heir-at-law is the devisee in possession of the legal estate and is protected in his title against vague and uncertain claims.

Mr. Powell, in his valuable work on Devises, at page 348, states the rule as follows: "It is a rule universally adopted in the construction of wills, that whenever there is an unreasonable uncertainty or repugnancy in the disposition made by a testator of his real property, the title of the heir-at-law shall be preferable to all others; because where a Court cannot find words in a will which either expressly or by necessary implication denote the testator's intention beyond the possibility of a doubt, the rules of law regulating descents which are certain must prevail and

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cannot be super*seded by an uncertain devise; thus, whether the words of the limitation are to be taken as precatory or as proposing a devise, they must indicate to the Court with certainty the intent of the testator."

In my opinion, there is no such certainty in the will before us. The cases cited in the argument show that the word "family" is sometimes construed to mean children, sometimes heirs-at-law, and sometimes has been entirely rejected as without meaning. I cannot reach the conclusion that by such indefi-

nite words the testator intended to limit the estate of his only child; at all events, the language is so vague that it cannot affect the estate. I conclude that the title tendered to the defendant, Evans, by Miss Emma Julia Blum is a good title in fee simple; that the supposed limitation over has no legal validity, and that the purchaser from Miss Blum must complete his contract, and it is so ordered and adjudged.

From this judgment the defendant, Evans, appealed on the ground that His Honor was in error in holding that the limitation over was too vague and indefinite, and that the title tendered to appellant was a good title in fee simple, and that defendant should complete his contract.

Pressley, Lord & Inglesby, for appellant:

The questions involved in the case are these:

1st. Are the words, "I wish my entire estate to be equally divided," &c., &c., sufficient to create a contingent interest in the Blum and Horlbeck families? or are they merely precatory, as the Circuit Court has held?

2d. Does the language employed designate with sufficient distinctness the subjects of the limitation over? or is it so indefinite as to render the limitation over void for uncertainty?

3d. Assuming the limitation over to be good, who are to be comprehended in the terms, "the Horlbecks, my wife's family," and "the Blums, my family?"

I. It is not necessary that the terms employed in a devise should be direct and imperative. Wishes and requests are sufficient. —1 Wms. on Ex., m. 89; Dougherty v. Dougherty, 2 Strob. Eq., 66.

In this State it has been held that the words "it is my wish" will operate as a direct bequest, and will be construed to mean an act of the will rather than an inclination of the mind, unless a different construction would produce inconsistency and repugnance. —Brunson v. King, 2 Hill Ch., 490.

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*There is nothing in this will to require a departure from the ordinary meaning of the word. On the contrary, everything indicates that the testator used the words "I wish" as synonymous with "I will." He gives his estate to his wife for life and adds: "I wish my wife to enjoy this estate during her life." In the devise to his daughter he uses the same expression: "I wish the estate at my wife's death to go to my daughter;" and then adds: "Should she die without issue, I wish my entire estate to be divided," &c.

The decree holds that by these words a remainder in fee simple was devised to the daughter. What reason can there be for supposing that the testator used the words "I wish" in a different sense in the next sentence, where he provides for the contingency of his daughter dying without issue?

The cases in which these and similar words have been held precatory are all cases in which property is given absolutely to some person who is by the giver "requested" or "recommended" or "wished" to dispose of that property in favor of another.

II. Assuming, then, that the language employed is mandatory and not precatory, the question to be considered is whether the devise of one-half of the estate to the testator's family and one-half to his wife's family is void for uncertainty. The decree holds that the word family is one of doubtful import, and on that ground declares the remainder over void. We submit that in this the decree is erroneous, and that the word "family," though not a technical word, has a fixed and well-settled meaning, and is synonymous with "next of kin," unless something in the context shows that it is used in a different sense. —2 Jarman, m. 28; Wms. on Ex., 964; Atkyns v. Wright, 17 Ves., 261.

Mr. Jarman thus sums up the result of the cases: "It would seem, then," says he, "that a gift to the family, either of the testator himself or of another person, will not be held to be void for uncertainty unless there is something special creating that uncertainty." —2 Jarman, m. 31.

In this case there is nothing to create uncertainty unless it be the addition of the words "the Blums" and "the Horlbecks."

In the case of Pyot v. Pyot (1 Ves., 335,) real and personal estate was given to the testatrix's nearest relation of the name of Pyot. Lord Hardwick said: "I think the Pyots describe a particular stock, and the name stands for the stock, and I think the sister is equally entitled to take with the

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brother, the change of *name by marriage not being material nor the continuance of the name regarded by the testatrix." There is nothing, therefore, in the words above referred to calculated to create any uncertainty as to the word family in the will under consideration.

We submit, therefore, that the plaintiff took a fee simple in her father's estate, defeasible on her dying without issue, and, should that contingency happen, one-half of the estate will go to the next of kin of the testator and the other half to the next of kin of his wife.

The only question about which there is the slightest room for doubt is, whether the estate is given to such persons as were the next of kin of the testator and his wife at their respective deaths or to such persons as will be their next of kin at the plaintiff's death. The discussion of this question we leave for those who may chance to represent the parties in interest when that contingency happens. It is enough at present to cite the cases of Jones v. Colbeck (8 Ves., 38,) and Say v. Creed (5 Hare, 587,) as authorities for the position that the language used by the

testator in the limitation over describes some persons other than the plaintiff; and if that be the case, the decree must be reversed and the bill for specific performance dismissed.

Memminger, for respondent:

The testator's will devises his estate to his widow for life, with a remainder in fee to his only daughter. This remainder is now vested in her, the tenant for life having died, and the question before the Court is whether it can be defeated by the words which follow, to wit: "Should my daughter die without issue, I wish my entire estate to be divided equally among the Horlbecks (my wife's family) and the Blums, (my family,) one-half to the Horlbecks and one-half to the Blums."

This limitation over is not an actual devise; it is merely the expression of a wish, and therefore, falls within that class of devises which are called precatory. In these cases the legal estate is held to be affected with a trust, but the objects and the subject of the trust must be certain, otherwise the estate will be left as it stands at law, unaffected by the trust.

Thus, Judge Story in summing up in his Equity Jurisprudence, § 1070, says: "Wherever the objects of the supposed recommendatory trust are not certain or definite, &c., Courts of equity will not create a trust."

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*So, Mr. Jarman (1 Jarman on Wills, 338,) says: "We find of late more strict and uniform requisition of definiteness in regard to both the subject matter and objects of the intended trust than can be traced in some of the earlier adjudications."

These writers are fully sustained by the authorities, of which an example may be found in Dashwood v. Peyton, (8 Ves., Jr.,) where, at page 41, the Lord Chancellor says: "So as to precatory words, which, in equity, have been held imperative where the object and subject are certain; where, for instance, personal property is given to a person forever, with words of request to that person to give, upon his death, definite ascertained parts to definite ascertained objects, a trust arises, as it is declared what is to be given, and to whom, which, however, may be considered rather a strong decision."

If we consider the limitation as a legal devise the same rule prevails.

In 1 Powell on Devises, 348, he says: It is a rule universally adopted in the construction of wills, that whenever there is an irreconcilable uncertainty or repugnancy in the disposition made by a testator of his real property, the title of the heir-at-law shall be preferred to all others; because where a Court cannot find words in a will which either expressly or by necessary implication denote the testator's intention beyond the possibility of a doubt, the rules of law directing descents which are certain must prevail and cannot be superseded by an uncertain devise. And this uncertainty, Mr. Powell says, may be either in respect to the thing devised, or to the quantity of interest therein meant to be devised, or to the person described by the devise.

An example of the application of the rule is found in the case of Comden v. Clerks, (case cited at same page,) where a devise to the heirs of the testator's name, part and part alike, was held void, because it was uncertain how they should take, for heirs could not take part and part alike.

In either aspect of the case, therefore, whether the limitation over be regarded as a devise or a trust, we have to inquire whether the object or parties to take are definite and certain.

Who are "the Horlbecks, my wife's family, and the Blums, my family"?

Are they to be ascertained at the testator's death, at his widow's death, or at his daughter's?

2. How are they to take—as families, per stirps, or by descent?

3. Are parents, children and grandchildren to take each a share?

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*4. How are husband and wife to take? and if husband or wife with the name be dead, is the survivor to take, or the issue having the blood but not the name?

5. Shall whole and half blood take equally?

6. Is every one with the blood or name in any degree to take an equal share?

All these uncertainties are fatal unless the word family has acquired such a legal construction as to restore certainty to the description of parties and interests.

But so far is that word from having any such effect, that in Doe v. Ioinville, (3 East, 172,) the Court set aside the devise to brother and sister's family for uncertainty and held that the heir-at-law took.

In Harland v. Trigg, (1 Brown E. C., 142,) the devise was precatory: "I give to my brother, John, forever, hoping he will continue them (my estates) in the family." The Court held that these words were too indefinite to carry the estate from John and his heirs.

So in Robinson v. Waddelord, (8 Sim., 134,) testator gave all the residue of his effects to be equally divided between his two daughters and their husbands and families. The Court rejected the words husbands and families and held that the two daughters took the residue equally and absolutely.

Sometimes the words "my family" are construed to mean children, as in Barnes v. Patch, (8 Ves., 604); the devise was to A and B's families, and the children were held entitled to take exclusive of their parents.

In Wright v. Atkyns, (1 Turn. & R., 143, 11 Cond. C., 89,) the Court says a remainder to "my family" operates as a devise to my heir-at-law. The Lord Chancellor says: "The

Court in its anxiety to find out the meaning of the testator has found out that what he has said has the same meaning as if he had said nothing at all." With respect to these cases he must be a bold man who, sitting in a judicial chair, would attempt to disturb them.

Now, as Miss Blum, the testator's daughter, is the heir-at-law of the testator, the Blum family, and of her mother, the result under this last case is precisely the same as if the limitation be held void for uncertainty.

Again, the words "my family" has been held in a recent case to mean "my children." —Prigg v. Clark, cited in Law Review for April, 1877, from late English chancery cases.

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*The true rule seems to be that stated in 2 Story, § 1071, that the word "family" will answer when it is aided by a context; but the language may be so loosely and indeterminately used as not to amount to a clear designation of persons, and then the precatory words will fail to create a trust.

In the case now before the Court, the loose and indeterminate character of the devise is proved by the large number of parties whom it has been deemed necessary to make, in view of the recent constructions to which the will is subject. The number of defendants is ———.

We conclude, therefore, that the devise over, whether construed as a legal limitation or as a precatory trust, is too indeterminate and uncertain to defeat the preceding legal estate in testator's daughter.

Before the Act of 1853, any limitation over of real estate after the dying without issue of the preceding devisee was held to be too remote and could not take effect.

That Act, now renewed in the Revised Statutes, page, declares that whenever in any will of a testator, etc., an estate, either in real or personal property, shall be limited to take effect on the death of any person without heirs of the body or issue, etc., such words shall not be construed to mean an indefinite failure of issue, but a failure at the death of such person.

Does this Act embrace cases of precatory trusts where there is no legal limitation of an estate? That somewhat depends upon the expediency of extending the scope of the Act to a case like the present.

Was it the wish of the testator to defeat the beneficial estate which he gave to his only daughter in behalf of distant relations and connections whom he did not even know? Here is a large real estate, the possession of which, under such an interpretation, reduces its possessor to actual want, the expenses of protecting the whole property consuming nearly all the income.

Are the precatory words of the testator to be clothed with such force as to be considered as a limitation of an estate upon which the statute is to operate, or are they not rather to be regarded as a flexible expression of a wish which is at the discretion of the real object of the testator's bounty? The operation of the Act of 1853 in every such case as this defeats the intention of the testator, and it would seem a proper mode

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of construction that the provisions of *the Act should be confined to such cases as are unquestionably subject to its terms.

The Court should endeavor to benefit the chief objects of testator's affections and bounty, and should not defeat their estates merely to transfer the property to distant and unknown claimants upon some remote merely contingent event.

Simons & Simons, for respondents:

There is no doubt or question that under the dispositive part of the will, as above stated, there is: First. A life estate given in the whole to the wife. Second. A remainder to the daughter.

There can be no doubt that the daughter takes a fee simple, under the words of the will, although there are no words of perpetuity. The Act of 1824, § 1, p. 28, provides "that no words of limitation shall hereafter be necessary to convey an estate in fee simple by devise, but every gift of land, by devise, shall be considered as a gift in fee simple, unless such a construction be inconsistent with the will of the testator, expressed or implied."

There is nothing in this will which shows any intention of the testator to cut down the estate to less than a fee simple. The provision as to her dying without issue is not intended to modify the estate by the event of her death, but the devolution of the estate may be effected by the event of her death without issue; and if the provision on that subject be effective, it would be equally so whether the estate was a life estate or an estate in fee simple. If we consider the daughter to take a life estate, the provision over would be in the nature of a contingent remainder. If she take a fee simple, the provision would be in the nature of an executory devise.

If it be a contingent remainder, the life estate and the remainder together would constitute the whole fee simple, and the remainder would take effect on the efflux of the particular estate, to wit, the life estate.

If the provision operate as an executory devise, it would operate independently of the fee simple in Miss Blum and in substitution for her.

But it will not be contended by any person that the provision referred to is a contingent remainder. The estate, therefore, after the death of the testator's widow, Mrs. Blum, must be regarded as a fee simple. At this point we encounter the proposition that the fee simple, thus given, however, is rendered

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defeasible by the words *"should my daugh-

ter die without issue," in which event testator seeks to make another disposition of his estate.

The first answer to this proposition arises out of the interpretation to be put on the words "die without issue."

The testator does not intimate when his daughter's death should take place in order to make the provision of the Horlbecks and Blums effective, and that period is material. The question is to what period is her death without issue referable?

An exegesis of the sentence will show that there were only three possible periods for the death of Emma Julia without issue. The fact of her death at some time was certain: but there were two uncertainties connected with it, to wit, the time, and whether she would have issue.

These periods are:

1st. Within the testator's lifetime.

2d. Within the lifetime of her mother, the tenant for life.

3d. At any time after the death of the testator and the life tenant.

In a case like the one under consideration, Cambridge v. Rous (8 Ves., Jr., 23,) Sir Thomas Plumer, Master of the Rolls (1802) asks: "As it appears, then, that the construction is to depend upon the intention, what is most likely to have been the intention in this case?"

It will be admitted that, except in certain cases, when an absolute rule of law intervenes, the intention of the testator himself must generally be the key to the interpretation of his will. When the intention is against the law, it must be rejected; and when it is confused or inexplicable, it must either be rejected altogether or be interpreted by the rules of law.

It will be remembered that testator's wife and daughter were the two persons who, before all the world, naturally absorbed his affections. He had already given to them the whole of his estate, and he had nothing more to give, and there was no use to make any other provision to prevent his intestacy. Observe, that we are seeking the intention of the testator, which is doubtful, on account of the inartificial mode of expression employed in the paper.

Can it be supposed that with these two objects of his affection, the sole claimants of his bounty, he should have limited and restricted the gift to them in favor of classes of persons in and for whom he could not possibly

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have had either interest or affection, *and in the construction of his will contended for by the other side, who might not be born for years after his death, and would be scarcely related to him or his wife?

We can very well understand that the testator desired not to die intestate, and that, therefore, he wished to provide against intestacy. It is manifest that after his wife and child should be provided for he had no special object of his testamentary regard, for he does not specify them, but puts them all together in one general designation of "Blums and Horlbecks." He does not even give or devise, but wishes the whole estate to be divided among them.

Now, a sensible and natural inference would be, that his intention was to give his entire estate to his wife for life, and afterwards to his daughter absolutely; and then if they both should die in his lifetime, or if both survived him, and his daughter should die in his wife's lifetime without issue, then that the "Blums and Horlbecks" should, under such circumstances, divide the estate between them.

There could not be anything more unnatural and repugnant to the presumed affection of a parent tenderly attached to an only daughter, than to give her a large estate, which would require considerable expenditure annually to keep up, and yet clog the gift with such restriction that, in the language of Sir Thomas Plumer in the above cited case, the daughter would have no right to "touch a shilling or make any use of her share for her own establishment or the use of her family."

How horrible a conception it would be that the last thought of an affectionate father should be employed in so tying his bounty to an only daughter as to afflict her life by the existence of possible if not probable hopes, although unexpressed, of a hungry crowd of anxious expectants that she should die in youth, before she might be surrounded by the ties of marriage or the blessings of offspring, or, if she should marry and be a happy parent, that she might lose her children and still die orbate.

Nor is this all. If a house fell into decay or was blown down in a tempest, she could not sell any part of her property to restore what was injured; and if in the course of time the property appreciated in value, and, if converted, might realize the highest price in the market, she would still have to retain it to await the event of her death without lineal ties, when, in spite of her natural wish to dispose of her property by will, strangers

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to her person and her *affections will enter into and enjoy with higher right than hers the estate of her parent.

Indeed, we may use the paraphrase of Chancellor Dargan in Henderson v. Laurens: "Well might she say, when she asked her father for bread he gave her a stone, and when she asked for a fish he gave her a serpent."

We are not confined on this point to the argument based on the intention of the testator. We have authority which we will cite briefly.

We hold that the testator intended by the words "should my daughter die without issue," that the death should be either—

1st. Before the death of the testator; or,

2d. During the life of the first taker, Mrs. Blum.

We propose to show that the words "die without issue" should be construed to mean dying without issue within either of the above periods, and that the "wish" that the estate should be divided is alternative or substitutionary and is not a limitation.

Pressley v. Davis, 7 Rich. Eq., 105: Testator directed his estate to be equally divided among his children, and if any should die or make their exit without lawful issue, then their portions are to be equally divided among the remainder of the aforesaid children: Held, That testator meant if any should die without issue in his lifetime, then, etc.

We refer to the following authorities:

1 Roper on Legacies, Section 4, page 606, side margin: "The construction to be put upon a clause directing and limiting over a bequest 'in case of the death of the legatee,' generally: The words in which such a bequest over is expressed neither have, nor by construction have they received, a precise and definite meaning, in which they must be uniformly understood. The expression itself is incorrect, as it applies words of contingency to an event which is certain. No person can with propriety speak of death as a contingent event, which may or may not happen. When, therefore, a testator so expresses himself, the question is what he means by that inaccurate expression. He may perhaps have had some contingency in his mind, as that the legatee was dead at the time he was making his will, or might die before the testator, or before the legacy should be payable, and then the inaccuracy consists in not specifying the period to which the death was to be referred. He might have meant to speak generally of the death

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whenever it might happen, *and then the contingent or conditional words must be rejected and words of absolute signification must be introduced; and accordingly, in every instance in which these words have been used, Courts have endeavored to collect from the nature and circumstances of the bequest or the context of the will in which sense it is most likely this doubtful and ambiguous expression was employed. In treating of this subject we must distinguish between immediate bequests with a limitation over in case of the death of the legatees and when such clauses are annexed to legacies given at future periods, as after the determination of preceding estates for lives."

These authorities cover cases where the devise or legacy is "immediate but defeasible" in case of the death of the legatee.

If they do not include our case, then it must be included within a class of cases where the legacy is not immediate but in remainder after an estate for life or other special period, with a bequest over in case of the death of the legatee.—1 Roper on Legacies, 610.

In the case under discussion there is a gift for life to Mrs. Blum—remainder in fee to the daughter—then a bequest over after the remainder to Miss Blum, and it is thus brought under the class we are considering.—1 Roper, 610, 611.

But it may be objected that these cases of gift, not immediate, do not apply to Mr. Blum's will because, although in case of mediate gifts the dying is referred to the death of the person taking the preceding estate, yet the executory provision in Mr. Blum's will is not limited on the contingent words "in case of the death," but on the words "should my daughter die without issue."

These words, however, mean only in case of the death "of my daughter without issue," superadding the words without issue.

This addition does not, however, vary the effect of the words nor change their legal signification.

In Davenport v. Bischopp, (2 Younge & Collyer, 462,) the words were "depart this life without issue," which are identical with the words "die without issue."

The following is the rubric of the case:

"Testator bequeathed the residue of his personal estate after the decease of his wife upon trust to pay the interest and proceeds thereof to N for life, and after his decease the testator bequeathed the said trust money unto all the children of the said N in equal shares; and in case N should die without leaving lawful issue, the testator gave and bequeathed the said trust money unto his,

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the *testator's, nieces, M and E, to be equally divided between them, share and share alike. If either of the said nieces should depart this life without issue, then he gave and bequeathed the part or share of her so dying to the survivor of them: Held, That the words "depart this life" meant depart this life in the lifetime of either of the preceding tenants for life; consequently that E, having survived the tenants for life, took an absolute interest in one moiety of the residue, though she died without issue in the lifetime of M."

It follows from these cases: 1st. That it is a settled rule upon this subject that if a legacy be given to A, generally, "and in case of his death" to B, these expressions, unexplained by the context of the will, are to be confined to the event of death happening during the life of the testator so that if the legatee survive him the legacy will immediately vest discharged of the executory bequest to B, and parol evidence that the testator used the words in a different sense cannot be admitted.—1 Roper, 607.

And, 2d. "That where a bequest is not immediate, but in remainder, with an executory limitation 'in case of the death of the legatee,' those expressions will be applied

to the period when the remainder takes effect in possession, to wit, the death of the person taking the preceding interest."—1 Roper, 610.

And, 3d. That the addition of the words "without issue" to the terms "in case of the death of the legatee," so as to read "in case of the death of the legatee without issue," will create no difference.—Davenport v. Bischopp, 2 Younge & Collyer, 462.

It would follow, therefore, that Miss Blum having survived the testator, and also having survived her mother the tenant of the precedent interest to wit, the life estate, the remainder in fee, limited on the life estate, became absolute and indefeasible on the death of her mother.

It is thus shown that it is consistent with obvious and unrestrained reasoning on the natural intention of the testator that he designed the provision for the "Horlbecks and Blums" to be alternative or substitutionary in case his daughter should die without issue, either in his lifetime or in the lifetime of his wife.

Admitting, however, for the sake of argument, that this conclusion be erroneous, and that the provision for the "Horlbecks and Blums" was not substitutionary or alternative but was limited, to take effect at any time when the estate of Miss Blum might be defeated by her death without issue, and

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not be confined to her death *either in the lifetime of testator or of the tenant of the preceding estate, the question will then arise on the interpretation of the words "should my daughter die without issue, I wish my entire estate to be divided equally between the Horlbecks (my wife's family) and the Blums, (my family,) one-half to the Horlbecks, one-half to the Blums."

We have shown that this will contains two parts, the dispositive and the precatory.

The words "I wish my entire estate to be divided equally" is not dispositive in the connection in which they are used.

"With respect to the words necessary to create a devise, the proper and technical words are 'give and devise,' but any other words which sufficiently shew the intention of the testator to dispose of all or any part of his lands or real estate will be sufficient for that purpose."—6 Cruise Dig., Chap. 10, § 1, p. 171.

After the unqualified gift to Miss Blum of the remainder in fee, after the life estate to her mother, the mere expression of a wish that after her death without issue the property should be divided, etc., can only be regarded as a manifestation of the mental inclination of the testator.

"Words of advice, recommendation or desire do not create a devise, nor will they operate so as to raise a trust in equity, unless the property is certain and persons to whom it is given clearly described; and even in that case such words are not in general deemed imperative or legatory where they are inconsistent with the antecedent right or interest devised to that person to whom they are addressed; for in such cases the subject matter of the recommendation having been once absolutely devised away, it cannot be presumed that the testator intended to use the subsequent words of recommendation in a legatory sense, which would be to construe his will as inconsistent with itself in one and the same sentence."—6 Cruise Dig., Chap. 10, § 7, p. 172.

We thus see that the true words of devise, so as to carry an estate, are "give or devise," or other equivalent dispositive words, but that words of advice, recommendation or desire will not create a devise. In some instances such words may, however, create a trust, but under stringent rules.

Thus there are three requisites to raise such a trust:

1. If the words on the whole are sufficiently imperative.

2. If the subject be sufficiently certain.

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*3. If the objects or persons to take under the trust be also certain; not that they should be designated by name, but the context should clearly and definitely fix the persons who are to take.—Hill on Trusts, 71–75; Knight v. Knight, 3 Beav., 173, 43 Eng. Chan.; Williams v. Williams, 1 Sim., 357, 40 Eng. Chan.; Lesesne v. Witte, 5 S. C., 450.

In Knight v. Knight, we recommend particular attention to the observation of the Vice Chancellor:

"But it is not every wish or expectation which a testator may express, nor every act which he may wish his successors to do, that can or ought to be executed or enforced as a trust in this Court."

And after speaking of the difficulty of ascertaining the intention of the testator, in the great variety of expression and the liability to be mistaken as to intention, the Vice Chancellor adds: "For of late years it has been frequently admitted by Judges of great eminence that by interfering in such cases the Court has sometimes rather made a will for the testator than executed the testator's will according to his intention."

We recommend the special examination of the case of Williams v. Williams, (1 Sim., N. S., 40 Eng. Chan., 358,) which is full to the point of the certainty of the objects.

Let us inquire how these precatory words in Mr. Blum's will can operate, if at all.

The testator gave to his widow and daughter his whole estate—the entire fee simple. If the precatory words are imperative, then the trust created is to divide the property equally on the death of Miss Blum without issue among the classes of persons indicated. Where will the legal estate—the fee—reside in that event? The answer is, either in the heirs of testator or in the heirs of Miss

Blum; but it cannot be in the heirs of testator, because the fee was given and had vested in Miss Blum. It follows that the fee would be in her heirs and not in the heirs of testator.

One of the requisites, however, necessary to the execution of a trust by precatory words is that "the objects or persons intended to have the benefit of the recommendation or wish be also certain."—Knight v. Knight.

Here is a capital difficulty: Who will be "the Horlbecks, (my wife's family,)" "the Blums, (my family)"?

The Vice Chancellor, in Williams v. Williams, (above cited, page 371,) says "the word family is one of doubtful import, and may, according to the context, mean children or heirs or next of kin."

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*If this proposition be true, and it is also maintained and confirmed by many learned Judges, then one of the requisites for the trust fails in limine.

There is yet another requisite for the creating such a trust: It must be capable of going into effect within the prescribed period of limitation, that is to say, within a life or lives in being, and twenty-one years and part of a year, so that ever since the case of Forth v. Chapman (1 Pr. Will., 665,) it has been held in England and this country that as to real estate, at least, a limitation over after a general failure of issue without "any qualifying or restrictive words has always been construed to mean an indefinite failure of issue, which is too remote a contingency, and, therefore, the limitation is void."

This doctrine has been discussed, explained and confirmed in very able arguments, and in a learned note by the editor (Attorney General Bailey) in Bailey's Equity Reports, from page 40 to page 57, inclusive, to which reference is now made.

The provision for the "Horlbecks" and "Blums" may not in strictness, and with technical accuracy, be termed a limitation, but may be properly called an executory provision; but, nevertheless, such executory provision of real estate must be so made that if it depend on the failure of issue it must not be on the indefinite failure of issue, but so that the failure of issue must be within the life of the person on the contingency of whose death without leaving issue living at the time of the death the executory provision is dependent.

It is beyond all doubt that the executory provision of Mr. Blum's will would be held void, not only for uncertainty, but also for remoteness, without any the least hesitation, except for the A. A. 1853, p. 298; and it now becomes proper to make an exegesis of the Act. It is as follows:

"That whenever, in any deed or other instrument in writing, not testamentary, hereafter executed, or in any will of a testator, hereafter dying, an estate, either in real or personal property, shall be limited, to take effect on the death of any person without heirs of the body or issue, or issue of the body, or other equivalent words, such words shall not be construed to mean an indefinite failure of issue, but a failure at the time of the death of such person."

In other words, that the terms "death without heirs of the body or issue, or issue of the body," "shall be equivalent to death

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without *leaving heirs of the body or issue, or issue of the body living at the time of the death" of the first taker. Or, to simplify the proposition, (by reducing the words,) that "death without issue" shall be equivalent to "death without leaving issue living at the time of the death" of such person, in case that the executory provision be such as will declare an estate. There must be an "estate" limited.

The only possible way in which an interest could enure, under Mr. Blum's will, to the "Horlbecks" and Blums (except, as pointed out, by way of trust) would be by executory devise.

We assume this proposition as a postulate. Then it becomes proper to inquire: 1. What is an estate? 2. Is an executory devise "an estate"?

It is easier to ascertain what is not an estate, and that is more conformable to our position, that no estate is limited under Mr. Blum's will to the "Horlbecks" and the Blums.

It appears to us, in the beginning, that it cannot be held that any estate is limited to them, because the testator had but one estate, and he devised that to his wife and daughter in fee simple; there remained nothing more for him to give, and whatever was to go to the "Horlbecks" and Blums was not to go contemporaneously but in substitution for and in place of what he had designed for his wife and daughter. Without a miracle he could not have given away his whole estate in his property in one direction and at the same time have given away the same property in another direction. This would be a physical impossibility, and to hold such a proposition would be an absurdity, for the estate of the Horlbecks and "Blums," if an estate, could only be a fee, and the same fee could not be given away to different persons at the same time.

This conclusion is derived from the reasoning according to the principles of common sense, independently of the dogmas of the schoolmen and the mysteries of an antiquated logic, but we are not without authority to sustain this argument, as we will proceed to show.

Mr. Fearne shows that a similar interest, given by way of executory devise, was no estate, but a collateral or mere possibility.—Fearne Contg. Remr., top margin p. 418, side margin 419, quod vide.

See also the argument of Mr. Preston, in Goodright v. Foster, 1 Taunt., 587: "Contingent and executory interests are sometimes termed contingent and executory es-

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tates: this, however, is an *inaccurate expression." Such an interest is not such an estate as can be sold under execution.—2 Hill Ch., 240–241. That a right of the character under contemplation is not an estate, (Preston v. Estates, 64–66, ibid, p. 75,) but only a possibility, (especially Adams v. Chaplin, 2 Hill Ch., 277).

A possibility of reverter is not an estate (per O'Neall, J). If, then, there be any weight in the learning and authority of the great masters whom we have cited, we must conclude that there is no estate limited to the Horlbecks and Blums, but that they have under the will only a possibility, even although the same be coupled with an interest, and that hence the exception carved out by the statute of 1853 cannot apply to Mr. Blum's will and does not render the words "should my daughter die without issue" equivalent to "should my daughter die without issue living at the time of her death," and hence that the words of the will "die without issue" mean an indefinite failure of issue, and that the contingency on which the executory provision for the "Horlbecks and Blums" depends is too remote, and, therefore, the executory provision is void.

Pressley, Lord & Inglesby, in reply:

I. The circuit decree seems to be based on the idea that the slightest uncertainty in a will is sufficient to set it aside. The rule, however, is just the reverse.

In Pyot v. Pyot (1 Ves., 336,) Lord Hardwicke says: "A devise is never construed absolutely void for uncertainty, but from necessity."

Mr. Jarman says: "No degree of technical informality * * * will deter the judicial expositor from diligently entering upon the task of eliciting from the contents of the instrument the intention of its author, the faintest traces of which will be sought out."—1 Jarman on Wills, m. p. 315.

"In modern times, instances of testamentary gifts being rendered void for uncertainty are of less frequent occurrence than formerly, which is owing probably, in part, to the more mature state of the doctrines regulating the construction of wills, which have now assigned a determinate meaning to many words and phrases once considered vague and insensible, and in part to the more practiced skill of the Courts in applying these doctrines. Hence the student should be cautioned against yielding implicit confidence to

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many *early cases, in which a gift has been held void for uncertainty, the principle whereof has not been recognized in later times."—Ibid.

Referring to the familiar phrase, that the heir is not to be disinherited unless by express words or necessary implication, he says: "This must not be understood to imply that a greater degree of perspicuity is requisite to defeat the title of the heir to the real estate of the testator than would suffice to exclude the claim of the next of kin as the successor to the personalty."—Ibid: 2 Redfield on Wills, § 2, p. 394.

II. It was said on the circuit that the Act of 1853 is not applicable to this case because it provides only for cases in which an "estate" is limited to take effect "on the death of any person without heirs," &c., &c., and authorities were cited to show that a contingent remainder was not an "estate."

Should this argument be urged before this Court, it will be enough to say that Blackstone defines an estate in lands to be "such interest as the tenant hath therein;" and Mr. Fearne, in his work on Contingent Remainders, page 1, divides "estates," with regard to the certainty and time of the enjoyment of them, into: 1, Estates vested in possession; 2, Estates vested in interest; 3, Estates contingent, as contingent remainders and such executory devises, future uses, conditional limitations and other future interests as are referred to or made to depend on an event that is uncertain.

The Act of 1853 is a remedial Act and must receive a liberal construction. The interpretation which the appellees seek to place upon it will be tantamount to a repeal of the Act.

III. The case of Robinson v. Waddelow, (8 Simons, 134,) relied on in the argument on circuit, and in which the Vice Chancellor rejected the words "and their husbands and families" as incapable of being construed, "is expressly overruled by the case of Parkeson's Trust," (40 E. Ch., 242.) "I cannot say," says the Vice Chancellor, "that that case is quite satisfactory to my mind; but I think it is sufficient to say that the decision turned very much on the specialty of the language of the will in that case and could not govern any other case." In the case of Parkeson's Trusts it was admitted that the word "family" was a word which, standing by itself, had a fixed meaning, and the only question was whether it became incapable of interpretation when the bequest was to the "parents and their families." The Court refused to reject the words, and held that the testator meant testator's sisters and

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their *children. The case of Williams v. Williams (40 E. Ch., 357,) is cited in the decree as authority for the position that the word "family" is a word of "doubtful import." True, the Vice Chancellor expressly says so. But did he on that account reject the words and declare the bequest void? On the contrary, he examined the will carefully and came to the conclusion that, though the word "family" was one of doubt-

ful import, and might, according to the context, mean children or heirs or next of kin, in that case it was equivalent to "of your blood."

The Vice Chancellor ought, if the position taken by counsel and in the circuit decree be correct, at once to have rejected the entire bequest as uncertain without any attempt to ascertain the testator's meaning.

IV. If the word "family" be construed "next of kin," Templeton v. Walker (3 Rich. Eq., 543,) furnishes the rule as to the proportions in which they shall take.

V. As to the statements in the decree that Miss Blum desires to sell some of the property to enable her to renew and repair some of the buildings which are untenantable—that the property has depreciated in value and does not yield an adequate support to the plaintiff, we observe:

1st. That there is no evidence to sustain these allegations of the decree, and we do not admit them.

2d. That, if the facts be as stated, they would not warrant this Court in placing a construction upon the will which would not otherwise be placed upon it.

3d. That plaintiff's remedy is by proceedings for the sale of the property and reinvestment of the proceeds subject to the trusts of Mr. Blum's will.

Cooper v. Denison, 13 Sim., 390: In this case the bequest was of the income from the residue of the testator's estate for the use of his wife and maintenance of his daughter. In case the daughter survived the wife, then at wife's death to the daughter; and if daughter died before the mother, then at mother's death one-third to go according to mother's will, and two-thirds "to my other next of kin of my paternal line."

All this was in one clause of the will.

The mother survived the daughter.

The Court held that the daughter could not be called next of kin of the "paternal line."

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*Lee v. Massey, 3 DeGex, Fisher & Jones, 113: The testator had but one child—a daughter. He gave the half of his estate to his wife for life and half for the maintenance of her daughter; after the wife's death, all his estate to his daughter, provided should his daughter, Margaret Smith, die without issue, his wife surviving her, "then and in such case I bequeath such estate to my said wife for life, and after her death to my relations, share and share alike." Relations were held to mean next of kin under the Statute of Distributions.

Lord Chancellor Campbell decided that the general rule was well settled in Bullock v. Downes, and by it, but for special circumstances, the daughter would take; but it was impossible that by relations in the plural the testator could mean his only daughter, and equally impossible for him to mean that she, a single person, was to take "share and share alike." He must, therefore, mean next of kin under the statute other than the daughter.

April 23, 1878. The opinion of the Court was delivered by

HASKELL, A. J. The testator, after giving to his wife his "entire estate, real and personal, during her lifetime," continues as follows: "I wish my wife to enjoy this estate during her life; at her death to go to my daughter, Emma Julia. Should my daughter die without issue, I wish my entire estate to be divided equally among," &c. The wife is dead—the daughter is alive, "without issue." The question is, what estate does she take under the will of her father? It is admitted that by the words "at her death to go to my daughter" the "entire estate, real and personal," passes to the daughter at the death of the wife in fee. But it is contended that the estate in fee is defeasible upon the daughter dying at any time without issue. In the opinion of the Court the time of the death contemplated by the testator when he used the words "should my daughter die without issue" must be during the lifetime of the wife—the life tenant.

It is unnecessary, and, indeed, impracticable, when the amount of business before the Court is unusually great and the time at its disposal limited, to discuss those principles of law and natural reason by which the true intention of the testator in every case is to be ascertained. It is unnecessary, because in this instance the intention of the testator is derived from the application, as was said by Chancellor Wardlaw in Evans v. Godbold, (6 Rich. Eq., 39,) of settled rules of construction, framed to define the general

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intention *of testators and prevent the necessity of bringing the construction of every will into litigation;" and in this case what we regard as manifestly the actual intention of the testator is fully sustained by the rule.

In that Chaper (L) of 2 Jarman on Wills, which treats of "words referring to death, coupled with a contingency and to what period they relate," on marginal pages 693–4, the following will be found: "Where the two concurrent or alternative gifts are preceded by a life or other partial interest, or the enjoyment under them is otherwise postponed, the rule is to apply the words in question to the event of death occurring before the period of possession or distribution. In such case the original legatee, surviving that period, becomes absolutely entitled."—Da Costa v. Keir, 3 Russ., 360; Galland v. Leonard, 1 Swanst., 161; Evans v. Godbold, 6 Rich. Eq., 26; Schoppert v. Gillam, 6 Rich. Eq., 83; Anderson v. Smoot, Speers Eq., 312.

There seems, indeed, to be no real difference between the present case and that of

Vidal v. Verdier. (Speers Eq., 402,) in which the rule stated was followed. In that case there is a subsequent provision in Peter Bennett's will which is not contained in this will. It directs how the property shall go to the children of the legatee, who occupies the position of Emma Julia in this case, in the event that legatee should die leaving children; but it had nothing to do with the case, and is only alluded to by the Chancellor as corroborative of the conclusion at which he arrives upon other grounds.

The circuit decree by Chancellor Dunkin and the opinion by Chancellor Harper dispose of every question which could arise in this case. In Bennett's will the sentence upon which the question hinges is "but in case of the death of my nephew, James Felix Vidal, without his leaving a lawfully-begotten child or children," then over. In the present case the words are "should my daughter die without issue." The word "should" is subjunctive, and certainly is equivalent to the words "in the event of" or "in case of."

It is needless to discuss the questions, however, as a mere comparison will show, in a moment, the close resemblance between the wills and the direct application of all that was said in that to the present case. It was held that the gift, after the death of the wife, was an absolute gift in remainder after the estate for life; that the subsequent provisions amounted only to contingent limitations over on the death of the legatee, and that the expression must be

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con*strued to refer to the death of the legatee prior to the period when the remainder takes effect in possession, or prior to the death of the life tenant.

It is an absolute estate subject to defeasance on the happening of a particular event. That contingency had become impossible upon the death of the life tenant. And that, we think, is the right determination in the present case.

In the cases of Yates v. Mitchell [1 Rich. Eq., 265] and DeHay v. Porcher, heard together, (1 Rich. Eq., 266,) Chancellor Harper says of Vidal v. Verdier: "That case was decided upon this principle, that when a testator, giving in remainder after an estate for life, uses one set of expressions denoting that the remainderman is to take an absolute estate and another set of expressions limiting him to an estate for life with remainder to his issue, and a limitation over in the event of not having issue, this apparent repugnance may be reconciled by restricting the dying without issue to the lifetime of the tenant for life, thus permitting every part of the will to have its proper effect." If he dies during the lifetime of the tenant for life leaving issue, the issue will take as purchasers under the will; if without issue, the limitation over will have effect; but if he survives the tenant for life, the estate is absolute. Such is, in every case, a reasonable and probable intention; and in that case there were circumstances to satisfy me very fully that such was the actual intention."

By parity of reasoning the same conclusion must be attained in the case before us.

The Act of 1853 (Rev. Stat., 443,) is applicable to this case and removes any distinction which might otherwise have been made between this and that of Vidal v. Verdier. The language of the will and the circumstance that it was dictated by the testator, as it is said, in extremis, go very far to show that it was not his intention to dwarf or cripple the estate of his only child for the benefit of a class stated so generally, and, further, to show that when he had given his whole estate to his wife for life and then to his daughter, he regarded himself as having fully disposed of his estate, unless a particular contingency should occur, which he next proceeds to contemplate by providing that it should then go over to the Horlbecks one-half and to the Blums one-half—his family and his wife's family.

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*The indefiniteness of the last provision is evidence of the little importance which it had in the mind of a dying man, who had for the objects of his natural solicitude his "beloved wife" and his infant daughter. The brief language which provides for the wife and child is amplified by the Acts of 1824 and 1853 and is easily capable of construction.

The estate has passed from the trustees and is vested in the daughter. We consider that to be the final disposition contemplated by the testator in the event that his daughter survived her mother. Cœteris paribus, "the Court," as was said by the Chancellor in the circuit decree in Evans v. Godbold and by Lord Brougham in Havery v. McLauchlin, "the Court inclines to a construction which favors the early vesting of estates and against a construction which divests an estate already vested."

The judgment of the Court below is affirmed and the appeal dismissed.

WILLARD, C. J., and McIVER, A. J., concurred.

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10 S. C. 82

WALKER v. RUSSELL.

(Columbia. Nov. Term, 1877.)

[*Courts* ⇨472; *Insane Persons* ⇨70.]

The jurisdiction of the Probate Court "in cases of idiocy and lunacy and persons non compos mentis" is not exclusive, but concurrent with that of the Court of Common Pleas.

[Ed. Note.—Cited in Jordan v. Moses, 10 S. C. 434; State v. Glenn, 14 S. C. 134; Witte Bros. v. Clarke, 17 S. C. 322.

For other cases, see Courts, Cent. Dig. § 1212; Dec. Dig. ⇨472; Insane Persons, Cent. Dig. § 115; Dec. Dig. ⇨70.]

[*Insane Persons* ⇐25.]

A person found lunatic by inquisition has legal capacity to bring an action to traverse the inquisition.

[Ed. Note.—For other cases, see Insane Persons, Cent. Dig. § 32; Dec. Dig. ⇐25.]

[*Insane Persons* ⇐8.]

The Court of Probate has no jurisdiction in cases of lunacy to give relief to persons aggrieved by the inquisition by granting leave to traverse the same. Such jurisdiction is in the Court of Common Pleas.

[Ed. Note.—For other cases, see Insane Persons, Cent. Dig. § 16; Dec. Dig. ⇐8.]

Before Cooke, J., at Pickens, August, 1877.

These were two actions, one by John S. Walker against W. Walker Russell and the other by Eleanor J. Walker against same defendant.

The case is sufficiently stated in the opinion of the Court.

Norton, Keith & Hollingsworth, for appellants.

Cothran & Child, contra.

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*April 23, 1878. The opinion of the Court was delivered by

McIVER, A. J. In the case first above stated the plaintiff alleges that on the 15th of March, 1877, the defendant filed, in the Court of Probate for Pickens County, a petition praying that a writ de lunatico inquirendo might be issued to inquire into the alleged lunacy of the plaintiff; that on the 29th of March, 1877, the inquisition found that the plaintiff was a lunatic, and that on the 23d of April, 1877, the defendant was appointed committee of the plaintiff. It is also alleged that, as soon as this was done, the defendant filed a petition in the Court of Probate praying that he might be allowed, as such committee, to mortgage the real estate of the plaintiff for the purpose of raising the sum of two thousand dollars, but for what purpose the plaintiff asserts his ignorance, alleging that he stands in no need of the money. The plaintiff then avers that the finding of the inquisition is altogether untrue, as he never was at any time a person of unsound mind, but had, and still has, intelligence sufficient for the government of himself and his affairs. Upon these allegations the plaintiff demands judgment, first that he be permitted to traverse the said inquisition; second, that, in the meantime, the defendant be enjoined from borrowing money for or on the credit of the plaintiff and mortgaging plaintiff's lands for the same, and from interfering in any way with the property of the plaintiff.

The allegations and prayer of the complaint in the second case are the same in substance, except that there is no allegation as to borrowing money for this plaintiff and mortgaging her property to secure the same.

In each case the defendant files a demurrer upon the same grounds, viz.: First, that the Court has no jurisdiction of the subject of the action; second, that the plaintiff has not legal capacity to sue; third, that there is another action pending between the same parties for the same cause; fourth, that the complaint does not state facts sufficient to constitute a cause of action.

The defendant in each of the cases also gave notice of a motion to dissolve the injunction which had been granted upon the filing of the complaint.

The Circuit Judge dismissed the motions and overruled the demurrers, from which the defendant appeals. As these two cases involve the same questions, they will be considered together.

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*The question of jurisdiction will first be considered. It must be admitted that the Constitution leaves this question in some uncertainty, as its terms are not as clear as they might be. There is no doubt, however, but that the Court of Common Pleas is a Court of general jurisdiction in civil cases, while the Court of Probate is one of limited and inferior jurisdiction. Hence, according to a well-established rule of law, those who undertake to deprive the former of jurisdiction in any given case and give it to the latter must be able to point out some particular provision of the Constitution which either expressly or by necessary implication gives jurisdiction of such case to the limited and inferior tribunal to the exclusion of the superior tribunal. There is no pretense that there is any clause in the Constitution which, in express terms, gives the Probate Court exclusive jurisdiction "in cases of idiocy and lunacy and persons non compos mentis." Section 20 of Article IV does give that Court jurisdiction in such cases, but not exclusive jurisdiction. The argument, however, is, that though exclusive jurisdiction in such cases is not conferred in express terms by that Section, yet that it is by necessary implication, upon the principle announced by Butler, J., in the case of Righton v. Wood, (Dud., 167,) viz.: "Where a new forum has been created for the trial of cases that belonged to another, it has a superseding and paramount jurisdiction and thereby deprives the old tribunal of all authority." Without stopping to show that this language is nothing but an obiter dictum of the Judge who delivered the opinion of the Court, as the case turned upon another point, viz., that the Act of 1740, under which the proceeding in question was had, had been repealed by the Act of 1821, it is sufficient to say that this principle cannot be applied to the question we are considering. Here the old forum was abolished altogether, and its entire jurisdiction has been, in express terms, conferred upon another tribunal—the Court of Common Pleas—by the very same instrument by which

a portion of its jurisdiction was conferred on the Court of Probate.

The old forum, which unquestionably had jurisdiction of the matter in hand prior to the Constitution of 1868, was the Court of Equity; and by Section 16 of Article IV of that Constitution the Court of Common Pleas is invested with "jurisdiction in all matters of equity," while by Section 20 of the same Article the Court of Probate is invested with jurisdiction in some matters of equity,—amongst other things, in cases of idiocy and

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lunacy and persons *non compos mentis." The necessary inference would seem to be that while the Court of general jurisdiction —the Court of Common Pleas—was to have unlimited jurisdiction of all matters which were formerly cognizable by the Court of Equity, which was then abolished, the Court of inferior and limited jurisdiction—the Court of Probate—was to have concurrent jurisdiction in some of those matters, to wit, those which were particularly specified in the Section (20) conferring such jurisdiction. Any other view would involve a palpable inconsistency between these two Sections of the Constitution, which must, of course, if possible, be avoided. It can be easily avoided by holding the jurisdictions to be concurrent as to those matters specified in Section 20, just as it was held in Burge v. Willis, (5 S. C., 212,) that the Court of Common Pleas has concurrent jurisdiction under the Constitution in civil cases cognizable before Justices of the Peace, or as is said in Rhodes v. Railroad Company, (6 S. C., 385,) "the General Assembly having established Courts of Trial Justices and vested them with jurisdiction in actions ex delicto where the damages claimed do not exceed one hundred dollars, they have to such extent concurrent jurisdiction in suits of that character with the Circuit Court." It is argued, however, that as the jurisdiction of the Court of Chancery over idiots and lunatics had its origin, not in the powers inherent in that Court, but was a personal trust in the Lord Chancellor, especially delegated to him under the sign manual of the King, it ought not properly to be classed among 'matters of equity.'" But it must be remembered that, whatever may have been the origin of this jurisdiction, it had long before the adoption of the present Constitution come to be regarded as much within the scope of the powers exercised by the Court of Equity as cases of fraud, accident or trust; and in construing the Constitution we are bound to assume that the terms therein used were intended to be applied to the then existing condition of things, and not to a condition of things existing centuries before; that the Constitution gave to the Court of Common Pleas jurisdiction of all such matters as were then cognizable in the Court of Equity.

Again, it may be mentioned that, notwithstanding the origin of this jurisdiction in England, even there, after the custody of the lunatic was granted to some one, the Chancellor acted, in other matters relating to lunatics, not by virtue of the special warrant under the King's sign manual, but by virtue of

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the general powers *of the Court of Chancery.—2 Story Eq., § 1364; Shelf. on Lunacy, *17. And in England the petition for a writ de lunatico inquirendo was addressed to the Lord Chancellor, not as such, but as the person acting under the special warrant of the crown, (2 Story Eq., § 1365; Shelf. on Lunacy, *655,) while here such petitions have always been addressed to the Chancellor as head of the Court of Equity.

It is very obvious that this branch of the jurisdiction of the Court of Equity, as established in this State, was as well recognized as any other. The language used in the Act of 1808 (5 Stat., 571,) shows that the Legislature, as far back as that time, so regarded it; for when by that Act concurrent jurisdiction in cases of lunacy and idiocy was conferred upon the Court of Common Pleas, this language is employed: "That the Judges of the Court of Common Pleas shall be, and they are hereby, declared, in all cases of idiocy and lunacy which may hereafter occur, to be vested with jurisdiction concurrent with that exercised in like cases by the Judges of the Court of Equity, and the Judges of the several Circuit Courts of this State be, and they are hereby declared to be vested with the like power and authority which the Judges of the Court of Equity by law, or by the style, usage and practice of the Court of Equity, now have and exercise, either as to inquiring into the lunacy or idiocy of any lunatic or idiot or as to the appointment of guardians of the person or property of such lunatic or idiot, according to the usage and practice of the Court of Equity in like cases." Nor can any argument be drawn, as has been attempted, from the fact that this Act has been repealed by the General Statutes, Chapter CXLVII, page 810, for the jurisdiction having been, as we have seen, conferred upon the Court of Common Pleas by the Constitution of 1868, there was, of course, no longer any necessity for the Act, and hence it, like many other Acts which had become obsolete or unnecessary by reason of the great changes in the fundamental law, was repealed.

Again, it is argued that the words "unless otherwise provided by law," in the concluding line of Section 16 of Article IV of the Constitution, may be used to qualify the grant of jurisdiction of all matters in equity. The whole Section reads as follows: "The Court of Common Pleas shall sit in each judicial district in this State at least twice in every year, at such stated times and places as may be appointed by law. It shall have

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jurisdiction in all matters of *equity, but the Courts heretofore established for that purpose shall continue as now organized until the first day of January, one thousand eight hundred and sixty-nine, for the disposition of causes now pending therein, unless otherwise provided by law." The bare inspection of this Section must satisfy every one that to give the concluding words the qualifying effect contended for would require a forced and unnatural construction of the sentence. There is no necessity so to strain the language of the Constitution, for the only effect of giving to the Section its natural and usual construction will be to invest these two Courts—the Court of Common Pleas and the Court of Probate—with concurrent jurisdiction of several matters specified in Section 20 of this Article of the Constitution. And if, as we have seen, the Constitution gives the Court of Common Pleas concurrent jurisdiction with the Trial Justice Court, or the Court of a Justice of the Peace, in certain cases, we see no reason why the language of the Constitution should be distorted from its usual and natural construction in order to avoid giving the Court of Common Pleas concurrent jurisdiction with the Court of Probate in certain other cases.

Next, it is argued that Section 17 of Article IV of the Constitution ordains "that the General Assembly shall provide by law for the preservation of the records of the Court of Equity, and, also, for the transfer to the Court of Common Pleas and Probate Courts, for final decision, of all causes that may remain undetermined;" and that, in pursuance of this provision, the Act of 1868 (14 Stat., 10.) was passed, in which it is enacted, in Section 18, that "all suits in equity * * * shall be transferred to the Courts of Common Pleas * * * Provided, That no cause shall be transferred to the dockets of the Courts, as aforesaid, not cognizable therein under the Constitution: Provided, further, That all causes depending, as aforesaid, and the property and records pertaining thereto, cognizable under the Constitution in the Courts of Probate, shall be transferred to said Courts," and this amounts to contemporaneous construction of the Constitution in favor of the view contended for by the appellant. We do not think it should be so regarded, for the Legislature at the very same session, when they passed "an Act to define the jurisdiction and regulate the practice of Probate Courts," (14 Stat., 76,) did not undertake to declare that those Courts should have exclusive jurisdiction of cases of the kind now under consideration, but used the same terms as those employed in the Constitution.

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*The first proviso to the Act above quoted must, therefore, be regarded as relating to cases covered by Section 34 of Article IV—suits for the enforcement of contracts for the purchase of slaves: and the second as nothing more than a repetition of the words used in Section 17 of Article IV, above quoted. Nor do we see the force of the argument that Section 17, Article IV, of the Constitution would be a nullity under the construction which we have adopted; for if the two Courts have, as we believe, concurrent jurisdiction of a certain class of cases, the language used in that Section would be appropriate. The Court of Equity being abolished, the cases pending therein must be transferred to some other tribunal; those of which the Court of Common Pleas were to have exclusive jurisdiction would, of course, be transferred to that Court, while those of which the two Courts were to have concurrent jurisdiction would be transferred to the one or the other Court, as the parties controlling the causes might elect, under such regulations as should be provided by the General Assembly for the purpose—just as now, when a party has a claim within the jurisdiction of a Trial Justice he may bring his action either in that Court or in the Court of Common Pleas, as he may elect.—Burge v. Willis, Rhodes v. Railroad Company, supra. The fact that Section 21 of the Act last cited (14 Stat., 78.) gives the Court of Common Pleas appellate jurisdiction of all matters originally within the jurisdiction of the Court of Probate is not inconsistent with the idea of these two Courts having concurrent jurisdiction of certain matters; for, as we have seen, the Court of Common Pleas does have concurrent jurisdiction of certain cases with a Trial Justice's Court, and yet it is also invested with appellate jurisdiction of the same cases.—Gen. Stat., 658; Code of Procedure, § 369. And if there is no inconsistency in the one case, neither is there any in the other.

If, then, the Court of Common Pleas has jurisdiction of the case, even though it be concurrent with the Court of Probate, there would seem to be no difficulty in disposing of the other questions raised by the appellant.

As to the objection that the plaintiff has no legal capacity to sue, we are unable to see upon what ground it can be sustained. If it is based upon the ground that the plaintiff, having been found to be a lunatic, cannot bring any action except by his committee or guardian ad litem, this would be assuming as established the very point which it is the object of this action to raise. The proceeding

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by *which the plaintiff was found to be a lunatic was an ex parte proceeding, and it is very clear that both in England and in this country the application for leave to traverse an inquisition is always made in the name of the alleged lunatic.—Shelf. on Lunacy, *663; in the matter of Wendell, 1

John. Ch., 600; Medlock v. Cogburn, 1 Rich. Eq., 477.

So, too, we do not see any foundation for the objection that there is another action pending between the same parties for the same cause; for if by this reference is made to the proceedings in the Court of Probate by which the plaintiff was found to be a lunatic, that proceeding was not only not between the same parties, for the proceeding being ex parte there could be only one party, but that proceeding could scarcely be said to have been pending at the time this action was commenced. It seems to have been fully disposed of, and the Court in which it was instituted had no power and no means of taking any further action in regard to it.

Upon the return of the inquisition the only other steps which could have been taken would have been, first, to quash it for some irregularity in the finding or because it appeared on the face of it to be insufficient and award a new commission, (Ex parte Barnesley, 3 Atk., 168; Ex parte Cramner, 2 Ves., 454); or, second, the alleged lunatic might have been personally inspected and examined by the Judge, and, if he was satisfied of the soundness of the party's mind, the proceeding might have been discharged or a new commission awarded, (Ex parte Roberts, 3 Atk., 6); or, third, any person aggrieved by the finding of the inquisition might have applied for leave to traverse the inquisition, which was not a matter of discretion but a matter of right.—Ex parte Ferne, 5 Ves., 832. It does not appear that either of the two first steps were taken, and as the last could not be taken in the Court of Probate, as we shall presently see, the proceeding in that Court was at an end, the whole power of that Court having been exhausted.

Although the statute of 2d and 3d Edward VI, Chap. VIII, giving the right of traverse, has never been expressly made of force in this State, yet the practice in this State has always followed that statute, which, as Harper, Ch., says, in Medlock v. Cogburn, (supra,) was but in conformity with the principles of the common law; for as the inquisition was always regarded as an ex parte proceeding, "by the common law no one is concluded by proceedings to which he is not a party." Or,

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as is said by Dunkin, Ch., in *Keys v. Norris, 6 Rich. Eq., 390: "In reference to proceedings in lunacy, our Courts adopt the practice of Westminster Hall as it existed prior to 1721, so far as is consistent with our institutions."

In this view, the statute of 2d Edward VI, giving the right of traverse, has been held applicable, although not expressly declared to be of force in this State by any legislative enactment. By the statute of 2d and 3d Edward VI, Chap. VIII, "any person aggrieved by the inquest is authorized to traverse the finding of the jury, and this is done by an issue in the Court of King's Bench." And, after stating some points of the practice of England, he says that, according to our practice, "an issue at law seems the appropriate remedy."

Now, if as is very clear from the authorities, any person aggrieved by the finding of the inquest has a right to traverse such finding and have such traverse tried by a jury of the country, and if the Court of Probate cannot furnish the means of affording such a trial, as it manifestly cannot, inasmuch as, being a Court of limited jurisdiction, it has no powers except such as are granted, and no such powers have been granted to it, then one of two things must be the result: either the party who is aggrieved by the finding of the inquest must, in violation of Section 14, Article I, of the Constitution, be deprived of the benefit of a trial by jury in a case involving his most cherished rights, for, as Chancellor Harper well says, "all the cases on the subject regard the proceedings in lunacy as affecting in the highest degree the rights and liabilities of the citizen, as they manifestly do," or he must have access to some tribunal where that mode of trial secured to him by the Constitution can be obtained.

Now, if, as we have seen, the Court of Common Pleas is invested by the Constitution with concurrent jurisdiction in cases of lunacy, there is no reason why that Court cannot entertain a case brought, as this is for the purpose of effecting that object. In the case of Keys v. Norris, one John M. Keyes was found to be of unsound mind by an inquisition of lunacy in February, 1836. In 1838 he married, and in 1850 he died intestate, leaving issue of that marriage. Upon a bill filed by such issue, claiming to be his heirs-at-law, it was held that the finding of the inquest was not conclusive upon the issue of the marriage as to the mental incapacity of J. M. Keyes at the time the marriage took place; that they had a right to have the question of his capacity tried, and that an issue at law was the proper mode of trying it.

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*Dunkin, Ch., in delivering the opinion of the Court, uses this language:

"In the case before the Court the intestate was not concluded by the inquisition, but might at any time have traversed the same. Until a traverse had been tendered by the lunatic, the proceedings were altogether ex parte. * * * If he was not concluded, it is difficult to perceive upon what principle those claiming under him could be in a worse situation. A traverse being now impracticable for the reason stated, they are left to the ordinary mode of presenting and establishing their rights, subject only to the burthen of rebutting any prima facie inference which may arise from the inquest of February, 1836."

So here we may say that the plaintiff was not concluded by the proceedings in the Court of Probate, to which he was not a party, and, a traverse in that Court being impracticable by reason of the want of power in that Court to call to its aid the services of a jury, the plaintiff is left to the ordinary mode of asserting his rights guaranteed to him by the Constitution by an action in the Court of Common Pleas—a Court of general jurisdiction.

The fourth ground of demurrer is sufficiently disposed of by the views hereinbefore presented.

The motions in both of these cases are refused.

WILLARD, C. J., and HASKELL, A. J., concurred.

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10 S. C. 91

STACK v. RAILROAD COMPANY.

(Columbia. Nov. Term, 1877.)

[*Sales* ⇐384.]

In an action to recover damages for breach of a contract to pay for a certain amount of lumber, to be delivered by plaintiff to defendant at a certain place, the true and only measure of damages would be the difference between the contract and market price of the lumber which plaintiff tendered to defendant and which the latter refused to accept.

[Ed. Note.—Cited in Woods v. Cramer, 34 S. C. 517, 13 S. E. 660; Huguenot Mills v. Jempson & Co., 68 S. C. 367, 47 S. E. 687, 102 Am. St. Rep. 673.

For other cases, see Sales, Cent. Dig. § 1099; Dec. Dig. ⇐384.]

Before Carpenter, J., at Richland, May, 1877.

Action by William H. Stack against the Charlotte, Columbia and Augusta Railroad Company to recover damages for an alleged breach of a contract made the 29th of January, 1870, between the plaintiff, party of the first part, and defendant, party of the second part, a copy of which is as follows:

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*"That the party of the first part, for the consideration herein mentioned, covenants and agrees that he will, at his own charge and cost, deliver to the parties of the second part, at the landing of the party of the first part, situate about six and one-half (6½) miles North of Columbia, S. C., on the line of the C., C. & A. R. R., known as 'Stack's lumber yard,' one million (1,000,000) feet of lumber, to be delivered in equal proportions in the next four (4) years, at one dollar and twenty-five cents ($1.25) per hundred (100) feet for first class, and one dollar ($1.00) per hundred feet for stringers and second class, payable in sixty (60) days after month of delivery; three-fourths (¾) of the said quantity is to be twenty (20) feet and under in length, and the other one-fourth (¼) between twenty (20) and twenty-six (26) feet in length.

"The parties of the second part to 'put in' a turnout at the landing of the party of the first part and maintain it during this term, or longer if it be its pleasure, the party of the first part to furnish stringers and crossties for the construction.

"Now, in consideration of the faithful performance of the above provisions by the party of the first part, the parties of the second part promise and agree that they will pay for the same on the terms above mentioned."

The complaint further alleged:

That this plaintiff, to fulfill the terms of the said contract, incurred very great expense in the purchase of mules, wagons and other outfit necessary to such undertaking, and did on his part fulfill all and singular the covenants in said agreement contained.

That in furtherance of said agreement, and with the confident expectation that the defendant would carry out in good faith the terms of the said contract, the plaintiff discontinued all other engagements for furnishing lumber to the various contractors and builders in the city of Columbia, with whom he then did a very large business, and devoted his whole time and energy to the execution of said contract, which this plaintiff alleges was on his part fully performed.

That in the execution of the said contract this plaintiff sawed and delivered at the point on the road of the said defendants known as "Stack's lumber yard," in said agreement described, between the 12th day of February, 1870, and the 29th day of April, 1874, very large quantities of lumber, and that the de-

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fendants received thereof *about the sum of three hundred and fourteen thousand feet, for which said lumber so received from this plaintiff by the defendants the defendants paid the price stipulated in the said agreement.

And the plaintiff further alleges that after the said 29th day of April, 1874, the said defendants neglected and refused longer to fulfill and abide by the terms of the said contract, and that until that time it had failed to comply with the said contract in the following particulars:

1. That it neglected to give orders for such bills of lumber as they needed, without which the plaintiff was wholly unable to cut bills of lumber of special dimensions; and

2. They had neglected to receive such lumber as this plaintiff could, under the terms of the said contract, saw without especial order, and which he had sawed and placed at the said lumber yard ready for delivery, or to pay him therefor the price agreed upon in said contract.

That the plaintiff has ever been prepared and anxious to perform on his part the terms of the said contract, and frequently during the continuance of said contract applied to the defendants to indicate the class and di-

mensions of such lumber as they required; and in the execution of the contract on his part always kept at the said lumber yard, and ready for delivery to the said defendants, a large quantity of lumber of such dimensions as was ordinarily used by the said defendants and such as he was enabled to saw without special instructions; but that the said defendants have ever neglected and refused to order the quantity of lumber contemplated in said contract, or to receive such as was sawed by the plaintiff and delivered by him at said lumber yard, except the sum of three hundred and fourteen thousand feet, hereinbefore referred to and admitted to have been received, and has in all other respects wholly failed to perform on its part the terms of said contract, to damage of the plaintiff five thousand dollars.

The answer denied that defendants ever failed and refused to fulfill or abide by the terms of the contract.

The case is as follows:

On the part of the plaintiff, evidence was introduced to prove that he was, at the time of the contract sued on, the owner of a saw mill, in large business, near Stack's Turnout,

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about seven miles *from Columbia, on the line of the railroad of the defendants; that, upon entering into the contract, he found it necessary, in order to be at all times ready to comply with its terms, to dismiss a large portion of his regular customers and to procure large additions to his mules, wagons and other appliances; that he received orders from the defendants for three hundred and fourteen thousand feet of lumber according to the contract and promptly filled them; that he thereafter applied for other orders, according to the terms of the contract, and the defendants failed to make such orders upon him; that the defendants, having refused further to comply with the terms of the said contract, entered into contract with other persons on the line of the said railroad, and procured the like lumber from such persons, from time to time, at prices below those stipulated in the contract with the plaintiff; that making reasonable and proper estimates of the expenses of manufacturing the lumber and delivering the same at the place designated in the contract, and of the time, care, risk and responsibility which would have been expended in completing the contract, and deducting the same from the gross amount of the prices of the lumber not ordered and accepted by the defendants, the net profits thereof would have amounted to the sum of five thousand one hundred and fifty-five dollars.

On the part of the defendants, evidence was introduced to prove that during the time specified in the contract the plaintiff had delivered to the defendants and received payment for a number of feet of sawed and hewn cross-ties exceeding the number of feet specified in the contract, with the view of showing that such cross-ties were included in the contract, and that the contract had thereby been fulfilled, and that the plaintiff had, during the time embraced in the contract, furnished divers persons with large bills of lumber.

In reply, the plaintiff introduced evidence to prove that the cross-ties were bought by the piece and not by the foot, and were purchased and paid for at prices greatly different from those specified in the contract, and were not included in the contract.

The plaintiff requested the Court to charge the jury that the measure of damages is the difference between the cash of furnishing the lumber and what the plaintiff was to receive for it under the contract, making reasonable

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deductions for the less time en*gaged and for release from care, trouble, risk and responsibility attending a full execution of the contract, which was refused, and the plaintiff excepted.

The Court instructed the jury that the measure of damages was the difference between the contract price and the market price of the lumber at the time it was to be delivered to the defendants according to the contract. To which the plaintiff excepted.

The jury found a verdict for the plaintiff for the sum of seventeen hundred and fifteen dollars.

The plaintiff appealed.

Clarke, Melton & Wingate, for appellant.

Rion, contra.

April 29, 1878. The opinion of the Court was delivered by

WILLARD, C. J. This action is to recover damages for the alleged breach of the following contract between the plaintiff and the defendant, in which the plaintiff is the party of the first part and the defendants the party of the second part, namely: "That the party of the first part, for the considerations herein mentioned, covenants and agrees that he will, at his own charge and cost, deliver to the parties of the second part, at the landing of the party of the first part, situate about six and one-half (6½) miles North of Columbia, S. C., on the line of the C., C. & A. R. R., known as 'Stack's lumber yard,' one million (1,000,000) feet of lumber, to be delivered in equal proportions in next four (4) years, at one dollar and twenty-five cents ($1.25) per hundred (100) feet for first class and one dollar ($1.00) per hundred feet for stringers and second class, payable in sixty (60) days after month of delivery; three-fourths (¾) of the said quantity is to be twenty (20) feet and under in length, and the other one-fourth (¼) between twenty (20) and twenty-six (26) feet in length. The parties of the second part to 'put in' a turnout at the landing of the party of the first part and maintain it during the term, or longer, if it

be its pleasure; the party of the first part to furnish stringers and cross-ties for the construction. Now, in consideration of the faithful performance of the above provisions by the party of the first part, the parties of the second part promise and agree that they will pay for the same on the terms above mentioned."

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*The questions presented arise exclusively on a request to charge refused by the Circuit Judge and a proposition charged by the Court, both propositions relating exclusively to the measure of damages. The plaintiff's request to charge rests on the ground that the plaintiff had been prevented from performing his part of the contract by the refusal and neglect of the defendants to give orders for lumber, and that he had lost certain profits which he might have made had he not been prevented from performing his part of the contract. He therefore claimed that he was entitled to recover the contract price for that part of the lumber not delivered and accepted by the defendants, less what it would cost to produce such lumber.

The contract called for the delivery of a fixed quantity of lumber of two classes with corresponding prices. The lengths of the lumber are sufficiently given. Nothing is said about the other dimensions of the stocks nor the kind of lumber required, nor does there appear to be any question or any uncertainty in the contract in this respect; on the contrary, it appears that so far as the lumber was delivered it was accepted without question. The only contract on the part of the defendants was to pay for the lumber as delivered according to the terms of the contract. If there was no delivery, there was no obligation to pay. The defendants were not bound to supply the plaintiff with any further instructions as to the dimensions of the lumber than those which the contract afforded, and the plaintiff was not bound to adapt the lumber to the special needs of the defendants beyond compliance with terms of the contract. As it regards "cross-ties," all that the contract called for was such as were needed for the construction of the turnout.

It therefore follows that the request to charge rested on a construction of the contract at variance with the true construction, inasmuch as any right to recover in the action must rest on the amount of lumber delivered or tendered under the contract, and not on the refusal or failure of the defendants to give orders for lumber. It does not appear that the plaintiff delivered or tendered the whole amount of lumber called for by the contract, consequently the whole sum called for by the contract could not be assumed as the basis of the request to charge. The charge, as requested, would have been erroneous if made, and consequently was properly refused.

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*The next point to be considered relates to the alleged error in the charge of the Circuit Judge. The charge, as made, was " that the measure of the damages was the difference between the contract price and the market price of the lumber at the time it was to be delivered to the defendants according to the contract."

Under the view that has been presented, we cannot see how the charge can be regarded as a logical deduction from the case made by the pleadings and evidence. As it assumes important matters adversely to the defendants, and they are contented with it, there is no ground to set it aside for that reason. It assumes what would appear to be the most favorable case possible for the plaintiff under the view that we take of the contract, viz., that he had delivered or tendered actual delivery of the whole amount of lumber called for by the contract to the defendants; that they had refused to accept and pay for the lumber, and on that idea gives him the difference between the market price of the lumber and the agreed contract price. If such had been the fact, and the lumber was of a marketable character, the rule of damages would have been correct as it was laid down, and it was for the jury to say, under their ruling, whether the lumber was marketable, or, in other words, whether it had a market price.

We cannot see that any rule more favorable for the plaintiff, or equally favorable, could have been laid down, nor can we conclude that the plaintiff has been in any respect prejudiced or affected otherwise than advantageously by the ruling of the Court.

The appeal must be dismissed.

McIVER, A. J., and HASKELL, A. J., concurred.

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10 S. C. *98

*ZIMMERMAN v. AMAKER.

(Columbia. Nov. Term, 1877.)

[*Equity* ⇦190; *Waste* ⇦11.]

In an action to recover damages for waste committed upon the land by defendant as plaintiff's tenants, the answer alleged that the land was purchased by one of the defendants, and in part paid for by him for himself and his wife, and that title was to be taken in the name of the plaintiff for their benefit, and with a distinct understanding that a conveyance should be made in a manner therein set forth. The answer then prayed that the plaintiff be charged as trustee and be compelled to convey as he had agreed: *Held*, That the answer stated a good equitable defense to the action, and could not, therefore, be struck out as insufficient and irresponsive to the complaint.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 433; Dec. Dig. ⇦190; Waste, Cent. Dig. § 19; Dec. Dig. ⇦11.]

[*Pleading* ⊂⊃98.]

An objection that an answer is not responsive to the complaint cannot be taken under the Code.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 200, 201; Dec. Dig. ⊂⊃98.]

[*Pleading* ⊂⊃236.]

Applications to amend an answer before trial should, it seems, be allowed where the nature of the amendment is such as the Code permits.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 601; Dec. Dig. ⊂⊃236.]

Before Reed, J., at Orangeburg, May, 1876.

Action by Thomas H. Zimmerman against A. Perry Amaker and others, to recover damages for waste alleged to have been committed by the defendants as tenants of the plaintiff and to restrain them from the further commission of waste. The case is stated in the opinion of the Court.

The defendants appealed.

Knowlton, Izlar & Dibble, for appellants:

The Court below erred in granting the plaintiff's motion.

1. The answer of A. Perry Amaker, executor of Ann Augusta Amaker, presents a complete equitable defense to the complaint.

Subdivisions 1 and 2 of Section 172 of the Code of Procedure are in the disjunctive, and an answer is good which meets the requirements of either.

Subdivision 2 of said Section requires that the answer contain "a statement of any new matter constituting a defense or counter claim." By Section 173 of the Code it is provided that "the defendant may set forth by answer as many defenses and counter claims as he may have, whether they be such as have been heretofore denominated legal or equitable, or both."

An answer is sufficient if it constitute a defense or counter claim to so much of the complaint as it professes to answer.—McKyring v. Bull, 16 N. Y., 309; Allen v. Haskins, 5 Duer, 332.

The answer alleges facts constituting a good cause of action for specific performance, and

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it was as erroneous to dismiss the an*swer upon the pleadings as to similarly dismiss a complaint alleging a similar cause of action.—Hubbie v. Courtenay, 5 S. C., 87, and cases cited.

The answers of the infant defendants were formal, submitting their interests to the protection of the Court. Such an answer is sufficient in form and substance, is equivalent to a general denial, and entitles the infant to any and every defense which may appear upon the hearing of the case. Even though the guardian neglects to claim interests to which the infants are entitled, the Court will decree it.—Stephens v. Van Buren, 1 Paige, 479.

And where there are infant defendants the facts which entitle plaintiff to judgment must be established against them by legal proof. Neither the guardian ad litem or any other person has power to waive this proof.—Litchfield v. Burwell, 5 How. Pr., 341; Spencer v. Bank, Bail. Eq., 468.

It is erroneous to decree against infants without proof, on the admission of their guardian ad litem.—Taylor v. Parker, 1 Smith, 225.

Where an infant was a party defendant and testified against his interest at request of his codefendants, and against the advice of his guardian ad litem, his testimony was suppressed by the Court on the ground that a Court of equity is bound to protect infants against their own immature judgments and improvident conduct.—Moore v. Moore, 4 Sandf. Ch., 37.

In equity, against an infant, nothing can be admitted, but everything must be proved.—Hilt v. Ormsbee, 12 Ill., 166.

The necessity of establishing the case as stated in the pleadings is not obviated by making the infant a plaintiff.—Benson v. Wright, 4 Md. Ch. Decs., 278.

In a suit against infant defendants for the recovery of lands which have regularly descended to them, nothing will be taken as admitted, but complete proof will be required against them.—Tuttle v. Garrett, 16 Ill., 354; Cost v. Rose, 17 Ill., 276.

In equity proceedings against infants full proof is necessary, which must appear on the record, notwithstanding any answer made in the suit by the guardian ad litem.—Carr v. Fielden, 18 Ill., 77; Adams' Eq., 363; 3 Green. Ev., § 278.

The Court erred in holding that the case was not one where an amendment was allowable, and in refusing to hold that as a matter of law the Court had the power to grant the motion to amend.—Code, §§ 192-200; Bull v. Lambson, 5 S. C., 288.

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*A plaintiff is not permitted to reply to an answer, to go into Court upon the issues thus raised, and then summarily dismiss the answer and take judgment. If he considers the answer insufficient in point of law, he must demur; if he considers it sham, false or frivolous, he must move regularly for judgment, upon notice.—Code, §§ 174, 175, 270.

DeTreville, Glover & Glover, contra.

April 29, 1878. The opinion of the Court was delivered by

WILLARD, C. J. The Circuit Court struck out the answer of the defendants as "insufficient and irresponsive to the complaint." An order setting aside the order of the Circuit Court has already been entered, and it

only remains for us to state the grounds on which that order was based.

The answer was undoubtedly sufficient. The action was against the defendants as tenants of the plaintiff to recover damages for waste and contained a prayer for an injunction to stay waste. The answer alleged that the lands were purchased and in part paid for by the defendant, A. B. Amaker, for himself and his wife, and that title was to be taken in the name of the plaintiff for the benefit of the defendants, and with the distinct understanding that a conveyance should be made by the plaintiff in the manner stated in the answer. The answer prayed that the plaintiff be charged as trustee and compelled to convey as he had agreed. The cause was at issue as to the facts alleged and denied by the parties respectively.

The matter of the answer constituted an equitable defense to the action and ground for affirmative equitable relief. Such a defense is proper under the Code and cannot be stricken out.

The objection that the answer was not responsive to the complaint cannot be taken under the Code. If a defendant fails to deny any matter of fact charged by the complaint and material to the case, the only effect is that the charge of the complaint as to such matter stands admitted by answer.—Code, § 191. In this respect an answer under the Code differs from an answer to a bill in equity under the former practice, where the complainant could gain no advantage by the silence of the defendant, and, therefore, had a right to put him to his answer as to all matters alleged by the bill of complaint and material to the case.

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*As there was no ground for striking out the answer, it is not material to the present case to consider the refusal of the Court to allow an amendment; but as the course pursued by the Court was entirely inconsistent with the rule as to amendments under the Code, it should not pass unnoticed. Applications to amend before trial, made in good faith, should be allowed where the nature of the amendment is such as the Code permits. The Court in such cases cannot arbitrarily refuse the amendment, but may impose reasonable terms to compensate any injury that may result to the opposite party from the allowance of such amendment.—Ahrens v. State Bank, 3 S. C., 410.

In the present case no ground for refusing the amendment is stated. When an amendment is refused, the ground of such refusal should appear, so that this Court may judge of its sufficiency in point of law.

McIVER, A. J., and HASKELL, A. J., concurred.

10 S. C. 101

ROBERTS v. JOHNS.

(Columbia. Nov. Term, 1877.)

[*Executors and Administrators* ⇦438.]

In an action by the administrator of a distributee of an intestate against the administrator of such intestate, a distributee of the distributee is not a proper party plaintiff, the whole interest being represented by the administrator of the distributee.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1765–1785, 1790; Dec. Dig. ⇦438.]

[*Executors and Administrators* ⇦76.]

An action lies in the Court of Common Pleas by an administrator of a distributee of an intestate against the administrator of such intestate and another distributee to set aside for fraud an ex parte decree of the Judge of Probate discharging the administrator of such intestate from liability to account and praying an account against such administrator and a judgment against the defendants as for a personal liability on their part.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 336; Dec. Dig. ⇦76.]

Before Cooke, J., at Oconee, February, 1876.

Action by M. Jane Roberts, wife of John Roberts, as administratrix of John B. Johns, deceased, and Lila Johns, by guardian ad litem, against James A. Johns as administrator of James Johns, deceased, and Samuel H. Johns.

The complaint alleged and prayed:

1. James Johns, late of the then District of Pickens and State aforesaid, died, about August, 1863, intestate, seized and possessed

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*of a considerable real and personal estate, and leaving as his only distributees his three living children, Samuel H. Johns, James A. Johns and John B. Johns.

2. On the day of , A. D. 1865, James A. Johns applied for and received from W. E. Holcombe, Esq., the Ordinary of the then District of Pickens, letters of administration upon the personal estate of his father, James Johns, deceased, and possessed himself fully of the same.

3. On the day of , 1864, John B. Johns died intestate, leaving as his heirs-at-law his widow, M. Jane Johns, and one infant daughter, Lila B. Johns.

4. On the day of , A. D. 1865, M. Jane Johns applied for and received from W. E. Holcombe, Esq., the Ordinary of the then District of Pickens, letters of administration on the personal estate of John B. Johns, deceased.

5. On the day of February, A. D. 1865, James A. Johns, as administrator aforesaid, sold, under the order of the then Court of Ordinary, the personal estate of the said James Johns, upon a credit of twelve months, with interest from date, in gold or its equivalent, for the sum of three thousand eight hundred and sixty-two dol-

lars and twenty-nine cents, of which two thousand six hundred and sixty-five dollars was for negro slaves,—the administrator himself purchasing slaves to the value of thirteen hundred and sixty-five dollars.

6. On the day of , A. D. 186 , the plaintiff, then M. Jane Johns, intermarried with one John Roberts.

7. The administrator, James Johns, made three returns: The first in July, 1866, in which he charged himself with the sale bill and acknowledged himself indebted in the sum of three thousand eight hundred and eighty-three dollars and nine cents; second, in 1868, in which he acknowledged himself indebted in the sum of three thousand eight hundred and seventy-six dollars and thirteen cents; third, in 1869, in which he acknowledged an additional indebtedness of three hundred and forty-seven dollars and thirteen cents—making his net indebtedness to the estate in 1869, by his own showing, the sum of four thousand two hundred and twenty-three dollars and twenty-six cents.

8. Yet, on March the 7th, 1870, the administrator filed another paper, which he called his final return, in which, ignoring his own returns, the estate in his hands is summa-

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rily reduced to the sum of *seven hundred and sixty-nine dollars and twenty-six cents, and, adding an alleged advancement to John B. Johns of one hundred and sixteen dollars, makes the estate eight hundred and eighty-five dollars and twenty-six cents—one-third of which only is set down as the share of each of the distributees, to wit, two hundred and ninety-five dollars and eight cents; and the share due the plaintiffs, as heirs-at-law of John B. Johns, reduced by the said alleged advance, falls to the miserable pittance of one hundred and seventy-nine dollars and eight cents, which on that day the Probate Judge ordered "to be paid to Mrs. Jane Roberts and husband, John Roberts."

9. The pretense for this extraordinary reduction seems to be two-fold: 1st. An arbitration, which was had June 1, 1869, between the administrator and Samuel H. Johns, which ignored all his former returns; and, 2d, some proceeding, by which it is alleged the administrator sold the notes of the estate, including the notes taken for slaves, for a mere trifle, with which only he charged himself, neither of which pretenses can affect the rights of the plaintiffs, who object to the alleged last return and all proceedings had in relation thereto. And the notes had not been appraised doubtful or worthless.

10. As to any alleged compromise with Samuel H. Johns the plaintiffs had no connection and can no way be bound thereby. They state nothing as to that, except it seems to have been a compromise all on one side, when it was believed negro notes would not be collected.

11. In regard to the pretended sale of choses in action, the plaintiffs charge that the whole proceeding was void. It was illegal in its inception and carried out by the administrator in a fraudulent manner—sold by him for his own corrupt advantage. The petition to sell bears no date, but the order of Judge of Probate directing the sale "bears date November, 1869," when there was no law authorizing such sale. The choses were not appraised doubtful or worthless, but all the "bonds, notes, choses in action belonging to the estate, were ordered to be sold, for cash, at or near Bachelor's Retreat, on Friday, the 17th instant, after having given at least fifteen days' notice."

12. This extraordinary order was carried out by the administrator in a manner still more extraordinary. No notice as required was given of the time and place. Persons

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living at Bachelor's Re*treat did not know of the sale. No one was present at McWhorter's store when the pretended sale was made but the administrator and his friend and kinsman, Sloan Dickson. The administrator went through the form of a sale, and choses nominally worth over seven thousand dollars, and actually worth at least half that sum, were bid off by the administrator and his friend Dickson for the sum of fifty-seven dollars and ninety-two cents. The administrator himself bid off more than half of them, including his own purchases, for slaves, ($1,365,) thirteen hundred and sixty-five dollars, for four dollars and fifty-nine cents. His friend Dickson bid off the remainder. Many of these choses, including some of those bid off by Dickson, the administrator has since collected for his own benefit in full.

13. On the same day on which the extraordinary statement of account was made, to wit, March 7, 1870, before the time allowed for appeal had expired, before the statement could be examined by the parties, one of whom, Lila B. Johns, was an infant, and the other, M. Jane Roberts, a resident of the State of Georgia, and before the pittance ordered to be paid to M. Jane Roberts was paid to her, which in fact never has been paid to her, Richard Lewis, Esq., the then Judge of Probate, undertook to make, and actually did make, an order prematurely and illegally discharging and dismissing the said James A. Johns from further liability as administrator of said estate.

14. Plaintiffs, one of whom was then and still is a minor, and the other a non-resident of this State, were not summoned to said accounting and had no notice of it; and they insist the said discharge is illegal and not binding on them; that the account was ex parte and based on fraud and mistake; that the conduct of the administrator throughout was fraudulent and illegal, and especially in regard to the pretended sale of the choses in action, which, by himself or

through another, he purchased for his own benefit. And they desire that the said administrator may be required to account properly for the estate of his intestate, James Johns, deceased.

15. That the plaintiff, Lila B. Johns, is an infant, over the age of fourteen years.

16. That a Referee be appointed to state the accounts between the parties.

17. That John S. Verner, Esq., an attorney of this Court, has been appointed, by the Probate Court, guardian ad litem of the

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*infant, Lila B. Johns, to protect her rights and interest in this action.

Wherefore, plaintiff prays—

1. That the said pretended discharge, granted by the Judge of Probate, 7th March, 1870, may be set aside and declared void, as prematurely and illegally granted, and as based upon mistake and fraud.

2. That a Referee be appointed by this Court to state the accounts between the parties hereto.

3. That the conduct of the said James A. Johns, as administrator, as aforesaid, especially in regard to the sale of the choses in action, may be inquired into, that the said pretended sale may be set aside, and the said administrator required to account for the full value of the same.

4. That the said James A. Johns may be required to account for the estate which has or should have come into his hands as administrator of James Johns, deceased, and for his actings and doings generally as such administrator, or for such other and further relief as the circumstances of the case may require; and

5. For the costs of this action.

The defendant, James A. Johns, demurred upon the grounds—

1. That the complaint does not state facts sufficient to constitute a cause of action; and

2. That the Court has no jurisdiction of the subject of the action.

His honor the Circuit Judge overruled the demurrer, and the defendant appealed.

[For subsequent opinion, see 16 S. C. 171.]

Norton, for appellant.

McGowan, contra.

A brief containing the following constitutional and statutory extracts in relation to the jurisdiction of Probate Courts was filed by counsel in the cause:

The following are the existing constitutional and statutory provisions on the subject, viz.:

Constitution, Art. IV, Sec. 1: "The judicial power of the State shall be vested in a Supreme Court, in two Circuit Courts, to

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wit, a *Court of Common Pleas, having civil jurisdiction, and a Court of General Sessions, with criminal jurisdiction only, in Probate Courts and in Justices of the Peace. The General Assembly may also establish such municipal and other inferior Courts as may be deemed necessary."

Sec. 15: "The Courts of Common Pleas shall have exclusive jurisdiction in all cases of divorce, exclusive original jurisdiction in all civil cases and actions ex delicto which shall not be cognizable before Justices of the Peace, and appellate jurisdiction in all such cases as may be provided by law."

Sec. 16: "It (the Court of Common Pleas) shall have jurisdiction in all matters of equity, but the Courts heretofore established for that purpose shall continue as now organized until the first day of January, 1869, for the disposition of causes now pending therein, unless otherwise provided by law."

Sec. 17: "The General Assembly shall provide by law for the preservation of the records of the Courts of Equity, and also for the transfer to the Court of Common Pleas and Probate Courts for final decision of all causes that may remain undetermined."

Sec. 20: "A Court of Probate shall be established in each County, with jurisdiction in all matters testamentary and of administration in business appertaining to minors and the allotment of dower, in cases of idiocy and lunacy, and persons non compos mentis."

Statute 1868, page 10, Sec. 18: "All suits in equity depending in the Courts of Chancery and not finally disposed of and the property and records relating thereto on the first day of January, A. D. 1869, shall be transferred to the Courts of Common Pleas in and for their respective Counties, and shall be entered upon the dockets of said Courts for the stated term thereof next ensuing, and thereupon shall be heard, tried and determined, with all rights respected and preserved in the same manner as if originally brought there: Provided, That no cause shall be transferred to the dockets of the Courts as aforesaid not cognizable therein under the Constitution: Provided, further, That all causes depending as aforesaid and the property and records pertaining thereto cognizable under the Constitution in the Courts of Probate shall be transferred to said Courts."

September 21, 1868, Sec. 7 of an Act to define the jurisdiction and regulate the practice of Probate Courts, 14 Stat., 78: "All proceedings in relation to the settlement of

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the estate of any person *deceased shall be had in the Probate Court of the County in which his will was proved or administration of estate was granted." And Sec. 21 of the same Act: "The Circuit Court shall have appellate jurisdiction of all matters originally within the jurisdiction of the Probate Court."

14 Stat., 263, Sec. 1, March 26, 1869, providing the discharge, Rev. Stat., 189, Sec. 4:

"It shall not be lawful for any of the Judges of Probate in this State to grant a final discharge to any executor or executrix, administrator or administratrix, trustee, guardian or committee, without he, she, or they first giving public notice in some County newspaper, (if there should be no newspaper published in the County, then in some public journal having the greatest circulation therein,) for the space of at least one month, that on a day certain he, she or they will apply to the Judge of Probate for the County where his, her or their bond is filed for a final discharge: Provided, The said publication shall be tri-weekly in the cities of Charleston and Columbia."

May 11, 1878. The opinion of the Court was delivered by

WILLARD, C. J. The complaint is in the nature of a bill by the administratrix of a distributee to charge the administrator of the intestate of such distributee for losses to such distributee occasioned by fraudulent misconduct on the part of the administrator in dealing with the assets of the intestate's estate, and alleges that a decree upon the accounting purporting to be final had been taken ex parte in the Probate Court without notice to either of the plaintiffs. The administratrix joins with herself as plaintiff Lila Johns, an infant, one of the distributees of the distributee whose estate she administers, she herself being the other distributee of such estate. The infant, Lila, appears by guardian ad litem. The defendants demurred to the complaint for want of equity and to the jurisdiction of the Court. The Circuit Court overruled the demurrer, and the defendants have appealed.

We will first consider the demurrer as affecting the plaintiff Lila Johns. She was clearly an improper party. She was not a distributee of the estate of James Johns, but was entitled only as a distributee of John B. Johns, who was a distributee of the estate of James Johns; consequently her right was properly represented by the plaintiff M. Jane Roberts as administratrix of John B. Johns. It follows that no decree can be demanded by Lila Johns.

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*One of the grounds of demurrer to the complaint was that it stated no cause of action in favor of the plaintiffs against the defendants. As it regards Lila Johns, the point made by the demurrer was clearly well taken, and as to her the order overruling the demurrer is erroneous and must be set aside and the complaint as to her dismissed. Upon such dismissal the parties must pay their own costs, as it does not appear that the defendants have been subjected to either costs or inconvenience by the misjoinder of her name with that of the administratrix as parties plaintiff.

It remains to consider the demurrer as it regards the administratrix, and, for the purpose of convenience, the complaint will be treated as if brought by her alone. There is no question but that such a bill could have been brought in the Court of Chancery prior to the present Constitution as against proceedings covered by the sanction of an ex parte decree of the Ordinary, and the facts here stated, spread out upon the bill and admitted by demurrer or answer, would have entitled the plaintiff to a decree.

Has the Court of Probate exclusive jurisdiction, under the Constitution, of the matter of the controversy presented by the present complaint?

It may be conceded that the plaintiff might have applied to the Probate Court to set aside an ex parte decree, and have required the matter of the accounting of the administrator to have proceeded upon proofs and allegations to which all parties in interest, creditors or distributees, might have participated.

The effect of such a proceeding would have been to open the accounting for the benefit of all concerned, whether creditors or distributees, and to procure a reformation of the accounts and to fix the rights of the several parties in interest under such accounting.

The complaint demands an account as "between the parties," who are the plaintiff, the administratrix of a distributee, the administratrix, and S. H. Johns, charged to have had improper dealings with the administrator, who is also a distributee. What the plaintiff has sought to do is to fix a personal liability on the administrator as it regards the effect upon her rights as administratrix of his alleged fraudulent misconduct.

The plaintiff is not compelled to seek to reform the accounts as a whole, but, leaving them as they stand as affecting all other parties interested in the administration, is at liberty to charge the administrator—on the ground of fraud—with procuring an inequi-

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*table settlement as to the measure of his liability. It is competent to obtain relief in equity, as against one clothed with authority of a fiduciary character, for any injurious consequence or fraudulent conduct, and procuring prima facie evidence of discharge from responsibility under such fiduciary character is an act injurious to those interested in a full and fair accounting.

The fraud of the administrator is the proper foundation of such a jurisdiction, and the decree sought is not necessarily one tending to charge the assets of the estate as such and to subject them to a rule of distribution different from that which formed the basis of the accounting under which the discharge was granted, but may be personal as between

the plaintiffs and the administrator, the remedy being based on personal wrong and measured by the injury to the plaintiffs.

There being, then, such a remedy as that which the plaintiff has a right to demand under her complaint, the Court of Common Pleas, invested with full equity powers, has undoubted jurisdiction of it.

The Constitution (Art. IV, § 20,) gives the Probate Court "jurisdiction in all matters testamentary and of administration." Is the entertaining of such an action a "matter of administration"? Clearly not; matters of administration consist in collecting, reducing and holding personal assets, paying debts, making distribution and accounting therefor.

A personal remedy against an administrator for wrong done, by means of which distribution has taken place in a manner injurious to the plaintiffs, is a matter distinct from things done in the course of administration. Whatever is done in the course of administration necessarily affects all concerned in the results of the administration. The present question affects only the parties to the suit, and as to those it is hereby to be assumed that the plaintiff seeks the benefit of a new accounting in behalf of S. H. Johns, who is charged by her with complicity in the matters alleged.

It is clear that if the plaintiff had sought a remedy in the Probate Court it would necessarily have been of a different character from that which she has a right to claim under the complaint, and consequently there is no ground for holding that the present action is one that should have been brought in another form in the Probate Court.

The appeal must be dismissed as it regards M. J. Roberts.

McIVER, A. J., and HASKELL, A. J., concurred.

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10 S. C. *110

*RICKENBACKER v. ZIMMERMAN.

(Columbia, Nov. Term, 1877.)

[*Descent and Distribution* ⟸93.]

One of the essential elements of an advancement is, that it must be something taken by the parent out of his own estate and given to the child, or something purchased and paid for by the parent for the child.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. § 389; Dec. Dig. ⟸ 93.]

[*Descent and Distribution* ⟸95, 113.]

Where an intestate purchased and paid for a policy of insurance on his own life in the name of his daughter and for her sole benefit, and paid the annual premiums thereon until his death: *Held*, That such policy, and also the annual payments of premiums after its purchase, were advancements to the daughter.

[Ed. Note.—Cited in Heyward v. Middleton, 65 S. C. 498, 43 S. E. 956.

For other cases, see Descent and Distribution, Cent. Dig. §§ 392, 422; Dec. Dig. ⟸95, 113.]

[*Descent and Distribution* ⟸112.]

Where a policy of insurance purchased and paid for by a father in the name of his daughter is charged as an advancement to her, its value must be estimated at the time of the father's death, relation being had to its situation at the time of the gift, that is to say, at the time it was issued. Subsequent annual payments of premiums made by the father *held* to be advancements of so much money to be charged without interest during the father's lifetime.

[Ed. Note.—Cited in Wilson v. Kelly, 21 S. C. 539.

For other cases, see Descent and Distribution, Cent. Dig. § 421; Dec. Dig. ⟸112.]

Before Cooke, J., at Orangeburg, October, 1875.

Action by Thomas E. Rickenbacker, administrator of Louis H. Zimmerman, deceased, and Anna A. Zimmerman, against Ida Zimmerman, Ella Zimmerman and Cornelia Zimmerman.

The case will be sufficiently understood from the judgment of the Circuit Court and the opinion of this Court.

The judgment of the Circuit Court is as follows:

"The above entitled cause was heard before me at the October session of the Court of Common Pleas at Orangeburg.

"After hearing the pleadings, testimony and argument of counsel upon the question of law involved, I find the following as matters of fact:

"1. Lewis H. Zimmerman died at his residence, Orangeburg County, on the twelfth day of March, 1874, intestate.

"2. On April 6th, 1874, the plaintiff, Thomas E. Rickenbacker, obtained letters of administration upon the estate of said intestate, and has paid the debts, and has in hand for distribution a surplus of from $4,000 to $4,500 from the personalty, including rents and crops of 1874 and 1875.

"3. That the real estate of the intestate for distribution consists of about six hundred acres of land in Orangeburg County, described in the complaint, and is worth about $2,500.

"4. That the intestate left surviving him, as distributees of his estate, the plaintiff, Ann A. Zimmerman, his widow, and the defendants, Cornelia, aged seven years, his daughter by his first wife, and Ida, aged five years, and Ella, aged three years, his daughters by his second wife, now his widow.

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* "5. The intestate in his lifetime, on January 24, 1870, after the death of his first wife, and before his second engagement and marriage, insured his life for the sole benefit of his daughter Cornelia, his only child by his first marriage, in the Equitable Life Assurance Society, (a corporation chartered under the laws of New York,) for the sum of four thousand dollars, payable upon his death; and then and thereafter paid regularly up to the time of his death an annual pre-

mium of $99 12-100, on the twenty-fourth day of January in each year, upon the policy for said insurance, making in all five payments, aggregating four hundred and ninety-five 60-100 dollars; and on the decease of the said intestate, the general guardian of the infant Cornelia received from the Equitable Life Assurance Society the sum of four thousand one hundred and eleven 53-100 dollars, the amount of the said policy and its accumulations.

"6. About the middle of February, 1870, Lewis H. Zimmerman became engaged to, and on October 12, 1870, intermarried with, his second wife, now his widow; and of this marriage the two children, Ida and Ella, were born.

"7. The laws of New York bearing upon the contract of insurance, and the regulations and policy of the Equitable Life Assurance Society, were in evidence.

"Concerning the foregoing facts there was no dispute. The questions discussed by counsel were whether the said insurance was an advancement by the intestate to his daughter Cornelia, and, if so, the value of such advancement. On these issues I have arrived at the following conclusions of law:

"1. The policy of insurance purchased by the intestate was a substantial provision for the future support and maintenance of his daughter Cornelia, and is, therefore, an advancement, and to be so considered in the distribution of the estate of the said intestate.

"2. The value of the said advancement is the sum named in the policy of insurance, four thousand dollars, the excess over that sum paid to the general guardian of Cornelia being the earnings of said policy during her father's lifetime."

It was accordingly so ordered and adjudged.

Defendant, Cornelia Zimmerman, appealed.

Knowlton, for appellant:

First. Amounts paid for or realized under a policy of life insurance are not subject to

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the law regarding advancements. The *appellant's counsel has been unable to find a case where the contrary principle has been invoked.

Second. There is no evidence showing an advancement—that there was any gift to or payment for the appellant from the paternal estate.—Ison v. Ison, 5 Rich. Eq., 18. On the bare case, the finding that the intestate "insured his life for the sole benefit" of the appellant, does not, when connected with the statement in the policy that the premiums were paid and payable by the appellant, raise any presumption that such payments were made by the father a suis, but, on the contrary, raises the absolute legal presumption that the money paid was the daughter's.—Millspaugh v. Putnam, 16 Abb. Pr., 380; Bogert v. Morse, 1 N. Y., 377. Non constat but that, and presumably, the father did act as the daughter's agent in procuring the policy and making the first payment. And this presumption is not rebutted by the finding that the father made the subsequent payments, for the further presumption is that the original status continued.

And the finding that the father effected the insurance "for the sole benefit" of the appellant is not only preclusive of any idea of an advancement, but, under the law of New York, (where the policy was made and whose law must prevail in case of conflict with that of this State, but there is no such conflict,) which holds that the intention of the parent must prevail, (Jackson v. Malstaf, 11 Johns., 41; Proseus v. McIntyre, 5 Barb., 424.) is proof that the father intended no advancement. For the policy could not be for the sole benefit of the appellant if the father had intended that his other children should either directly or indirectly profit by it.

Third. The Court below erred in the principle fixing the valuation. At all events the appellant is chargeable with no greater amount than the premiums paid.

1. The property must be accounted for at its value when given.—1 Wash., (Va.) 224; 17 Mass., 358; 3 Pick., (Mass.) 450; 2 DeS., 127; 3 Rand., (Va.) 117, 559; 8 Ves., 51; 2 Wms. on Exrs., 1354.

The cases of McCaw v. Blewit, (2 McC. Ch., 103,) and Ison v. Ison, (5 Rich. Eq., 15,) which hold that "in ascertaining the amount of an advancement reference should be had to the description of the chattel at the time of the gift and the value of a chattel of that description at the death of the intestate," are not in conflict with this proposition. The rule established by them is in aid of those who have been advanced, and declares (Mc-

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Caw v. Blewit) *that "the increased value of the property given which arises from improvement is expressly excluded by our Act, which constitutes an important difference between it and the statute of Charles."

2. The principle of the law of advancements goes no further than that one child shall have no more than another of the paternal estate. It has no application against the profits of a pecuniary investment in a child's favor.

Izlar & Dibble, contra:

A policy of insurance on the life of a father, purchased and paid for by him out of his estate, for the benefit of an infant daughter, is an advancement.

1. It is a substantial provision for the future support and maintenance of the child.—McCaw v. Blewit, 2 McC. Ch., 102, 103; Ison v. Ison, 5 Rich. Eq., 19.

2. "An advancement is a provision made by a parent to his child, of money or property, the entire interest in which passes out of the former in his lifetime, though it is not necessary in all cases it should take ef-

fect in possession before his death."—Grey v. Grey, 22 Ala., 233, cited in 14 U. S. Ann. Dig., 15.

Policies in favor of minor children are neither purchasable nor assignable.—Regulations Eq. Life Assurance Society.

3. "It is not necessary, to constitute an advancement, that the provision should take place in the parent's lifetime. A portion secured to the child in futuro, or to commence after the father's death or upon a contingency that has happened or to arise within a reasonable time, is an advancement."—Clark v. Wilson, 27 Md., 700, 701; Edwards v. Freeman, 2 P. Wms., 436, 449; Lord Kircudbright v. Lady Kircudbright, 8 Ves., 63; Grey v. Grey, 22 Ala., 233.

The value of the advancement is the sum of $4,000, payable by the terms of the policy to the child on the death of the parent, and actually received by her guardian.

1. The Statute of Distributions of 1791 provides that the value shall be estimated "at the death of the ancestor."—Gen. Stat., Chap. LXXXV, § 7, p. 440; 5 Stat., 163.

This is more explicit than the statute of Charles II, which did not fix the time of valuation.—2 Stat., 524; Thomas v. Gage, Harp. Eq., 200.

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*2. "The value of an advancement should be estimated as of the time when the donee is put in actual possession and enjoyment of it. A conveyance of property to take effect at the death of the grantor is an advancement."—Hook v. Hook, 13 B. Mon., 526, cited in 15 U. S. Ann. Dig., 13; also cited in Clark v. Willson, 27 Md., 704.

This is very strong, for the Kentucky statute provided that "all advancements should be estimated at their value when made;" and in this case a father executed a deed of gift to children, reserving to himself a life estate, and the value was estimated at the death of the donor.—See also Wilks, Adm'r, v. Green, 14 Ala., 443; Clark v. Willson, 27 Md., 702–705; Miller's Appeal, 31 Penn., 338.

In the present case, while his infant daughter was under the age of two years, the father insured his life for her sole benefit and paid the premiums regularly till his death.

This the law presumes to be an advancement.—2 Fonbl. Eq., 121; Sampson v. Sampson, 4 S. & R., 333; Douglass v. Brice, 4 Rich. Eq., 323–326; 2 Story Eq. Jur., § 1202–1204; Creed v. Lancaster Bank, 1 Ohio State R., 10.

1. The intention of the donor may be ascertained by parol evidence and proof of facts and circumstances. In the absence of such evidence the presumption of law is favorable to equal distribution being intended.—Parks v. Parks, 19 Md., 323, cited from Md. Dig., 6; Speer v. Speer, 1 McCart. Ch., (N. J.,) 240; Dilman v. Cox, 23 Ind., 440; Autrey v. Autrey, Adm'r, 37 Ala., (N. S.,) 614; Sandford v. Sandford, 5 Lans., (N. Y.,) 493; Wilson v. Beauchamp, 44 Miss., 555.

July 1, 1878. The opinion of the Court was delivered by

McIVER, A. J. On the 24th January, 1870, the intestate insured his life for the sole benefit of his daughter Cornelia, and, having subsequently married a second time, died intestate on the 12th March, 1874, leaving as his heirs-at-law and distributees, his widow and two children of his last marriage, Ida and Ella, together with the appellant Cornelia. Under proceedings for partition and settlement of his estate two questions arose: 1. Whether such insurance was an advancement to the appellant. 2. If so, how should such advancement be valued. The Circuit Judge held that the insurance was an advancement, and that the value of the advancement was the sum named in the policy and received by the guardian of appellant. From this decision the appeal is taken.

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*In the absence of any direct authority upon these points, these questions must be determined upon the general principles regulating the law in respect to advancements, aided by such analogies as may be afforded by the decided cases.

In 1 Bouv. Law Dic., 76, the term advancement is defined to be "that which is given by a father to his child or presumptive heir by anticipation of what he might inherit." In McCaw v. Blewit, (2 McC. Eq. 91,) the leading case on the subject of advancements in this State, no definition of the term is given in the decision of the Court of Appeals, but in the circuit decree it is defined to be "such a part of a man's estate as he gives to a child on marriage, or on setting out in life, which may be necessary for its settling in the world."

In the argument of this case the counsel for the appellant, who afterwards became one of the most eminent Chancellors of this State, questions the correctness of this definition, and says: "If a definition may be ventured, an advancement is the gift of a parent to a child beyond what by law he is bound to provide, from which a substantial benefit is to be derived by the child."

But, after long experience on the bench, this distinguished Judge seems to have reached the conclusion that it was not an easy matter to frame an accurate definition of the term.—Murrell v. Murrell, 2 Strob. Eq., 151 [49 Am. Dec. 664]. While, however, it is a difficult matter to frame such a definition as will cover every possible case, there are certain essential elements which every advancement must possess, one of which is that it must once have been a part of the ancestor's estate, which, upon his death, would descend to his heirs but for the fact that it has, by the act of the ancestor in making the gift, been separated from or tak-

en out of his estate, or it must be something which is purchased with the funds of the father in the name and for the benefit of the child.

This is obvious from the very terms of our Act of 1791, (corresponding with the terms of Section 7, Chapter LXXXV, General Stat., p. 440,) as construed by the case of McCaw v. Blewit, supra; and, as Johnston, Ch., says in Ison v. Ison, (5 Rich. Eq., 19,) "an advancement always embraces the idea that the parent has parted from his title in the subject advanced." Even the case of Clark v. Wilson, (27 Md., 693,) which is much relied on by the respondents, recognizes this idea, for in that case it is said: "An advancement is a giving by anticipation the whole or a

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part of what it is *supposed a child will be entitled to on the death of the party making it and intestate," evidently implying that it must be a part of the ancestor's estate of which the child would be entitled to inherit a part in case of intestacy. So, too, in Miller's appeal, (31 Penn., 338,) an advancement is said to be "a pure and irrevocable gift by a parent, in his lifetime, to his child, on account of such child's share of the estate after the parent's decease." And in Dilman v. Cox, (23 Ind., 442,) it is said: "The true notion of an advancement is a giving by anticipation the whole or a part of what it is supposed a child will be entitled to on the death of the parent or party making the advancement."

If, then, one of the distinguishing features of an advancement is that it must once have been a part of the ancestor's estate, which, but for the gift by way of advancement, would descend to his heirs, the next question to be considered is whether this policy of insurance or the money secured by it ever constituted any portion of the intestate's estate. The finding of fact by the Circuit Judge is that "the intestate in his lifetime * * * insured his life for the sole benefit of his daughter, Cornelia, * * * for the sum of four thousand dollars, payable upon his death, and then and thereafter paid regularly up to the time of his death an annual premium of ninety-nine 12–100 dollars," &c.

The policy recites that the first premium was paid by the said Cornelia, and upon what evidence, if any, the Circuit Judge based his finding contradictory of this recital does not appear. Assuming, however, as we must do, the correctness of the finding of the Circuit Judge, inasmuch as in the case agreed upon he says, after stating the facts as found by him, that "concerning the foregoing facts there was no dispute," the inquiry is whether this policy or the money secured by it ever constituted any part of the intestate's estate which, in any event, could have descended to and become distributable amongst his heirs and distributees, or which he could, by his will, have given to one or more of them. The authorities leave us in no doubt upon this point.

In Bliss on Life Insurance, (§ 317,) it is said the rule is "that a policy and the money to become due under it belong, the moment it is issued, to the person or persons named in it as the beneficiary or beneficiaries, and that there is no power in the person procuring the insurance, by any act of his or hers, by deed or by will, to transfer to any other person the interest of the person named."

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Again, *at Section 328, the writer says: "Payment of the premium without any contract with the person entitled to the benefit of the policy gives no title to it." And, again, at Section 339, it is said: "Where the policy designates a person to whom the insurance money is to be paid, the person who procures the insurance and who continues to pay the premiums has no authority, by will or deed, to change the designation or title to the money. He is under no obligation to continue to pay the premiums unless he has covenanted so to do; but if he does so, the person originally designated in the policy will derive the benefit."

To the same effect, see May on Insurance, p. 447, § 392.

The cases which were principally relied upon by the respondents do not, in our opinion, conflict with these views. The case of Edwards v. Freeman, (2 P. Wms., 435,) was this: Richard Freeman, in contemplation of marriage with his first wife, Elizabeth, by articles, covenanted with the father of Elizabeth, in consideration of the marriage and of a marriage portion of £5,000, to settle certain lands to the use of himself for life, remainder to said Elizabeth, remainder to his first and other sons in tail male successively, remainder to trustees for five hundred years to raise portions for the daughters of the marriage, payable at eighteen or marriage, and to raise maintenance for such daughters, until their portions became payable, of £80 per annum. The marriage having been consummated and the only issue being one daughter, and Elizabeth dying, Richard Freeman married again and died intestate, leaving a widow and two children of the last marriage and the daughter of the first marriage. The question was whether the provision for the daughter of the first marriage could be regarded as an advancement: Held, that the £5,000 portion was an advancement, but not the annual provision for maintenance. The difference between that case and the one now before the Court is, that there the gift was of a portion of the intestate's estate, while here the sum of money secured by the policy never did constitute any part of the intestate's estate. For, as the Master of the Rolls says in that case, "the present case comes nearer to land than if it had been a charge out of land; for the trust of

the five hundred years' term being only to raise this £5,000 portion, and the plaintiff, Mary Edwards, being the person who is alone entitled to it, she, as to this purpose, is, in effect, the owner of the five hundred years' term."

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*It was, therefore, practically a gift to the daughter of a lease for five hundred years of the lands specified; that is, it was a gift of a portion of the intestate's estate. Kircudbright v. Kircudbright (8 Ves., 51,) was a case in which a father gave a bond to his son to secure the payment of a certain annuity until his son should be in possession of a living of a certain annual value, and by an agreement of the same date the son covenanted that he would forthwith enter into holy orders and accept such living. The father paid the annuity regularly for nine years, but the son failed to take orders and qualify himself for a living, and upon the death of the father intestate the question arose whether this annuity could be regarded as an advancement, and, if so, at what value it should be charged.

Lord Eldon, after expressing some doubt as to the legality of the transaction as being contrary to public policy, decided that, the son having failed to comply with the condition for nine years, the annuity was determinable by the father or his representatives, and that, while it should be regarded as an advancement, it was a very doubtful question as to how it should be valued, and, finally, gave the son the option to have it valued at the date of the grant or to estimate its value by the amount of the payments made under it. Besides, the fact that the very doubtful terms in which this decision was made deprives this case of much of the weight which it would otherwise possess; it may be remarked that here, too, the advancement was, practically, of a portion of the intestate's estate—the annuity being a charge upon that estate. It was also held in this case that a commission in the army, which the father had purchased for another son, was an advancement, to be valued at the sum paid for it, of which we will speak hereafter.

If, then, this policy of insurance never constituted any part of the estate of the intestate, the next inquiry is, was it something purchased for the child with the funds of the father, and, if so, how and when is its value to be estimated. Assuming that the finding of fact by the Circuit Judge is correct, then it follows that this policy of insurance does possess this distinguishing feature of an advancement, viz., that it was a thing purchased with the funds of the father in the name and for the benefit of the child. The thing purchased being the policy of insurance, and the purchase having been made and the gift completed the moment it was issued, as we have seen above, that is as soon as the first premium was paid, the only remaining in-

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quiry is how and when is its value to be *ascertained. Our Act of 1791, differing in this respect from the statute of 22 and 23 Charles II, fixes this beyond dispute by declaring that such value shall be "estimated at the death of the ancestor, but so as that neither the improvement of the real estate by such child or children nor the increase of the personal property shall be taken into the computation," or, as it is stated in the leading case of McCaw v. Blewit, supra, in order to ascertain the amount at which an advancement is to be charged, it "is to be estimated at what it is worth at the time of the death, relation being had to its situation at the time of the gift." The advancement or thing given being the policy of insurance, and the time of the gift being the moment it was issued, to ascertain its value, according to the rule established by our statute as construed by our Courts, the inquiry is, not what it cost, as was held in Kircudbright v. Kircudbright, under the English statute, in reference to the commission in the army, because that is not in accordance with the rule as established by our statute, for, as is said by Johnston, Ch., in Cooner v. May, (3 Strob. Eq., 189,) "it is not the sum expended, but the thing which is bought with it—the thing received by the child—which constitutes the advancement; nor is the cost of the purchase the measure of the value of the thing advanced;" but the inquiry is, what a policy for a like amount, upon which the first premium had been paid, on the life of a person, with like expectation of life and of the same age as the father of appellant was when this policy was issued, be worth on the 12th March, 1874, the date of intestate's death?

It is true that it is stated that by one of the regulations of the company issuing this policy a policy drawn in favor of a minor child, as this was, is "neither purchasable nor assignable." But without stopping to inquire whether such a regulation, not incorporated in or forming a part of the policy, which is the contract between the parties, could abridge the rights of the holder of the policy, it is sufficient to say that the inquiry should be what would such a policy be worth at the date of the death of the intestate in the condition in which this one was at the time when it was issued, that being the time when the gift was made. If, however, from any cause, it should appear to be of no value, then the result would be that it was no advancement.

The question as to the payment by the father of the premiums subsequent to the first presents more difficulty; but we are inclined

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*to regard them as advancements of so much money: like the case of a father who, after having given his child a piece of property—a residence, for example,—expends consider-

able sums of money from year to year in making improvements or additions to the buildings. In such a case, the thing given is the money expended; and while it is true that ordinarily the sum expended does not furnish the rule for estimating the value of an advancement, yet where, as in this case, the thing given is money, there is no other mode of estimating its value except by the amount given.

The suggestion in the argument of respondents that the premiums paid might exceed the amount received on the policy, or that the whole might be lost by the failure of the insurance company, loses all its force in view of the decisions holding that the child is chargeable with the value of the advancement even though the thing constituting the advancement had ceased to be property before the settlement is made, as in cases of advancements in slaves.—Manning [v. Manning] 12 Rich. Eq., 410; McLure v. Steele, 14 Rich. Eq., 115.

So that we think the advancement in this case was, first the policy of insurance, the value of which is to be ascertained in the manner above indicated, that being the thing which was purchased with the first premium, and that all subsequent premiums were advancements of so much money, which, of course, will bear no interest except from the time of the death of the intestate.

The authorities relied upon to show that the true value of the advancement in this case was the amount of money received by the child do not, in our opinion, sustain such a position, inasmuch as these cases are from States where the Statutes of Distributions are not like ours, and the decisions were made to turn upon the phraseology of the respective statutes.

In Clark v. Wilson, (27 Md., 693,) a father made a deed of trust of certain lands for the benefit of his children of the first marriage, reserving a life estate to himself. The questions were, first, whether the property conveyed by the deed of trust was an advancement, and, second, if so, whether it should be valued at the date of the deed or at the date of the father's death. It was held that the property was an advancement and that it should be valued at the date of the father's death, when the life estate fell in and the remainder took effect, or when the children received possession of the property.

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*The case turned upon the language of the Maryland statutes: "The value thereof at the time such advancement was received"—the Court construing those words to mean when the property actually goes into possession of the child.

The case of Wilkes v. Green (14 Ala., 443,) was this: A father made a deed of slaves to his children, reserving a life estate to himself, and the same questions arose. The Court, basing its decision upon the language of the Alabama statute, which provides that the value of the property constituting the advancement shall be fixed "at the time it was delivered," held that the children were chargeable with the value of the property at the time they came to the actual possession of it.

In Hook v. Hook, (13 B. Monroe, 528,) a father conveyed to certain of his children certain lands and slaves, reserving a life estate to himself. The Kentucky statute provided that "all advancements should be estimated at their value when made," and the Court held that the advancement should be deemed to have been made at the time the advancement is "made complete by the actual possession and enjoyment of it." These cases, besides resting upon the particular phraseology of the several statutes of the several States in which they were decided, differ materially from the one now before the Court. In each of them the property constituting the advancement was a part of the father's estate and continued in his use and enjoyment and under his control up to the time of his death, while in the case now under consideration the policy of insurance was never a part of the father's estate and was never in his own use or under his control. The case of Meadors v. Meadors (11 Iredell, 148,) is likewise relied upon. That case, however, turned upon the special provisions of the North Carolina statute and throws no light upon the questions we are considering. Many of the cases from other States cited in the argument hold that the question of advancement is one of intention, but such does not seem to be the rule in this State.

In Rees v. Rees, (11 Rich. Eq., 86,) it was held that whether property given by a parent to a child shall be considered as an advancement is not a question of intention. It is very true that what is or is not an advancement may depend upon the circumstances or condition of the parties, as in McCaw v. Blewit, 2 McC. Eq., 91; Murrell v. Murrell, 2 Strob. Eq., 148, and Ison v. Ison, 5 Rich. Eq., 15; "but the mere dec-

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larations of the donor cannot alter the *operation of the law either as to the character of the gift or even the mode of valuation."

The judgment of the Circuit Court, in so far as it conflicts with the principles herein announced, is set aside and the cause remanded for further proceedings in accordance with the principles herein established.

WILLARD, C. J., and HASKELL, A. J., concurred.

10 S. C. 122

SULLIVAN v. BYRNE.

(Columbia. Nov. Term, 1877.)

[*Contracts* ⟸289.]

In an action by the builder on a building contract, a stipulation therein that the installments should be "paid only on the approval of the architects and their written order:" *Held* not to mean that "the approval of the architects, under their written order," was essential to the plaintiff's right of recovery; but that if he could show that the written order had been unreasonably withheld, and that the work had been done in a workmanlike manner, and substantially according to the contract, he would be entitled to recover.

[Ed. Note.—Cited in Sullivan v. Susong & Co., 30 S. C. 323, 9 S. E. 156; Greenville-Carolina Power Co. v. United States Fidelity & Guaranty Co., 83 S. C. 100, 64 S. E. 518, 964.

For other cases, see Contracts, Cent. Dig. § 1310; Dec. Dig. ⟸289.]

[*Pleading* ⟸139.]

An independent counter claim, not pleaded as such, cannot be proved at the trial.

[Ed. Note.—Cited in McGee v. Wells, 37 S. C. 367, 16 S. E. 29.

For other cases, see Pleading, Cent. Dig. § 287; Dec. Dig. ⟸139.]

Before Reed, J., at Charleston, March Term, 1876.

Action by D. A. J. Sullivan against William Byrne.

The case is as follows:

On March 8th, 1875, the plaintiff and defendant made a contract as follows:

"Memorandum of agreement made this eighth day of March, one thousand eight hundred and seventy-five, between William Byrne, Esq., of the first part, and D. A. J. Sullivan, builder, of Charleston, State aforesaid.

"The said party of the second part covenants and agrees, to and with the said party of the first part, to make, erect, build and finish, in a good, substantial and workmanlike manner, on the lot belonging to the party of the first part, and known as number —— King street, in the city of Charleston, State aforesaid, a building, agreeable to the plans and specifications furnished by Abrahams & Seyle, architects.

"And the said party of the first part covenants and agrees to pay unto the said party of the second part the sum of six thousand

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dol*lars (less value of bricks furnished) in the following sums and manner, viz.:

"First installment. Three hundred dollars when the first story joists are on.

"Second installment. Six hundred dollars when the second story joists are on.

"Third installment. Seven hundred dollars when the third story joists are on. One-half the value of bricks to be deducted out of this installment.

"Fourth installment. Seven hundred dollars when the roof is tinned. The balance due on bricks to be deducted from this installment.

"Fifth installment. Five hundred dollars when the piazza work is up and roof tinned.

"Sixth installment. Seven hundred dollars, bond and mortgage, when floors are all laid.

"Seventh installment. Five hundred dollars when the building is furred, partitions put up and all trimmings are put up.

"Eighth installment. Three hundred dollars when the building has two coats of brown mortar on.

"Ninth installment. Three hundred dollars when the sash and blinds and front of building is finished and white coat of plastering put on.

"Tenth installment. Fourteen hundred dollars, by note at ninety days, when the building is finished and keys turned over to the architects. All the said installments to be paid only on the approval of the architects of the building, Messrs. Abrahams & Seyle, and under their written order.

"And the party of the second part further covenants and agrees, to and with the party of the first part, to complete and finish the said building in accordance with this contract and the plans and specifications referred to and incorporated herein, on or before July 1st, A. D. 1875, and upon said completion to return the plans to the architects, Abrahams & Seyle."

The complaint alleged:

"That on said contract there is due the plaintiff by defendant $1,151.07. That plaintiff has demanded said sum from defendant, but defendant has refused to pay same except upon written order of Abrahams & Seyle. Plaintiff avers that he has applied

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for said *order, and they have wrongfully, and without reasonable cause or excuse, refused to give the same, and that performance by plaintiff of so much of said contract as requires production of such order has been prevented by action of defendant and his agents, Abrahams & Seyle.

"Second cause of action sets out extra work, amounting to $223, and plaintiff asks judgment for $1,374.07, with interest from 29th November, 1875, and costs."

Answer filed 10th February, 1876, admits contract, also payments set out in complaint, and extra work, and denies every other allegation, and sets up as a defense that building was unfinished according to plans and specifications; that property was not turned over so as to allow defendant the opportunity of completing the same; that under terms of agreement installments were to be paid on order of architects and when work was approved; that architects considered building incomplete, and that it would require at least $1,000 to finish building according to plans and specifications; that

building was not completed on 1st July, 1875, and sets up a counter claim for $1,500 damages on account of plaintiff's failure to perform his contract.

For the plaintiff, testimony was given tending to show that he had finished the building substantially according to the plans and specifications of the contract; that all the installments, except the tenth, had been paid, most of them on the written orders of the architects; that he had demanded of the architects a written order for the amount of the tenth installment, and that they had refused to give said order, and that such refusal was owing to the interference of the defendant.

Testimony in behalf of defendant was given tending to show that the building was not done entirely in accordance with the specifications; and defendant also offered to prove that between March, 1875, and February, 1876, he had furnished the plaintiff with groceries to the amount of $120. This testimony was ruled out by the Court, and the defendant excepted.

The defendant's counsel requested the Court to charge as follows:

1. That under the contract and specifications, the contract being the law of the case, the order of the architects must first be produced before the plaintiff can recover.

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*2. That having voluntarily assumed the obligations and the risk of the contract, plaintiff's legal rights are to be ascertained and determined solely according to its provisions.

3. That when the final payment for the work was to be made when it was completed, and the certificate to that effect obtained, the plaintiff is as much bound by this part of his contract as any other, and he cannot withdraw the decision of this question from them and refer it to a legal tribunal.

4. That under the contract the architects are the arbitrators between the parties, and that both parties are bound by his decision, except in case of fraud.

The request was denied, and the defendant excepted.

His Honor charged the jury:

"That the architects were the agents of the defendant; that they were not arbitrators in the legal sense of the term, and, therefore, I might as well say at once, I decline to charge as asked by the counsel for the defense. The architects were the agents of the defendant, appointed to superintend the work as it went on, and it was agreed that the money should be paid upon their orders to the plaintiff.

"That the plaintiff must satisfy you that he has complied substantially with his contract—that he has built the house according to the specifications—and that defendant has improperly and unreasonably refused to give him the certificate for the last installment or pay him his money. If he has thus satisfied you, he is entitled to recover the amount claimed at your hands. But failing, you will make such deductions from his claim as defendant is entitled to and find your verdict for the balance due; or if he has failed to make out his right to anything, then your verdict will be for defendant.

"The defense has set up a counter claim; they insist that they have not only paid all that plaintiff is entitled to, but that they should recover damages against him for $1,500, and, certainly, not less than $105. The architect, Mr. Abrahams, thinks, as he testified, that it would cost one thousand dollars to finish the building according to the specifications, and it has also been proved that a rental value of $60 per month has been lost to the defendant from the day on which the house should have been in his possession. In

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*that way the amount claimed by defendant for damages exceeds plaintiff's claim by $105.

"With regard to the rent, you have heard it argued that there was no reason why defendant should not have taken possession of the house and used it, which would have precluded this claim on his part."

The jury found for the plaintiff $1,209.07.

The defendant moved for a new trial on the ground:

I. That the Judge erred in refusing to charge, as requested by the defendant's counsel.

II. That His Honor erred in excluding testimony of the account of defendant, William Byrne, against the plaintiff, since November 18th, 1875.

III. That the verdict of the jury, even admitting that the plaintiff was entitled to recover, should have excluded the sum of one thousand dollars, which the architect testified it would require to put the building in the condition required by the contract, and also should have excluded the amount of rent, to which the defendant was entitled, from July, 1875, to March, 1876, by reason of the failure of the plaintiff to complete his contract under the terms of the same.

IV. That the verdict of the jury was contrary to the law and the evidence.

The motion was denied, and the defendant appealed.

Cohen, for appellant.
Conner, contra.

July 1, 1878. The opinion of the Court was delivered by

McIVER, A. J. This action was brought upon a written contract for the erection of a building "in a good, substantial and workmanlike manner," to be paid for by installments as the work progressed. The main question in the case is whether the certificate of the architects was essential to entitle the plaintiff to recover the balance of the

last installment. The clause of the contract upon which the question is raised is in the following words: "All the said installments to be paid only on the approval of the archi-

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tects *of the building, Messrs. Abrahams & Seyle, and under their written order."

While it is very true that parties competent to contract may make such terms as they see fit, and will be held to the performance of the contract according to such terms, it is equally true that, in determining questions of this kind, we are to look not merely at the naked words of the contract, but at their real meaning, reading them in the light of common sense, common experience and common justice. The essential thing to be done, under this contract, was to construct the house in a good, substantial and workmanlike manner, in conformity to the plans and specifications furnished by the architects, and, when the object desired was attained, common sense and common justice demand that the party should be required to pay the price agreed to be paid for such object. Such must be regarded as the real intention of the contracting parties. The certificate of the architects may be, and doubtless is in most cases, a very proper means of ascertaining whether such desired object has been attained; but to say that it is the only means of ascertaining that fact is inconsistent with the plainest dictates of justice and common honesty, does not accord with the experience of mankind, and is not sustained by the authority of adjudicated cases.

It must be, and is, admitted that the certificate of the architect is not indispensable in every case under such a contract, for in case of the death or other disability of the architect it is conceded that it may be dispensed with. So, too, if through fraud or mistake the certificate is withheld, it is not essential to a recovery that such certificate should be produced. Or if, as the Circuit Judge charged the jury, the architects improperly and unjustly refused the certificate, this would be sufficient to dispense with the necessity for producing the certificate; and this charge was peculiarly applicable in this case, in which there was some evidence tending to show that the architects were willing to give the certificate but were deterred from so doing by the defendant.

These views, we think, are sustained by the authorities. Thomas v. Fleury (26 N. Y. Rep., 26,) was very much like the case now under consideration. It was an action on a building contract to recover the amount of the last installment.

By the terms of the contract the last installment was to be paid on the completion of the work; the building was to be erected and furnished according to the plans and

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specifications furnished by the *architect and annexed to the contract, and the work was to be done in a workmanlike and substantial manner to the satisfaction and under the direction of the architect, to be certified by a writing or certificate under his hand. The contract further provided that the installments, at different stages of the work, were to be payable in each case on a certificate signed by the architect. The Referee found that the work was performed according to the terms of the agreement, although he subsequently found that the plaintiff had omitted certain items required by the contract, amounting in value to about thirty dollars, which sum he allowed to the defendant. The Judge, in delivering the opinion of the Court, says, in reference to these apparently inconsistent findings: "This was contradictory to the previous finding, and is only to be reconciled on the theory that the Referee deemed these omitted items so trivial and insignificant as to justify the finding that the contract had been substantially performed. This was the view taken by the Supreme Court, and I think the just one."

The question there, as here, was whether the certificate of the architect was essential to a recovery, and it was held that "the architect was the defendant's agent, and if he unreasonably and in bad faith refused the certificate the plaintiff is not to be held responsible, but he may establish his right to recover by other evidence. The certificate is mere evidence of the substantial fact of performance, and if the kind of evidence of the fact stipulated for is obstinately and unreasonably withheld a forfeiture of $2,700 is not to be exacted for that reason from the plaintiff." It is observable that the report of this case, although apparently giving the facts fully, together with the findings of the Referee, does not show any fact or circumstance indicating fraudulent collusion between the defendant and the architect or bad faith upon the part of the latter; the finding of fact by the Referee being simply "that the plaintiff applied for the architect's certificate, as required by the contract, and he refused to give it."

The principal authority relied upon by the appellant (Smith v. Brady, 17 N. Y. Rep., 173,) does not, in our opinion, sustain his position, for even that case apparently recognizes the correctness of the rule which was applied by the Circuit Judge in this case.

In that case "it was not pretended that the plaintiff ever made an effort to procure the certificate," and in the opinion of the Court this language is used: "Had it been shown

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by the plaintiff that he *had made application to the architects for the requisite certificate, and that they had obstinately and unreasonably refused to certify, it might have been proper, perhaps, for the plaintiff to establish his right by other evidence," referring to the case of the United States v. Robeson, (9 Pet., 319,) in which the question arose up-

on a claim for the transportation of troops, with their baggage and stores, under a written contract, which contained a provision that the amount agreed upon should be paid upon the certificate of the commanding officer that the service had been performed. McLean, J., delivering the opinion of the Court, says: "It does not appear that any excuse was offered why these certificates were not procured, and the question is whether the claimant, at his option, can establish his claim by other evidence. * * * Where the parties, in their contract, fix on a certain mode by which the amount to be paid shall be ascertained, as in the present case, the party that seeks an enforcement of the agreement must show that he has done everything on his part which could be done to carry it into effect. * * * Had the defendant proved that application had been made to the commanding officer for the proper certificates, and that he refused to give them, it would have been proper to receive other evidence to establish the claim."

We think, therefore, that the Circuit Judge was correct in charging the jury that "to entitle the plaintiff to recover he must satisfy you that he has completed the job which he undertook to do substantially, according to the contract he entered into, and that, having thus completed it and offered to turn it over to the defendant, or to the architects, he was improperly and unjustly refused the certificates and payment to which he was entitled;" and that he committed no error in refusing to charge, as requested, either that the certificate of the architects must first be produced before the plaintiff could recover, or that the architects were the arbitrators between the parties, whose decision should be final.

On the contrary, the architects were the agents of the defendant, employed by him to superintend and direct work for him, which required skill that he did not possess, and, using the language of the Court in Thomas v. Fleury, supra, to defeat "a recovery upon the facts found and developed in the case, because of the non-production of the architects' certificate, would be manifestly unjust "to the plaintiff and a reproach to the law."

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*The second ground of exception is sufficiently disposed of by the remark that the items of account therein referred to were not connected with the contract upon which the action was brought, and, not having been pleaded as a counter claim, any evidence in support of such items was clearly inadmissible. As to the matters referred to in the third exception, they were properly for the consideration of the jury, and, having been submitted to them with proper instructions, their verdict must be regarded as conclusive.

The last exception, based upon a remark of the Circuit Judge indicating his opinion as to the amount for which the jury ought to have rendered their verdict, is disposed of by the decision of this Court in the case of Brickman v. The South Carolina Railroad Company [8 S. C. 173], filed 12th July, 1876. It by no means follows that because a Circuit Judge differs with a jury as to the amount of damages to which a party may be entitled there should be a new trial.

The judgment of the Circuit Court is affirmed.

HASKELL, A. J., concurred.

WILLARD, C. J. I concur in the conclusions already stated. The present case appears to me to be free from difficulties that have surrounded many cases of this class. The inclination of the Courts has always been to hold that provisions in contracts of this class making a prerequisite to payment a certificate of an expert not mutually selected by the parties as an arbitrator or appraiser, but acting as the agent of one of the parties to see that there is due performance of its requirements by the other party, are not conditions attached to the right of recovery under such contract, but means auxiliary to a settlement between the parties, tending to avoid legal controversy as to the part of due performance.

It has properly been regarded as inconsistent with the presumable intent of parties that their alternate rights should be made to depend upon the arbitrary act or judgment of a third person, however related to the parties. While the law and convenience allow parties to submit their differences to persons chosen by them as arbitrators, or to arrive at the ascertainment of some fact important between them by the help of arbitrators or appraisers, yet such an intent is not to be presumed nor gathered from words not necessarily leading to that conclusion. If the

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words of a contract can *bear any other construction, they cannot be regarded as working a deprivation of these important civil rights that secure to all the judgment of competent and impartial tribunals constituted by public authority in all matters of fact or law disputed between them.

Subjecting the contract in suit to these tests, I am satisfied that the sound conclusion is that only those specific modes of compensation provided for in the contract, and consisting of various installments of the contract price, agreed to be paid at various stages of the work, are affected by the provisions as to the requirement of the certificate of the architect, and that the general covenant to pay for the work at a certain price, dependent on its completion according to the contract, is not affected by such provision, and the right of recovery, on proof of due and complete performance, is not dependent in any respect on the question whether the architect gave or refused a certificate, or

whether his conduct was justifiable or unjustifiable in that respect.

The application of this view to all the installments but the last can hardly need illustration. Had no provision been made for anticipating the completion of the contract by payments during the progress of the work, the contractor would only have been entitled to receive the contract price upon due and complete execution of all that was called for by the contract. In conceding payment during the progress of the work for the advantage of the contractor, the owner of the building naturally desired protection from overpayment on the one hand or accepting work improperly done on the other. The usual and most practicable means for attaining this end was to make such intermediate payments to depend upon the certificate of an expert. If that certificate was properly withheld, the right to intermediate payment might be lost, but not to ultimate payment on the completion of the work.

Had there been a demand in this case for interest on any of the installments, and proof that it had been withheld, the question of the refusal of the architect to furnish his certificate might have become material. There is, however, no such demand, and the subject is alluded to only to illustrate the difference between a demand to have the installments paid on the conditions on which they depended and a demand for the whole contract price on proof of due performance.

The last installment contained a provision for the benefit of the owner of the house, namely that he should have a credit for a cer-

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*tain amount for a fixed period of time. If the architect had given his certificate so that this last installment had become payable as such under the contract, then the owner would have been entitled to the credit thus stipulated. The withholding of the certificate prevented this clause of the contract from becoming operative, so that the contractor could, on completing the work in his contract, have at once commenced his action for the contract price without waiting for the time stipulated in reference to this credit to expire.

The application of this rule of construction to the case would not lead to a different result had this peculiar feature of the last installment not existed and had that installment called for payment in each. It is the fact that the contract calls for payment for a single and indivisible object of contract in advance of its complete execution that gives the key of interpretation; and although this reasoning does not specially apply to this last payment, yet the demand of a certificate as to such installment is explained by the natural desire of the parties to have an uniform method of payment throughout and an important aid to a settlement without controversy.

When, as in the present case, the contract calls for payments during the progress of the work and there is a provision rendering necessary the certificate of an architect or engineer, such provision ought to be referred to the scheme of payment set out in the contract, and not to the final obligation to pay on proof of due completion of the work called for by the contract. The circumstances connected with the last installment already alluded to make this case a very strong illustration of the soundness of this conclusion.

The result of this construction is, that no part of the contract is rejected as insensible, but all provisions take useful effect subject to the proper legal presumptions already mentioned.

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10 S. C. *133

*BRIGGS v. WINSMITH.

(Columbia. April Term, 1878.)

[Reported and annotated in 59 Am. Rep. 46.]

[*Trial* ⇐388.]

In a case tried by the Judge, by consent, where there is no contest, there need be no finding of fact, and the order for judgment is a sufficient finding of the law.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 911; Dec. Dig. ⇐388.]

[*Bills and Notes* ⇐125.]

A contract to pay a sum certain at a future day, with interest at twelve per cent. per annum, nothing being said as to the rate of interest after the principal sum becomes due, bears interest at the rate of twelve per cent. until it becomes due, and from that time, upon the aggregate of principal and interest, seven per cent.

[Ed. Note.—Cited in Sharpe v. Lee, 14 S. C. 343; Piester v. Piester, 22 S. C. 140, 141, 53 Am. Rep. 711.

For other cases, see Bills and Notes, Cent. Dig. § 281; Dec. Dig. ⇐125.]

Before Northrop, J., at Spartanburg, March, 1877.

Action by L. Briggs against J. Winsmith.

The case is as follows:

On the 1st of January, 1871, defendant gave to one John Pratt his sealed note for $1,701.25, payable twelve months after date, "with interest from date at the rate of twelve per cent. per annum." On the 8th of March, 1871, Pratt assigned the note to J. F. & J. B. Cleveland, who afterwards assigned it to the plaintiff. Several credits were endorsed upon the note—one of 29th January, 1872, for $204.15; another of 10th March, 1873, for "the interest to the 1st of January, 1873," and a third, of 31st January, 1874, for $200.

The case was upon Calendar No. 1, for trial by a jury, but by consent the issues of fact were submitted to the Court.

The plaintiff proved the execution of the note and admitted the credits. The defendant offered no testimony.

The Court gave judgment as follows:

This action having been brought to trial by the Court, a trial by jury having been duly waived and a decision thereon rendered for the plaintiff, it is now, on motion of Elford, counsel for plaintiff, adjudged that the plaintiff recover of the defendant, J. Winsmith, twenty-three hundred and seventy-one dollars and sixty-four cents, with interest at twelve per cent. per annum, and costs.

The defendant excepted, and appealed on the ground that His Honor the presiding Judge erred:

1. In refusing a continuance and forcing the defendant to trial.

2. In allowing interest on said note at the rate of twelve per cent. per annum after its maturity.

3. In allowing any other interest except at the rate of seven per cent. per annum.

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*4. Because His Honor made no findings of either law or fact.

Thomson, for appellant.

Duncan & Cleveland, contra.

July 26, 1878. The opinion of the Court was delivered by

WILLARD, C. J. This is an action on a sealed note, tried by the Court, by consent of parties. The credits on the note were admitted and no defense made. The Court gave judgment for the amount due, with interest at the rate fixed by the contract, viz., twelve per cent. per annum to the day of judgment. The defendant appeals from the allowance of twelve per cent. interest, and also on the ground that there were no findings of fact and law. As there was no contest as to the facts, no finding of fact was necessary, and the order for judgment is a sufficient finding of the law.

The note contains a promise to pay a sum certain at twelve months from date, "with interest at the rate of twelve per cent. per annum." This contract must be construed as calling for interest at that rate until its maturity.

No contract appears intended to govern the rate of interest from and after the maturity of the note, consequently the damages for non-payment at maturity are governed by the rule of law fixing such damage at interest at seven per cent.—Langston v. South Carolina Railroad, 2 S. C., 248. The Court, therefore, erred in allowing interest at the rate of twelve per cent. after the maturity of the note. The proper allowance was at the rate of seven per cent. from that time.

The judgment is erroneous and must be set aside unless the plaintiff remits the excess of interest thus charged; and on such remission being made, the judgment, as amended, will stand affirmed, but with costs of this appeal to the appellant.

The case will be remanded to the Circuit Court for further proceedings in conformity with the foregoing decision.

McIVER, A. J., and HASKELL, A. J., concurred.

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10 S. C. *135

*WYMAN v. HOOVER.

(Columbia, April Term, 1878.)

[*Judgment* ⊂⊃350.]

The Circuit Judge has jurisdiction to set aside a judgment by default, where it appears that the summons was not served.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 686; Dec. Dig. ⊂⊃350.]

Before Wiggin, J., at Beaufort, December, 1877.

Action by Randal Wyman and his wife, Amy Wyman, against Josephine A. Hoover and her husband, George H. Hoover.

The case is as follows:

Judgment by default was entered in this case by plaintiff, and the defendant, Josephine, now moved His Honor the Circuit Judge, after due notice of the motion for a rule to show cause why the judgment should not be set aside, on the ground that no summons had been served upon her.

The moving papers set forth in the brief were, first, the notice of the motion; second, an affidavit by Josephine A. Hoover that she never was served with a summons in the case, and that she knows nothing of the existence of the action; third, an affidavit by John Glover, who stated that the copies of the summons and complaint in this case were given to him by Deputy Sheriff Ballinger "to serve upon defendants and to get them to sign an acceptance of service on the original," but he did not serve them on the defendant Josephine; and, fourth, an affidavit by George Ballinger, who stated that he gave the summons and complaint to John Glover to serve upon defendants.

His Honor made the following order:

"It appearing to my satisfaction that the proper remedy in the above stated case is by appeal, and this Court is without jurisdiction in the matter, on motion of W. J. Whipper, it is ordered that the motion for a rule be dismissed and the plaintiff have judgment for $10—costs of this motion."

The defendant, Josephine, appealed.

Warren, for appellant:

There was error in the dismissal of the motion for a rule.

There was no service of the summons on either of defendants.

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*The certificate or affidavit of the Sheriff is not conclusive upon the defendant. He may disprove the alleged service.—Bulkley v. Bulkley, 6 Abb., 307; Wallis v. Lott, 15 How., 567; Rensselaer v. Shadwick, 7 How., 297.

When summons is not legally served the Court has no jurisdiction of the defendant, and all proceedings based on the pretended service are void.—Bulkley v. Bulkley, 6 Abb., 307.

Where judgment is entered without jurisdiction and execution in form issued against a defendant, he has a right to move to set aside same.—Lambert v. Converse, 22 How., 265; Hallet v. Righter, 13 How., 43.

Defective service is to be cured by motion. —Nones v. H. Mut. Ins. Co., 8 Barb., 541.

A motion to set aside a judgment for irregularity can at any time be made in one year upon a very slight showing, but this does not apply to a void judgment; for when the defect is for a want of jurisdiction the motion may be made at any time.—Hallett v. Righter, 13 How., 43.

The Court has power to open a judgment and allow a defense to be made where a defendant has omitted to answer within the proper time.—Elsworth v. Campbell, 31 Barb., 134; McQuain v. Cace, 9 Abb., 160.

The only remedy defendant has to vacate a judgment by any reason void is by motion, and if motion is denied then by appeal to Supreme Court from decision on such motion. —5 Rich., 9.

Whipper, contra.

July 26, 1878. The opinion of the Court was delivered by

WILLARD, C. J. Judgment by default, for want of an answer, was entered in this action. The defendant, J. A. Hoover, moved to set aside such judgment as irregular, for want of service of the summons on such defendant. It appears by the affidavit of Ballinger, Deputy Sheriff, that the summons and complaint were delivered by him to Hoover for service on the defendant J. A. Hoover, and by the affidavit of Glover that such service was not made. Allusion is made in the argument to a return of service made by the Sheriff; but no evidence that such a return was laid before the Circuit Judge upon the motion appears by the record before us, and the case must be determined on the papers that appear to have been before the Circuit Judge for that purpose. The Circuit Judge an-

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*nounced his decision as follows: "It appearing to my satisfaction that the proper remedy in the above stated case is by appeal, and this Court is without jurisdiction in the matter, on motion of W. J. Whipper, it is ordered that the motion for a rule be dismissed, and the plaintiffs have judgment for ten dollars —cost of this motion."

The position assumed by the Circuit Judge is unintelligible to this Court. Whether the Circuit Judge has succeeded in expressing the nature of his doubt as to his right to interfere in the premises, we have no means of determining. The doubt of the Circuit Judge as to his jurisdiction has no legal foundation; and the idea that relief could be obtained on appeal that was not proper to be given by the Court of Common Pleas involves an entire misconception of the nature of original and appellate jurisdiction.

As the case stands, it was a matter of course for the Circuit Judge to set aside the judgment and admit the defendant to answer.

The order appealed from, with the judgment and execution as against the defendant, J. A. Hoover, must be set aside, with liberty to the defendant to answer in ten days from the service of this order, and with costs of motion in the Circuit Court and of this appeal.

McIVER, A. J., and HASKELL, A. J., concurred.

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10 S. C. 137

RODDY v. PURDY.

(Columbia. April Term, 1878.)

[*Taxation* ⇐734.]

A sale of delinquent land for taxes of the fiscal year commencing 1st November, 1873, made on 18th May, 1874, under an order of the Comptroller General, approved by the Governor, extending the time for the sale of delinquent lands: *Held* to be irregular and void.

[Ed. Note.—Cited in Dougherty v. Crawford, 14 S. C. 629; Shell v. Duncan, 31 S. C. 560, 571, 10 S. E. 330, 5 L. R. A. 821.

For other cases, see Taxation, Cent. Dig. §§ 1408, 1470–1473; Dec. Dig. ⇐734.]

[*Taxation* ⇐615.]

The Act approved 19th March, 1874, in relation to the assessment and collection of taxes, repeals all previous Acts fixing a day for the sale of lands for taxes.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1264; Dec. Dig. ⇐615.]

[*Taxation* ⇐615.]

The repealing clause of the Act of March 19th, 1874, in relation to the assessment and taxation of property, repeals all preceding Acts authorizing the Comptroller General to extend the time for the sale of delinquent lands for the payment of taxes, inclusive of the Act of 6th of February, 1874. It follows, therefore, that an order of the Comptroller General, made under the last named Act to extend the time for the sale of delinquent lands for taxes of the fiscal year commencing November 1st, 1873, was unauthorized by law, and that a sale made under such order was null and void.

[Ed. Note.—Cited in Willis v. Heighway, 40 S. C. 481, 19 S. E. 135.

For other cases, see Taxation, Cent. Dig. §§ 1264, 1343; Dec. Dig. ⇐615.]

Before Hudson, J., at Chester, March Term, 1878.

Action by W. Lyle Roddy against Thomas Purdy for the recovery of real estate.

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*The case is as follows:

The plaintiff claimed the land in dispute under a tax title from the Auditor of Chester

County to him, bearing date May 18th, 1874, on which day it was sold by the County Treasurer and bid off by the plaintiff. The sale was for delinquent taxes of the fiscal year commencing November 1st, 1873. The defendant was in possession of the land as tenant of the owner, and the only question made in the case was whether the sale could legally be made on the 18th of May, 1874.

The plaintiff proved that the sale was made under an order dated April 22d, 1874, by the Comptroller General, approved by the Governor, which extended the time for the sale of delinquent lands for taxes of the fiscal year commencing November 1st, 1873, to and inclusive of the day on which the sale was made.

His Honor instructed the jury in substance that the sale was invalid, because not made at the time authorized by law, and, therefore, that the deed under which the plaintiff claimed was void.

The jury found for the defendant, and the plaintiff appealed on the ground of error in the instructions of the presiding Judge.

J. & J. Hemphill, for appellant.

Patterson & Gaston, contra.

July 28, 1878. The opinion of the Court was delivered by

WILLARD, C. J. The action is for recovery of land upon the strength of an Auditor's deed upon a sale for taxes. The only exceptions presented arise upon the charge to the jury and relate to the regularity of the proceedings for the sale of the land for non-payment of taxes. The land in question was sold on the 18th day of May, 1874, to satisfy taxes assessed upon it for the fiscal year commencing November 1st last preceding that date.

The Act for the assessment and collection of taxes in force at the date of the sale was that passed March 19th, 1874.—15 Stat., 731. By that Act the sales of delinquent lands were to take place, commencing on the second Monday of March and ending on the following Friday. The sale in question did not take place at the time fixed by the Act in force at the time of such sale, and no authority for such sale was derived from said Act.

The question then arises, was the sale authorized by any statute antecedent to that of March 19th, 1874? The last named Act

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re*peals all Acts or parts of Acts inconsistent with its provisions. The preceding statutes, so far as they designated a different day for the sale of lands for taxes, were necessarily repealed. There is no natural repugnancy in having more than one day in the year designated for the sale of lands for the payment of taxes, but when we consider the reasonable intent of the statute we must conclude that the coexistence of two or more different days in one year for such sales is inconsistent with the object of the Act. The object of fixing a single day for such sales is to render convenient, certain and notorious the time of such sales, as uncertainty and inconvenience would arise from their frequent or irregular occurrence, so that all who are likely to be affected by such sales may be fully informed and aided to protect their rights and interests. Such objects would be seriously interfered with if sales of land for taxes of the same or different years were to be made on different days. It was the evident intent of the statute to perfect a uniform system of assessing and collecting taxes to supersede all others, as clearly gathered both from the title and the body of the Act, and the repealing clause was added in order to promote that end. Such being the case, the antecedent Acts must be regarded as repealed not only in their provisions as to the mode of assessing taxes, but also as to collecting them, including the designation of a day for making sales of land in satisfaction of taxes assessed upon them.

It remains to be considered whether under the Act of February 6th, 1874, the day on which the lands in question were sold was legally designated for that purpose independently of the operation and effect of the Act of March 19th, 1874, already considered. The Act of February 6th gives authority to the Comptroller General, with the approval of the Governor, to extend among other things "the time when the advertisement and sale of such delinquent lands may be made, so as the same may conform as near as may be to the period fixed by law," and declares that proceedings had thereunder shall have the same validity as if done "within the periods fixed and specified by law."

The Act allows this power of extension to be exercised only if any of the acts required to be performed by the general tax law "cannot, for want of proper time, be so performed in the payment or collection of taxes to be levied to meet the appropriations for the fiscal year commencing November 1st, 1873." Under this Act the Comptroller General extended the time for

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the sale of delinquent *lands to the 18th day of May, 1874, the day on which the land in question was sold.

It does not appear in allegation or in proof that the official acts required to be performed by the general tax Act, to which the statute referred, would not have been performed within the periods fixed by law. Whether such proof was essential to give validity to the authority conferred upon the Comptroller General need not be considered under the view we take of the case, for even if duly exercised it would not have the effect of establishing such day of sale as against

the repealing effect of the Act of March 19th, 1874. Assuming, then, that the authority of the Comptroller General was duly exercised, could it have the effect of giving legality to sales made on the 18th day of May, 1874? Although as the law stood prior to the Act of March 19th, 1874, the designation of a legal day of sale arose, in the cases specified, under the action of the Comptroller General, yet the authority to sell depended on the force and effect of the general tax Act. The repeal of that Act by that of March 19th, 1874, destroyed the source of that authority and consequently the authority itself. The day designated by the Comptroller General was a substitute for that fixed by the law as it then stood, and a sale on such substituted day could have no different effect than if that had been the day designated by the statute for that purpose. Such a designation by the statute would have ceased to operate with the repeal of the statute, and the same result must follow as it regards the day substituted therefor under the authority conferred on the Comptroller General. Although such authority was conferred by an Act independent of the general tax Act, yet, as auxiliary to it, it is clearly within the repealing effect of the Act of March 19th, 1874, inasmuch as its object is to give efficacy by extension to the provisions of an Act repealed by that Act.

It is unnecessary to consider the several propositions submitted to the jury by the Circuit Judge, for it is evident that if erroneous the plaintiff was not prejudiced by such error. Had the Circuit Judge given due effect to the repealing clause of the Act of March 19th, 1874, the necessary result would have been precisely that which occurred, namely, a verdict for defendant. If the day of sale was not authorized by law, it is clearly immaterial whether the terms of sale were or were not conformable to law. As these were the matters to which the charge related, it is

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clear that it must be *regarded as immaterial as it regards the question fundamental to the case and need not be considered.

The true question was suggested to the jury in the qualification made by the Judge in submitting matters which the plaintiff had requested to be charged. There the question is stated as involving the legality of the time of sale, but no view of the law appears to have been submitted on that point.

This was a proper modification of the request to charge and involved the real question; and as the jury found consistently with the correct view of the law, the verdict ought not to be disturbed.

The proposition involved in the plaintiff's request to charge depends upon the effect of an Auditor's deed by way of estoppel, but the deed not having been made with due authority it cannot operate by way of estoppel. Failing to operate directly, it cannot operate indirectly.

The appeal must be dismissed.

McIVER, A. J., and HASKELL, A. J., concurred.

10 S. C. 141

NEELY v. YORKVILLE.

(Columbia. Nov. Term, 1877.)

[*Municipal Corporations* ⟸1034.]

Where the charter of a municipal corporation did not in express terms confer upon it a corporate name, and, although a name was given to the town itself, all the authority and powers of the corporation were conferred upon the Town Council: *Held*, That an action against the Intendant and Wardens of the Town Council of, &c., was properly brought.

[Ed. Note.—Cited in Cobb & Seal Shoe Store v. Ætna Ins. Co., 78 S. C. 390, 58 S. E. 1099.

For other cases, see Municipal Corporations, Cent. Dig. § 2204; Dec. Dig. ⟸1034.]

[*Municipal Corporations* ⟸913.]

A bond given by a municipal corporation for a debt incurred by it in executing a contract which the corporation had authority by its charter to make is valid and binding.

[Ed. Note.—Cited in Luther v. Wheeler, 73 S. C. 91, 92, 52 S. E. 874, 4 L. R. A. (N. S.) 746.

For other cases, see Municipal Corporations, Cent. Dig. § 1905; Dec. Dig. ⟸913.]

[*Municipal Corporations* ⟸46.]

The Act of 1871 in relation to the town of Yorkville did not create a new corporation and substitute it in the place of the old corporation created by the Act of 1849, but such Act was a mere amendment of the Act of 1849, the corporation remaining liable for debts contracted by it before the Act of 1871 was passed.

[Ed. Note.—Cited in Milster v. Spartanburg, 68 S. C. 31, 46 S. E. 539.

For other cases, see Municipal Corporations, Cent. Dig. §§ 123–125; Dec. Dig. ⟸46.]

[*Municipal Corporations* ⟸927.]

A bond given by a municipal corporation, under its corporate seal, subscribed by the Intendant of the town, and countersigned by the Clerk and Treasurer of the Council: *Held* to be in the usual and proper form, and to be binding upon the corporation.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1940; Dec. Dig. ⟸927.]

[*Limitation of Actions* ⟸12.]

A plea of the Statute of Limitations is inapplicable to an action upon a bond given in June, 1861, by a municipal corporation.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 40–50, 52–55; Dec. Dig. ⟸12.]

[*Municipal Corporations* ⟸911.]

A bond given by a municipal corporation for work done in macadamizing the streets of the corporation: *Held* to be valid and binding, and that the consideration might be proved by evidence aliunde.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1899, 1901; Dec. Dig. ⟸911.]

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[*Municipal Corporations* ⟸955.]

*Where a municipal corporation has authority under its charter to issue bonds to a certain amount, a bond given by it within the

limited amount is at least prima facie valid; and if the corporation had previously exhausted its authority by issuing other bonds to the full extent of its power, the onus of showing the fact is upon the corporation.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 2006; Dec. Dig. ⟸ 955.]

[*Municipal Corporations* ⟸911.]

A proviso to an Act authorizing a municipal corporation to issue bonds to a certain amount, that the private property of the citizens should not be liable for the payment of the bonds except by a regular and uniform taxation, was simply intended to protect the private property of the corporators from liability for the payment of the bonds, and not to preclude the holders thereof from obtaining judgment against the corporation.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1899, 1901; Dec. Dig. ⟸911.]

[*Municipal Corporations* ⟸911.]

A clause in the charter of a municipal corporation, granted in 1849, giving the corporation the same powers over the streets and roads of the town as those vested in the then Commissioners of Roads, did not prevent the corporation from issuing its bond for a debt contracted by it in improving the streets of the town.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1899; Dec. Dig. ⟸ 911.]

[This case is also cited in Luther v. Wheeler, 73 S. C. 83, 52 S. E. 874, 4 L. R. A. (N. S.) 746, and distinguished therefrom.]

Before Mackey, J., at York, April Term, 1876.

This was an action entitled Eliza A. Neely, plaintiff, against William H. McCorkle, Intendant, and John R. Schorb, Joseph Herndon, Robert Wright and Edward Wheeler, Wardens, the "Town Council of Yorkville, in the State of South Carolina," defendants.

The complaint alleged that by an Act of this State, passed December 20th, 1853, entitled "An Act to give the Town Council of Yorkville the power to issue bonds of the corporation, and for other purposes," power was conferred on the Intendant and Wardens of said corporation "to issue interest-bearing bonds, which shall be binding on said corporation," to the amount of $5,000; that by an Act passed December 21st, 1854, the said Act of December 20th, 1853, was extended and made of force for the period of nine years from the said December 21st, 1854; that by the 19th Section of "An Act to incorporate certain towns and villages, and to renew and amend certain charters heretofore granted," passed January 28th, 1860, power was conferred on the Town Council of Yorkville to make contracts for lighting the streets of said town with gas, either by subscribing to the stock of any partnership or corporation organized for said purpose or otherwise, and to make payment for the same out of any moneys belonging to the corporation;" that the Town Council of Yorkville made a contract with George Waterhouse and Michael Bowes for lighting the streets of said town with gas, and agreed to pay them therefor the sum of $600; that said contract was made by said Town Council by virtue of their power and authority as such Town Council, under the Acts above mentioned, and also by virtue of their general

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power and authority as *such Town Council; and that on the fourth day of June, 1861, they evidenced their indebtedness to the said Waterhouse and Bowes by executing and delivering to them a bond for $600, a copy of which is as follows:

South Carolina, York District.

Know all men by these presents that the "Town Council of Yorkville," in the State aforesaid, acknowledges itself to owe unto George B. Waterhouse and Michael Bowes the sum of six hundred dollars, to be paid to the said Waterhouse and Bowes, or bearer, on the first of January, 1862, together with interest thereon from the first day of May, 1861.

This bond is issued in pursuance of powers vested in said Town Council to make contracts for lighting the streets of said town of Yorkville with gas; and it is intended, acknowledged and delivered as the bond of said "Town Council of Yorkville" for six hundred dollars, due to said Waterhouse and Bowes for lamp posts and fixtures, used as aforesaid, for lighting the streets of the said town. In witness whereof, the said Town Council has caused its corporate seal to be hereunto affixed, and these presents to be subscribed by the Intendant of said town of Yorkville, and countersigned by the clerk and Treasurer of said Council. June 4th, 1861. A. I. Barron, Intendant.

J. B. Allison, Clerk and Treasurer.

[Corporate Seal.]

That payments were made on said bond in 1863, 1867 and 1868; that there is still due on said bond, with interest from May, 1861, the sum of $600; that the plaintiff is the lawful and innocent holder and owner of said bond, and that the defendants above named now compose the Town Council of Yorkville.

The answer denied that the Town Council of Yorkville ever lawfully executed the bond, or that they were ever authorized to execute any such bond, and alleged that before the bond sued on was given the town Council of Yorkville had exhausted its power under the Act of December 20th, 1853, by issuing bonds to the amount of $5,000. It denied that defendants were indebted or responsible in any way for the claim sued on, pleaded that the claim was barred by the Statute of Limitations, and concluded by denying each and every allegation of the complaint.

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*At the trial defendants gave testimony tending to show that at the date of the al-

leged bond A. S. Barron was Intendant, and J. B. Allison, Clerk and Treasurer, of the Town Council of Yorkville; that the signatures to said bond and the seal of the Council were genuine; that the bond was drawn by the attorney of the Council; that the lamp posts and fixtures were erected and the town lighted with gas; and it was admitted that the plaintiff was the lawful holder and owner of the bond.

The defendants moved for a nonsuit on the ground that no cause of action had been established against them; that a judgment, if obtained under the pleadings, would operate against the defendants individually, and that the town of Yorkville was not a party to the action.

His Honor overruled the motion, and the defendants excepted.

The defendants then produced in evidence the books of the corporation for the purpose of showing what number of bonds had been issued under the Act of 20th December, 1853, and the amounts thereof, and also examined witnesses for the purpose of proving the same matters.

The judgment of His Honor the Circuit Judge is as follows:

This is an action brought for the recovery of a balance due on a bond executed by the corporate authorities of the town of Yorkville, S. C., to George P. Waterhouse and Michael Bowes for lamp posts and fixtures used in lighting the streets of Yorkville with gas. The plaintiff is the innocent purchaser and holder of the bond. By an Act of the Legislature, passed in 1860, (see page 920, § 19,) the Town Council are authorized to make contracts for lighting the streets of the town with gas, either by subscribing to the stock of any partnership or corporation organized for said purpose or otherwise. The bond was executed on the 4th of June, 1861, and in the body of the instrument it is recited that "this bond is issued in pursuance of power vested in said Town Council to make contracts for lighting the streets of said town of Yorkville with gas, and is intended, acknowledged and delivered as the bond of said Town Council of Yorkville for six hundred dollars, due to said Waterhouse & Bowes for lamp posts and fixtures used as aforesaid for lighting the streets of said town."

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*In addition to the authority conferred by the special Act of the Legislature above referred to, the execution of the bond comes within the scope of the general corporate authority of the Council, and especially within the powers conferred by the fourth Section of the charter.—See Act 1849, Vol. 11, p. 588.

The Council had the power and the right to make the contract with Waterhouse & Bowes, and to evidence the indebtedness arising therefrom by executing the bond upon which this action is brought.

It is, therefore, ordered and decreed that the plaintiff have judgment for the sum of ten hundred and forty-one dollars and eighty-five cents, with interest thereon from the second day of April, 1876, and costs.

The defendants appealed, and now moved this Court to dismiss the complaint on the grounds that the Court erred:

1. In refusing to grant the nonsuit asked for and holding that the present proceeding is a proper one in a suit upon the bond.

2. In refusing to hold that the testimony was sufficient to show that the Town Council of Yorkville had issued bonds to the amount of five thousand dollars before the bond here sued upon was issued.

3. In holding that the statute either of 1849 (11 Stat., 588,) or the statute of 4th June, 1861, (12 Stat., 920,) authorized the issuing of the bond here sued on.

4. In holding that the Town Council had the right and power to make the contract with Waterhouse & Bowes and evidence the indebtedness arising therefrom by executing said bond.

5. In holding that the execution of said bond came within the scope of the general corporate authority of the Council.

6. In refusing to hold that the limitation of the Act of 21st December, 1854, (12 Stat., 386,) entered into and was a condition of any bond issued by said Council after that date.

7. In refusing to hold that the corporation of the town of Yorkville, incorporated under the Act of 1871, (14 Stat., 562,) was not liable on a bond executed by the corporation of the village of Yorkville, incorporated under the Act of 1849.

8. In refusing to hold that the bond sued on was not executed as provided by statute, and was, therefore, not binding on the defendants.

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*9. In refusing to hold that the claim of the plaintiff is only that of a simple contract debt, and is, therefore, barred by the Statute of Limitations.

10. In refusing to dismiss the complaint and give judgment against the plaintiff for the costs of this action.

Another case, brought by J. D. Currence and M. J. Watson against the same defendants, was heard at the same time and decided in the same way. The facts in the two cases were essentially the same, and what difference there was between them sufficiently appears in the opinion of the Court.

Thomson, Spencer, for appellants.

Wilson & Wilson, contra.

July 31, 1878. The opinion of the Court was delivered by

McIVER, A. J. These two cases, depending in great measure as they do upon the same principles, will be considered together. In the first the action was brought by the

plaintiff as the lawful owner and holder on a bond bearing date 4th June, 1861, whereby "the Town Council of Yorkville" acknowledged itself to owe Waterhouse and Bowes the sum of six hundred dollars, to be paid to them or bearer on the first of January, 1862, with interest from the first day of May, 1861. From the recital in the bond it appears to have been issued in pursuance of power vested in said Town Council to make contracts for lighting the streets of the town of Yorkville with gas, and that it was "intended, acknowledged and delivered as the bond of said Town Council of Yorkville for six hundred dollars, due to said Waterhouse and Bowes for lamp posts and fixtures used as aforesaid for lighting the streets of the said town." The bond is signed by "A. J. Barron, Intendant," and "J. B. Allison, Clerk and Treasurer," and has affixed to it the corporate seal of the corporation.

Subsequent to the time when this bond came into the possession of the plaintiff, which time is not stated, sundry payments were made upon it to the plaintiff "by former Town Councils of Yorkville, the first credit endorsed being dated 17th June, 1863, and the last 5th May, 1868. There is no dispute that the work for which this bond was given was done and that the corporation enjoyed the benefit thereof, the defenses relied upon being mainly of a technical

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*character. Such defenses, though not recommending themselves to the favorable consideration of the Court, must nevertheless be fairly considered, and, if ascertained to be well founded, will be accorded their due weight.

The first ground of defense was that the action was against the parties named as defendants in their individual capacity and not as the Town Council of Yorkville. It will be sufficient to say, in answer to this position, that even were there anything in it the defendants have failed to present the objection at the proper time and in the proper way and can now claim no benefit from it. The next position taken by the appellants is that the plaintiff has mistaken the corporate name of the corporation which she designed to sue, her action being against the Town Council of Yorkville, while the proper corporate name, as it is alleged, is "Yorkville," by which name alone can it be sued. Without stopping to inquire whether, even according to the theory of the appellants, there is such a variation from the precise name of the corporation as would make this objection available, especially when it is remembered that as early as the time of Lord Coke a corporation was severely censured for attempting to set aside its own grant by reason of misnomer in its own name, (10 Co., 126, a; 2 Kent, Comm., 236; Dillon on Municipal Corporations, § 121,) or whether if there was a misnomer it should not have been distinctly set up in the answer, or whether if so set up it was not an error that was amendable, as of course, (Bank of Havana v. Magee, 20 N. Y. Rep., 355; Traver v. The Eighth Avenue Railroad Company, 6 Abb., N. S., 46,) we think that the appellants are in error in supposing that there is any mistake in the name of the corporation here sued.

There is no foundation for the assumption that the name assigned by statute to this corporation is "Yorkville." None of the Acts to which we have been referred assign any name to this corporation in express terms, but the implication from all of them is that the name of the corporation is the "Town Council of Yorkville." In the Act of 1849, (11 Stat., 588,) the language is that "all persons * * * in the village of York * * * shall be deemed, and are hereby declared, a body politic and corporate, and that the said village shall be known by the name of Yorkville," &c. The corporation is one thing, composed of the persons residing in a certain village, while the village itself is another thing, to which the name of Yorkville is

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assigned. As not unfrequently happens, *a corporation, composed of persons residing within certain territorial limits, may have one name, while another name is assigned to the territory embraced within such limits, be it village, town or city. It will also be noticed that all the corporate powers granted by this Act are conferred upon and are to be exercised by the Intendant and Wardens, who the Act in its 4th Section declares "shall be known by the name of the Town Council of Yorkville, and they and their successors in office shall have a common seal," &c. Now, if, as we have seen, this Act does not in express terms assign any name to the corporation thereby created, but proceeds to invest a certain body—the Intendant and Wardens—with all the corporate powers conferred, and declares that such body shall be known by a certain name, the necessary inference is that such name was designed to be the name of the corporation, otherwise the result would be that the corporation would have one name, while the body invested with all the corporate powers would have another. So, too, the Act of 1871 (14 Stat., 562,) declares that "all citizens of this State having resided sixty days in the town of Yorkville shall be deemed, and are hereby declared to be, a body politic and corporate, and the said town shall be called and known by the name of Yorkville," &c.

The remarks which have been made in reference to the Act of 1849 apply equally to this Act, to which we may add that if the Legislature had intended to assign the name of Yorkville to the corporation, and not to the village or town merely, they certainly would have used language more appropriate to such a purpose. If such had been their

design, the most natural as well as the most correct form of expression would have been, after declaring certain persons a body corporate, to say, which shall be known by the name of Yorkville. In this Act, also, all the corporate powers are conferred upon the Intendant and Wardens, who the Act, in its fifth section, declares "shall be known by the name of the Town Council of Yorkville, and they and their successors, hereafter to be elected, may have a common seal," &c. It will be observed, too, that in the Act of 1855 (12 Stat., 470,) and in the Act of 1861 (12 Stat., 921,) the Legislature, in conferring additional powers upon this corporation, in both instances designate it as the "Town Council of Yorkville," and in no Act to which we have been referred, or which we have been able to find, is this corporation designated by the name of Yorkville. This objection, therefore, cannot avail the appellants.

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*The next ground upon which appellants insist is that the Town Council of Yorkville had no authority to execute the bond in question. To determine this question it is necessary to keep in mind the character of this bond and the purpose for which it was given. It is not a coupon bond, issued for the purpose of "a commercial investment," but is simply an obligation of the corporation, given as a voucher or in payment for work done for the corporation under a contract with it, which the corporation unquestionably had the right to make. The two classes of obligations are wholly distinct and different. For, as said by Bradley, J., in the case of the Police Jury v. Britten, (15 Wall., 568 [21 L. Ed. 251],) "it is one thing for County or parish trustees to have the power to incur obligations for work actually done in behalf of the County or parish and to give proper vouchers therefor, and a totally different thing to have the power of issuing unimpeachable paper obligations," &c. And, in another part of the same opinion, he says: "That a municipal corporation which is expressly authorized to make expenditures for certain purposes may, unless prohibited by law, make contracts for the accomplishment of the authorized purposes, and thereby incur indebtedness and issue proper vouchers therefor, is not disputed. This is a necessary incident to the express power granted." The same distinction is recognized in the subsequent case of The Mayor v. Ray, (19 Wall., 468 [22 L. Ed. 164],) where it is said: "Indebtedness may be incurred to a limited extent in carrying out the objects of the incorporation. Evidence of such indebtedness may be given to the public creditors." And, again, "vouchers for money due, certificates of indebtedness for services rendered, or for property furnished for the uses of the city, orders or drafts drawn by one city officer upon another, or any other device of the kind used for liquidating the amounts due to public creditors, are, of course, necessary instruments for carrying on the machinery of municipal administration and for anticipating the collection of taxes."

So that even these two cases, which seem to be mainly relied upon by the appellants to show the incapacity of this corporation to issue the bond in question, clearly recognize the power of a municipal corporation to issue obligations like the one here sued upon. Hence it is unnecessary for us to consider further the question as to the power of a municipal corporation, without express authority, to issue negotiable commercial paper, as coupon bonds are now recognized to be, inasmuch as the bond in question does not belong to that class.

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*The corporation, in this case, having been invested with authority "to make contracts for lighting the streets of said town with gas," (§ 19 of Act of 1861, 12 Stat., 921,) and the contract sued upon in this case being a bond given for work done under a contract made for that purpose, there can be no doubt of the authority of the corporation to execute such a bond.—Dillon on Mun. Corp., § 372; Trustees of the Baptist Church of Brooklyn v. Fire Insurance Company, 19 N. Y., 305; Alleghany City v. McChurchman & Co., 14 Penn. Stat., 81. The next position taken by appellants is that there was error in holding that the corporation created by the Act of 1871 was liable on a bond executed by the corporation created by the Act of 1849.

To support this position it is necessary to assume that these two Acts created two distinct and separate corporations, and that the one was not a mere continuation of the other. We are unable to find any warrant for such an assumption; and, on the contrary, we think it clear that the two Acts both relate to the same corporation, and that it was not the intent of the Act of 1871 to destroy the previously existing corporation, but simply to enlarge and alter it by adding additional corporators and making certain alterations in its corporate powers. We certainly cannot impute to the Legislature the design of abrogating the previous corporation without making provision for the settlement of its affairs—the payment of its debts, &c.—(and no such provision is to be found in the Act of 1871,) and the most reasonable construction of the Act is that the Legislature simply designed to continue the previously existing corporation, with such changes and additions as the new condition of things seemed to demand.

It will be noticed, too, that the terms of the 3d Section of the Act of 1871 recognize the previously existing corporation, for that Section provides, not as is usual when an entirely new municipal corporation is created that the first election for town officers shall be held by such Managers as shall be appointed by the Clerk of the Court or Commis-

sioners of Election for the County in which such town may be situated, but the language is "the Intendant and Wardens shall appoint three Managers to hold the ensuing and any subsequent election." Now, what Intendant and Wardens can possibly be referred to but those of the previously existing corporation, of which the one provided for by this Act was intended to be a mere continuation?

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*The rule of law as stated by Dillon in his work on Municipal Corporations, Section 116, is this: "Where a statute or charter revives or continues an old corporation, the new corporation is subject to all the liabilities of the old corporation, of which it is but a continuation." Again, he says in Section 115: "The name of an incorporated place may be changed, its boundaries enlarged or diminished, and its mode of government altered, and yet the corporation not be dissolved, but in law remain the same." And, again, "transition from town to city organization does not dissolve the corporation or extinguish its indebtedness." So that it is very clear that this exception is not well founded.

The next point raised by the appellants is that the bond in question "was not executed as provided by the statute, and, therefore, not binding on the defendants." We are unable to discover in the charter of this corporation or any of its amendments any provision prescribing any particular mode of executing a bond, and therefore, even were there no authority upon the point, we should not hesitate to adopt the conclusion that the mode pursued in this case was the most usual, natural and proper one—that it should be signed by the head of the corporation, the Intendant, and countersigned by the Clerk and Treasurer, under the corporate seal of which he was the proper custodian.

The idea that it was necessary that the bond should be signed by all of the members of the Town Council has no warrant in law and is contrary to the usual and approved practice. In Dillon on Municipal Corporations, Section 131, it is said that "the corporate seal attached to an instrument, attested by the signatures of the proper officers, is prima facie evidence that it was lawfully placed there, and that the instrument is the act of the corporation." In this case, so far from this prima facie evidence being rebutted, there is evidence of repeated acknowledgments of the validity of this obligation by three different payments in three several years, presumably by three different Town Councils, as the charter provides for the election of Intendant and Wardens every year. These payments would of themselves be sufficient to estop the defendants from making the defense here set up. For while it may be true, as held in Loan Association v. Topeka, (20 Wall., 667 [22 L. Ed. 455],) that such payments would not operate as an estoppel where the corporation had no authority to issue the bond, yet, inasmuch as we have seen that this corporation did have authority to issue the bond now in ques-

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tion, *the principle decided in that case has no application to the question under consideration.

It is very obvious that, in the view which we have taken of this case, the plea of the Statute of Limitations cannot be sustained.

In Dillon on Municipal Corporations, Section 380, it is said: "If the corporation * * * has a common seal, * * * and it is affixed to an instrument, in pursuance of a vote of the corporation, or by the proper officer, such an instrument is, beyond doubt, technically the deed of the corporation."

The second case above stated, though differing in some of its details, does not, in any material respect, differ in the principles which should govern it. It was an action brought by the plaintiffs, Currence and Watson, as the lawful owners and holders of a bond, bearing date the 11th of February, 1861, whereby "the Intendant and Wardens of the town of Yorkville" bound themselves and their successors in office unto A. J. Daviney, in the sum of eleven hundred dollars, for the payment of five hundred dollars to said Daviney on the 1st day of January, 1862, with interest from the 1st of December, 1860. This bond was signed by the Intendant and the four Wardens and sealed with the corporate seal of the corporation. On the 4th of March, 1861, it was duly assigned to the plaintiffs, and on the 16th of March, 1868, a payment was made thereon by the Intendant of said town. This bond does not, as in the former case, recite what it was given for, but the Circuit Judge finds that it was given for work done in macadamizing the streets of Yorkville, pursuant to the terms of a contract entered into by the corporate authorities of said town with said Daviney, and that "the town has received and still enjoys the benefits of the work done," and as there was no exception to this part of the decision of the Circuit Judge we may assume that such were the facts.

While we think that this case should be governed by the principles established in the first case, and that, therefore, the appeal cannot be sustained, we may say that there is an additional and conclusive reason for dismissing the appeal in the second case which was not made to appear in the first. By the Act of 1853, (12 Stat., 304,) as amended and extended by the Act of 1854, (12 Stat., 386,) "the Intendant and Wardens of the village of York" were expressly authorized, at their discretion, to issue interest-bearing bonds to an amount not exceeding

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five thousand *dollars, which, of course, would be sufficient to authorize the issuing of the bond now in question. It is contended,

however, that the authority conferred by these Acts had been exhausted by the corporation prior to the issuing of this bond, inasmuch as, prior to that time, the corporation had issued bonds to an amount exceeding the sum authorized. This position depends upon a question of fact which has been decided adversely to the appellants by the Circuit Judge, who says that the evidence was not sufficient to show that bonds to the amount of five thousand dollars had been previously issued. This decision by the Circuit Judge of a question of fact, according to the well-established rule of this Court, we regard as conclusive, unless shown to be manifestly erroneous. So far from finding this to be the case, we would be inclined to adopt his conclusion even were the question an entirely open one. The burden of proof was on the corporation to show what amount of bonds had been issued under the authority of these Acts. They had, or at least ought to have had, in their possession precise and definite evidence of the number and amount of bonds issued by them in the shape of a registry or something of that kind, and, in the absence of any such evidence, we do not think the loose, indefinite testimony, consisting of extracts from their minutes showing the adoption of resolutions "that this Council will issue a bond or bonds for the sum of $400.27, in such amounts as the said Wm. M. Kerr may desire," &c., or "that the Intendant is authorized to execute a bond," &c., without some evidence showing the actual issue of such bonds, by any means sufficient to establish the fact that the corporation had exhausted the authority conferred by these Acts. Nor do we think that the appellants' case is bettered by the testimony of the Treasurer that an account showing sundry payments on sundry bonds was correct, especially when such account does not show whether such payments were made on account of interest or principal, and when, too, the small amounts of a number of these payments would seem to indicate that such payments were of interest and not of principal.

We are unable to perceive the force of the position that the limitations contained in the proviso to the Act of 1854 entered into and was a condition of any bond issued by the corporation after that date, nor can we see its application to this case. That proviso is in the following words: "Provided, That the private property of the citizens of said town shall not be liable for the payment of said

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*bonds or other corporate liabilities that may be created by virtue of this Act in any other mode than by a regular and uniform taxation, as provided in the Acts aforesaid." It was simply designed to protect the private property of the citizens of the town from being made liable for the payment of any bonds issued under the authority of these Acts, except by a regular and uniform taxation, and as we do not understand that any effort has been or ever will be made to make such property liable in any other way we are at a loss to understand the force of this objection. When such an effort is made, it will be time enough then to consider what we now regard as a purely abstract question. Surely it will not be contended that the last words of the proviso—"as provided in the Acts aforesaid"—should operate to deprive the Legislature, at any subsequent time, of the power to authorize the corporation to impose an additional rate of taxation on real estate, or to subject other species of property to municipal taxation, or that, in case of such additional taxing power being given, the money derived from such additional taxes should not be applied to the payment of such bonds. Such a construction would be not only very extraordinary, but also a manifest perversion of the terms of the proviso, which, as we have said, was designed simply to protect the private property of the corporators from being subjected to the payment of these bonds except through a system of regular and uniform taxation. The position that, as the Intendant and Wardens are invested, by the charter, with all the powers of Commissioners of Roads, for the purpose of enabling them to keep the streets of the town in good repair, they can do no more than such Commissioners, and, therefore, could not issue a bond for work done on the streets any more than the Commissioners of Roads could have issued a bond for work done upon the highways, cannot be sustained. This proposition rests upon the assumption that not merely the same powers were granted to the Intendant and Wardens as were conferred upon the Commissioners of Roads, but none other.

This assumption is manifestly unfounded, as, in the very next Section to that giving the Intendant and Wardens the same powers as those granted to the Commissioners of Roads, additional power is given to the Intendant and Wardens which was not possessed by the Commissioners of Roads, viz., the power to compound with such persons liable to work upon the streets as may desire it upon the payment by them of such a sum of

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money as the Intendant and *Wardens might deem a fair equivalent therefor, which money was to be applied, not to the payment for repairs of the streets alone but "to the uses of the corporation." This shows very clearly the intention of the Legislature not only to give the Intendant and Wardens all the powers which had been conferred upon the Commissioners of Roads but also the additional power to commute with persons liable to road duty by the payment of money. And this necessarily involved the idea that the repairs of the streets was not to be effected by the labor of persons liable to road duty

alone but by hired labor also—that is, by labor under contract. And if the corporation had the power to make contracts for the repairs of the streets, they had, as we have seen while considering the former case, the power necessarily incident thereto—the power to execute obligations for the payment of the money due under such contracts.

The judgment of the Circuit Court in each of the above stated cases is affirmed.

WILLARD, C. J., and HASKELL, A. J., concurred.

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RAILROAD COMPANY v. WHITE.

(Columbia. April Term, 1878.)

[*Corporations* ⟸13, 24.]

Where the charter of a corporation expresses the conditions upon which it is granted, it is not competent to add other conditions supposed to arise by implication.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 27, 48–52; Dec. Dig. ⟸13, 24.]

[*Corporations* ⟸83.]

In an action against A to recover the sum subscribed by him to the capital stock of a corporation, testimony that A was appointed to receive subscriptions to the stock at a meeting of the corporators, that he had assumed to act under such authority, and had taken not only his own but also the subscriptions of others, was competent to go to the jury for the purpose of showing that he was bound by his subscription, he having afterwards erased his name from the paper before he turned it over to the company.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 332; Dec. Dig. ⟸83.]

Before Kershaw, J., at Chester, October Term, 1877.

Action by the Cheraw and Chester Railroad Company against R. I. White to recover a sum of money alleged to have been subscribed by the defendant to the capital stock of the company.

The defendant by his answer admitted that he had signed a paper by which he subscribed $1,000 to said capital stock, but alleged that the paper subscribed by him was at the time in his possession and under his sole control;

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that he had not been legally appointed *by a majority of the stockholders a commissioner or agent to receive subscriptions, and that before the paper left his possession and had been turned over by him to the company he had determined not to become a subscriber and had erased his name from the paper.

The following is the testimony given at the trial:

William H. Hardin testified: I am President of the Cheraw and Chester Railroad Company; Erwin, Barber, Stevens and others Directors. [The paper writing, the subject of the action, shown him.] I recognize this paper, having the following form:

Cheraw and Chester Railroad.

We, the undersigned, severally subscribe for the number of shares of the capital stock of the Cheraw and Chester Railroad Company opposite our respective names, and severally agree and promise to pay for the same at the par rate of fifty dollars per share, to the Treasurer of the said company, at such times and in such installments as the same may hereafter be called for.

Name.	Shares.	Amounts.	Remarks.

It was turned over to me as assets of the company in January, 1877. The first signature is that of R. I. White, defendant, for $1,000. There are other signatures for various amounts. There were other papers of the same sort sent out for the same purpose. It will require all the stock subscribed, and more, to build the road and pay the debts. Debts were contracted on faith of this subscription in part. Three of the subscribers to this paper have paid.

Cross-examined: There is an attempt at cancellation of defendant's name on this paper. Three of the names are scratched. The paper is now in same condition as when I received it, except the three who have paid are marked "pd." All the subscriptions for stock are in this form. Thad. McFadden, one of the subscribers to this paper, paid $100 by note last March, with interest, he thinks. McFadden's name is scratched. The condition to all the names, except defendant's, is as follows: "If I am taxed, I do not pay this subscription." No condition to defendant's name. All the subscribers, except Anderson, owned property for taxation. J. G. Hall

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*and James Wilson, Sr., gave each his note for amount subscribed two or three weeks ago. Note for $100, without interest. Chester County subscribed to the stock of the Chester and Lenoir Railroad in 1873 or 1874, and in July, 1874, subscribed $75,000 to Cheraw and Chester Railroad Company. Subscription to Chester and Lenoir Road was first made, but not a year before the last. County has levied taxes to pay their subscription. The first levy for C. & C. R. R. was in 1875. I was in Lancaster on 15th April, 1873, when the chartered corporators of C. & C. R. R. met. A majority of the corporators were present. S. Jackson, W. A. Evans, John B. Erwin, Wm. Stevens, W. A. Moore, John R. Walsh, A. H. Davega, T. H. Moffatt and W. B. McMillan were present in person, and F. A. Cahew, Henry McIver, H. Craig and George W. Melton by proxy; others absent. No stock was represented. The corporators appointed the following persons, sixty-one in all, to receive subscriptions to the road: * * * Cedar Shoals, Chester County, R. I. White; and elected J. A. Haseltine President and E. F. Malloy, W. A. Evans, John S. Millen, W. A. Moore, John B. Erwin, Wm. Stevens, T. H. Moffatt, John S.

Wilson and Dr. A. H. Davega Directors. White was not present at this meeting. This organization was re-elected annually. Next meeting of these Directors was on 28th May, 1873. The first meeting of stockholders was on 1st September, 1874, when 2,106 shares of stock, being a majority thereof, was represented in person or by proxy. Next meeting of stockholders was on 27th June, 1876; 1,141 shares represented; can't say it was a majority. This was a call meeting. The next regular meeting of stockholders was on 1st August, 1876. It was an annual meeting, and 1,980 shares of stock, being a majority thereof, were represented. Same officers elected. The next meeting was on 23d January, 1877, when 1,704 shares were represented. At this meeting I was elected a Director, and on 1st February, 1877, elected President of the company. Haseltine had been President up to this date. On 1st August, 1877, the stockholders again met; 1,699 shares represented, which was a majority of the stock. This the last meeting.

In reply: The written conditions annexed to the paper are in handwriting of defendant.

John S. Wilson: I was at the first meeting of corporators, on 15th April, 1873, and was then elected a Director. Subscription papers were afterwards sent to me and sent out to

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the Commission*ers; one was sent to the defendant. On the day they were received, I sent them out, sent them to Whitesides, with request to send them to White and others. Defendant told me lately that I had said I would send him a paper for subscriptions; I don't remember the original conversation. White asked me if he had not sent the paper back to me; said he sent it by mail.

Cross-examined: I was not a corporator 15th April, 1873. I sent the paper through Whitesides, in a separate envelope, addressed to White. I saw the paper in its present shape first on 28th September, 1877. White's name then canceled as now.

In reply: Defendant, in conversation alluded to, was trying to call to my mind that he returned paper to me as principal Director here. I saw in 1874 all the papers presented by the Treasurer to a committee to estimate amount of stock. This paper in suit was not among them.

J. A. Haseltine: I was the first President. I saw the paper, subject of this action, for the first time in September or Fall of 1874, twelve or eighteen months after the company was organized, and have had it ever since. It came to me by mail; no letter with it. Dunlap said he had subscribed to defendant's paper without any conditions, and he intended to pay it, and he had authorized no condition put to it. [This declaration of Dunlap's objected to, but admitted; defendants excepted.]

Cross-examined: The paper, in 1874, was in same condition as now, except the three marked "pd." Conversation with Dunlap was several months before the paper was received; no one present but Dunlap.

In reply: Defendant said to me in Baltimore, two or three years ago, after I got the paper, that he would give $1,000 if road would run by his house.

W. D. Ingram: First saw the paper in action in defendant's hands; defendant's name only on it then, and was not scratched. Defendant asked me to subscribe in early part of the Spring, two, three or more years ago. Nothing was said about conditions or taxes.

Cross-examined: I readily refused to subscribe. Dunlap said there were no conditions at first, but he had it put there after he heard he was to be taxed; said he authorized White some time afterwards to put in this condition.

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*In reply: Dunlap first said there were no conditions; afterwards said conditions were authorized to be put to his subscription. White mentioned no other business, and was the only visit he has made to me.

Jess C. Clifton: Recognizes the paper, the subject of this action. The paper had four signatures when I first saw it; not scratched; no conditions to it. I was in the field, planting cotton, when the defendant came; asked me to subscribe, and mentioned no conditions; said it would be in installments and easily paid. He seemed anxious. Names to papers were defendant's, Dunlap's, Terrell, and down to McFadden. White was there half hour; does not visit often, and attends closely to business.

Cross-examined: I gave defendant no reason to think I would subscribe, and would not have subscribed on conditions.

In reply: I was not able to subscribe.

Uriah Jordan: White brought the paper to me in plantation; some names on it. I did not intend to subscribe, and told defendant so very soon. Defendant does not often visit me.

J. G. Clifton: Defendant presented the paper to me. James Wilson's name was there, and all above it. There were no conditions annexed and no scratched names; no conditions were mentioned. This in Spring of the year.

Cross-examined: I did not refuse to subscribe right there.

In reply: This after considerable conversation.

Thad. McFadden: I was in business with defendant as merchants. I have seen the paper; I signed it. There were no conditions and no names scratched; I scratched my name first; I intended to move away, and canceled my name. We dissolved in August, 1874. I remained with Mr. White until October, 1874. I then went to Lancaster, but am now living in Chester. White's name not scratched when I signed, and heard first of conditions after I signed, or about the time

the tax was levied for Chester and Lenoir on this road. I then put in the condition; don't know how long after I signed. I reckon it was after I signed I first heard of conditions. I then understood that, if taxed, subscription was void; how long after, don't know.

Cross-examined: I was present when White received the paper by mail; there was no letter with it. I did not understand defendant was agent of railroad. Defendant signed a day or two before I did. Heard defendant telling parties signing that they could

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*annex any conditions before he handed it in. I am not able to say whether the talk about conditions was before or after I signed. Conditions opposite my name when I canceled. I either put the conditions in or authorized White to do so; but I think it is in my handwriting. I thought I had a right to cancel my name. Dunlap is a taxpayer in Chester County. Owning property on the road prompted me to give my note last Spring for $100; gave note for $100, interest from date. Defendant had the paper when he scratched his name. The paper was sent up before October, 1874. The County subscription was talked of, but can't say whether before or after I signed.

In reply: Four names before mine. Some of the conditions put in about the time we dissolved.

J. A. Haseltine recalled: No authority given to any of Commissioners to receive conditional subscriptions. They were appointed by the corporators. Nothing said about conditions on the minutes.

B. J. Witherspoon [Record of proceedings of corporators, Directors and stockholders offered in evidence]: I was Secretary. On 28th of May, 1873, direction resolved that no conditional subscriptions be received. At this meeting a call of five per cent. on subscriptions was made. At meeting of directory 1st September, 1874, calls were made as stated in complaint, and notices thereof published in the Chester Reporter on the 15th of October, 1874, and subsequently. People generally prompt in paying. Defendant never paid his. I was Treasurer of the company till February, 1877.

Cross-examined: First saw this paper in Haseltine's hands, then in same condition as now, except "pds." None of the parties to this paper paid anything or attended the meetings of the stockholders that I know of.

Thad. McFadden recalled: Cedar Shoals postoffice was at White's store. We were subscribers for the Chester Reporter for part of the time I was there. The Reporter came to the office for others. Defendant and McFadden were postmasters there.

Cross-examined: I never attended a meeting of the stockholders.

John Buchanan: I am editor of the Chester Reporter. Defendant has been a subscriber to the Reporter since the 2d of July, 1874. White and McFadden were subscribers in 1873, at Cedar Shoals postoffice.

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*The Chester Reporter of the 15th of May, 1873, offered, containing an advertisement that books of subscription to the Cheraw and Chester Railroad Company would be open till the 20th of May, when they would be closed. R. I. White was named in the advertisement as the Commissioner for Cedar Shoals, with other persons for other places.

From the records of meetings in evidence, it appears that the chartered corporators held their second meeting on the 17th of September, 1873, in pursuance of a call by the Board of Directors of said road—seven present in person and five by proxy. After locating the road, the corporators adjourned sine die.

Also, on the 1st of August, 1874, the President and Directors, as successors of the corporators of the Cheraw and Chester Railroad Company, by resolution, turned over the road to the stockholders of said road, on condition that said stockholders, as their successors, elect ten Directors immediately, each share of stock entitling the holder to one vote, and the said Board then adjourned sine die. The stockholders then took charge of the road and elected the Board of ten Directors.

The plaintiff here rested, and the defendant moved for a nonsuit on the grounds:

1. Because the plaintiff has failed to prove itself a body corporate under and by virtue of and pursuant to an Act of the General Assembly of this State entitled "An Act to charter the Cheraw and Chester Railroad Company," approved February 27th, 1873, as alleged in the complaint, so as to enable plaintiff to bring this action for calls on subscriptions to stock, inasmuch as it had failed to prove that the $1,000,000 of stock required by the charter had been in fact subscribed.

2. Because plaintiff has failed to prove any valid contract between plaintiff and defendant, inasmuch as defendant had not been appointed Commissioner to make contracts for the company with subscribers by a majority of the chartered corporators as required by law.

The Court refused the motion for nonsuit and defendant excepted. The case was then submitted to a jury, who found for the plaintiff. The defendant appealed.

Patterson & Gaston, for appellant.
Hemphill, Rion, contra.

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*July 31, 1878. The opinion of the Court was delivered by

WILLARD, C. J. The only questions brought before us by the present appeal arise on the exceptions to the refusal of the Circuit Judge to nonsuit the plaintiff. The action was upon a subscription to the capital stock of the plaintiff corporation alleged to have been made by the defendant while acting as an agent of the plaintiff corporation in pro-

curing subscriptions to the capital stock of said corporation. The first ground of nonsuit raises the question whether the plaintiff was competent to sue as a body politic and corporate in pursuance of its Act of incorporation. The objection cited to its competency is, that it had failed to prove that the $1,000,000 of stock provided by its charter had been in fact subscribed.

The Act of incorporation (15 Stat., 442,) does not express any such limitation or condition, as it regards the grant of corporate authority to the incorporators. If such a limitation exists, it must be made out by implication, having regard to the objects of the Act of incorporation. The difficulty in the way of raising such implication lies in the fact that the Act expresses the conditions attached to the grant of the corporate franchise in the following language: "Provided, That said persons shall commence operations upon said road within two years after the passage of this Act and complete the same within five years." This proviso is immediately connected with the words conferring the franchise, as a proviso thereto, and makes the intention to subject the words of grant to it as a condition entirely clear.

The Legislature having thus expressed the conditions on which the grant of the franchise should depend, it is not competent to raise other and additional conditions by mere implication. It is not pretended that there is ground for a necessary implication, arising from the fact that any of the expressions of the Act would be insensible, or any of its provisions ineffectual, unless such intent was raised; but the attempt to raise the implication rests on no higher ground than that it is a reasonable inference considering the nature and the objects of the grant. Considered in this light the answer is conclusive that the conditions of the grant being expressed they are not left to inference. Section 6 of the Act fixes the period of commencement at three years instead of two, as fixed in Section 1. But it is not necessary to construe these Sections as connected together, as no objection is made based upon a failure to

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commence *operations within the time limited by law. The first ground of nonsuit was not well taken.

The proposition advanced by the second ground for nonsuit is based on the fact that the subscription list was in the hands of the defendant for the purpose of his obtaining subscriptions thereto in behalf of the corporation at the time the defendant signed it as a subscriber, and claims that no contract could arise as between the plaintiff corporation and defendant, unless it is made to appear by proof that the defendant had been appointed Commissioner to make contracts of that nature for the company by a majority of the chartered corporators. There was direct evidence that the defendant, White, was appointed to receive subscriptions to the road at a meeting of the corporators at which a majority of the corporators were present. Evidence was also introduced to the effect that the defendant assumed to exercise such authority in behalf of the company and actually took the subscriptions of several persons in addition to subscribing the subscription list himself.

These proofs were competent to go to the jury upon the question whether the defendant was acting in behalf of the plaintiff corporation while holding the subscription list and soliciting and obtaining subscriptions. The Act does not require the appointment of commissioners for such purpose, but its language in regard to the persons authorized to take subscriptions is as follows: "Under the direction of such persons as may be determined on by a majority of said incorporators." The Circuit Judge would not have been justified in withdrawing such evidence from the jury. The second ground on which a nonsuit was asked was insufficient.

The appellant has pressed other reasons for demanding a nonsuit than those that appear to have been urged at the trial and cannot be considered for that reason. It is not competent to reverse a ruling at the Circuit on grounds that were not urged before the Circuit Court.

The appeal must be dismissed.

McIVER, A. J., and HASKELL, A. J., concurred.

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*TRIMMIER v. THOMSON.

(Columbia. Nov. Term, 1877.)

[*Bonds* ⇦122.]

A joint action upon a joint and several bond, given by two obligors, may be maintained against the surviving obligor and the executors of the deceased obligor.

[Ed. Note.—Cited in Sullivan v. Sullivan Mfg. Co., 14 S. C. 501; Wiesenfeld, Stern & Co. v. Byrd, 17 S. C. 113. For other cases, see Bonds, Cent. Dig. § 155; Dec. Dig. ⇦122.]

[*Judgment* ⇦241.]

Where the nature of the case so demands, separate judgments may be entered against several defendants; as, for instance, where the action is against a surviving obligor and the executors of a deceased obligor, and the verdict is a general one for so much money, separate judgments may be entered against the defendants.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 426; Dec. Dig. ⇦241.]

[*Executors and Administrators* ⇦86.]

The personal goods and effects of a decedent vest in his personal representative from the moment of his death, and he, whether he be executor or administrator, is the proper and only party to sue for and collect the choses in action of the estate, and it makes no difference that he

has an interest in the chose sued on by assignment from a legatee.

[Ed. Note.—Cited in Pickens v. Bryant, 45 S. C. 24, 22 S. E. 750.

For other cases, see Executors and Administrators, Cent. Dig. § 359; Dec. Dig. ⟸86.]

[*Slaves* ⟸7.]

Where the owner of slaves conveyed them to another, reserving a life estate, the relation thereby created between him and the other was not that arising from bailment, but he simply remained owner of a life estate in the slaves, with power to sell and dispose of such estate as he pleased.

[Ed. Note.—For other cases, see Slaves, Cent. Dig. §§ 20–29; Dec. Dig. ⟸7.]

[*Slaves* ⟸8.]

Where one having a life estate in slaves transfers such estate to another, the contract between them is one of sale and not of letting to hire.

[Ed. Note.—For other cases, see Slaves, Cent. Dig. §§ 30–38; Dec. Dig. ⟸8.]

[*Covenants* ⟸93.]

A covenant to protect vendee of the covenantor in the possession of the slaves purchased during his natural life was not broken by the emancipation of the slaves before his death.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. § 101; Dec. Dig. ⟸93.]

[*Pleading* ⟸139.]

Where matter is alleged in an answer which might have been, but was not, set up as a counter claim, and there is no prayer for judgment thereon, it must for all the purposes of pleading be taken as a mere defense and not as a counter claim.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 287; Dec. Dig. ⟸139.]

[*Sales* ⟸267.]

Implied warranty of soundness is not excluded by an express warranty of title.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 760; Dec. Dig. ⟸267.]

[*Sales* ⟸428.]

Where in an action for the purchase money of a chattel the defense is unsoundness, if defendant has not returned or offered to return the chattel, he must pay what it was worth.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1220; Dec. Dig. ⟸428.]

[*Payment* ⟸74.]

A receipt for a smaller sum than that apparently due, expressed to be in full, must be taken as true until the contrary is proved.

[Ed. Note.—Cited in Steele v. Atkinson, 14 S. C. 161, 37 Am. Rep. 728.

For other cases, see Payment, Cent. Dig. § 229; Dec. Dig. ⟸74.]

[*Set-Off and Counterclaim* ⟸9.]

[A counterclaim properly sets up a cause of action in favor of defendant against plaintiff, and prays for judgment thereon.]

[Ed. Note.—For other cases, see Set-Off and Counterclaim, Cent. Dig. § 12; Dec. Dig. ⟸9.]

[This case is also cited in Mitchell v. Pinckney, 13 S. C. 210, as to the doctrine of implied warranty in sales of chattels, and in McCorkle v. Williams, 43 S. C. 69, 20 S. E. 744, on the subject of joinder of parties.]

Before Northrop, J., at Spartanburg, March, 1877.

This was an action by F. M. Trimmier as administrator with the will annexed of Peyton Simmons, deceased, against T. O. P. Vernon; and also against H. H. Thomson and J. S. R. Thomson, as surviving executors of H. H. Thomson, deceased.

To understand the opinion of the Court, it is necessary to publish the brief, as agreed upon by counsel, and which is as follows:

An action was commenced in the Court of Common Pleas on the 9th of June, 1874, by F. M. Trimmier, administrator with the will annexed of Peyton Simmons, deceased, against T. O. P. Vernon and H. H. Thomson and J. S. R. Thomson, as surviving executors of H. H. Thomson, deceased, defendants. The complaint alleged that T. O. P. Vernon and H. H. Thomson, Sr., had executed and delivered to Peyton Simmons a bond, a copy of which was attached. That Peyton Simmons died on 3d of June, 1871, leaving a will,

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and *that plaintiff was thereafter duly appointed administrator with the will annexed of said testator's estate; that H. H. Thomson, Sr., died, leaving a will, appointing Mrs. Mildred E. Thomson, J. Waddy Thomson, H. H. Thomson and J. S. R. Thomson executors; that said executors all qualified, and that afterwards Mrs. Mildred E. Thomson and J. Waddy Thomson died. The complaint demanded judgment against the defendants for thirty-six hundred and six dollars and ninety-seven cents, with interest from 20th of June, 1874.

The bond is as follows:

"For and in consideration of the sale, transfer and delivery by Peyton Simmons of all his right, title, claim and interest in the following negroes, to wit: Beck, Chany, Josephus, Susanna, Nutty, Isaac, Henry, Vina, Harriet, Cloe, George, Caroline and their increase, and also all his right, title, claim and interest in the following negro slaves, to wit: Elleck, Dick and Myra, and their increase, now in the actual possession of James W. Cooper and Jesse Cooper, to Thomas O. P. Vernon, of Spartanburg District, his heirs, executors, administrators or assigns, during the natural life of the said Peyton Simmons, all which will more fully appear by reference to the deed of the said Peyton Simmons, executed 7th of June, 1855, we do hereby bind ourselves, and each of us jointly and severally, our heirs, executors, administrators and assigns, firmly by these presents, to pay to the said Peyton Simmons, during his natural life, or while I, my heirs, executors, administrators, or assigns shall not have the possession of the said negroes so delivered taken from me, my heirs, executors, administrators or assigns, by any person or persons by suit at law or equity, claiming under the said Peyton Simmons, the sum of two hundred dollars per annum during the natural life of the said Peyton Simmons, and also the costs of the suit at equity just terminated between

James W. Cooper and others, complainants against the said Peyton Simmons; and also to save him harmless from anything arising out of said suit. Witness our hands and seals this June 9th, 1855.

"T. O. P. Vernon, [Seal.]
"H. H. Thomson, [Seal.]

"Test:
"A. W. Bivings.
"R. D. Belue."

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*Endorsements on bond:

"June 10, 1856. Rec'd of T. O. P. Vernon one hundred and thirty-five dollars on this bond in part payment of the two hundred dollars now due. P. Simmons."

"Rec'd, July 18, 1856, of Thomas O. P. Vernon, sixty-five dollars in full of principal, and thirty-seven cents in full of interest of first installment now due according to the within agreement. Paton his X mark Simmons.

"Test:
"J. M. Bowden."

"Rec'd, October 9, 1857, of T. O. P. Vernon, fifty dollars and ninety-seven cents on this bond.

"Rec'd, June 11, 1859, of T. O. P. Vernon, seventy dollars in part of amount for the year ending 1st June, 1859, and beginning with 1st June, 1858.

"Rec'd, June 15, 1857, of T. O. P. Vernon, one hundred dollars on this bond.

"Rec'd, December 14, 1857, of T. O. P. Vernon, fifty-one dollars and ninety cents on this bond.

"Rec'd, of H. H. Thomson's estate, by J. M. Elford, seventy dollars and sixty cents, in part of third annuity, due on this bond.

"Rec'd, November 5, 1858, of T. O. P. Vernon, one hundred and thirty dollars on this bond.

"Rec'd, October 14, 1859, of T. O. P. Vernon, fifty dollars in part of instalment now due on his bond. P. Simmons."

"Rec'd fifty dollars in full of installment due 9th June, 1859."

"Cr. by seventy-four dollars paid Mr. Simmons, July 2, 1860, by."

"Rec'd 22 Feb'y, 1861 thirty-five dollars, the amount due by the estate of H. H. Thomson, dec'd, from Waddy Thomson, Ex'or, including in't from 8th June, 1860, and paid same to Peyton Simmons April 2, 1861."

"J. D. Wright, Att'y."

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*"Nov. 3, 1859. Rec'd of the Ex'ors of H. H. Thomson, dec'd, thirty-four dollars and twenty-nine cents, their portion of the annuity above named prin. and in't from the first day of June last. P. Simmons.

"Test: R. C. Poole."

The defendants, in their answer, admitted the allegations of the complaint, but submitted to the Court that the plaintiff should not maintain his action because he had joined in the same action as joint defendants the living obligor, T. O. P. Vernon, and the surviving executors of the deceased co-obligor, H. H. Thomson.

The answer then alleged that the said bond belonged, under the will of Peyton Simmons, to Clarissa Simmons and her assigns; that the plaintiff had recognized the right of Clarissa Simmons to the control and possession thereof, and that the plaintiff had given to her his individual bond in the sum of seven hundred dollars, conditioned to pay her an annuity of one hundred dollars, and that, in consideration thereof, she had assigned said bond to him, and that he held said bond in his own right.

The answer further alleged that after the execution and delivery of the bond sued upon the obligors made an agreement with Jesse Cooper and James W. Cooper whereby one third part of the amounts to be paid on said bond was assured to be paid by Jesse Cooper, another third by James W. Cooper, one-sixth part by T. O. P. Vernon, and one-sixth part by the testator of the defendants, H. H. Thomson and J. S. R. Thomson; that Peyton Simmons was a party to said agreement, and consented thereto, and that there was an endorsement on said bond showing what amount each of said persons was to pay.

That the annuities due upon said bond were paid to the 9th of June, 1864.

That there was failure of consideration in that said bond was given wholly for the use of the slaves mentioned in the bond during the lifetime of Peyton Simmons, and that certain of said slaves, to wit, George, Caroline, Nutty, Chaney and Elleck, were unsound, and that the damage which resulted to defendants therefrom amounted to two hundred dollars per annum.

That at the time the bond was given Peyton Simmons covenanted to protect and defend

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his vendee, T. O. P. Vernon, in pos*session of said slaves during his life, and that on his failure to do so the aforesaid bond for annuity should become null and void, and that in April, 1865, said covenant was wholly broken and the bond thereby became null and void.

That by the failure of Peyton Simmons to perform his covenant after April, 1865, the defendants were damaged to a greater amount than the annual installments of the bond.

That Peyton Simmons, on the 29th of April, 1829, bargained and sold to James W. Cooper, Jesse Cooper and Thomas Cooper, and their heirs and assigns, certain negro slaves, reserving, however, the possession, use and benefit of the same during his own life and the life of his wife Susanna, (who afterwards died,) and covenanted that after his death said negro slaves and their increase should be equally divided between the said Coopers; that said Coopers, on the 7th of

May, 1838, consented to the sale of certain of said slaves, in consideration whereof certain other slaves were conveyed to them under the same terms and conditions and with like covenants as had been made in the first deed; that the slaves mentioned in the bond sued upon were all included in the two aforesaid deeds made by Simmons to the Coopers; that in 1855 the testator, H. H. Thomson, bought the interest of the Coopers in certain of said slaves, to wit, Chaney, Josephus, Susanna and Isaac, and was thereby entitled to the rights of the Coopers as to said slaves, and that the failure or inability of the plaintiff or his testator to carry out the covenants of said deeds damaged the estate of H. H. Thomson four thousand dollars; that T. O. P. Vernon bought likewise the interest of the Coopers in certain other of the said slaves, to wit, George and Caroline and child, and that by like failure of Peyton Simmons and his administrator to perform the covenants of said deeds said T. O. P. Vernon was damaged two thousand dollars; that Jesse Cooper, James W. Cooper and Thomas Cooper were damaged by like failure to perform the covenants of said deeds twelve thousand dollars.

The appellants also pleaded plene administravit.

The plaintiff in his reply alleged:

First. That plaintiff had no knowledge of the bond referred to in the answer; and that if there was such a bond executed by his testator, that the covenants therein had been performed by said testator.

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*Second. That the plaintiff admitted that the deeds were executed as alleged, but denied that any of the covenants therein were broken.

Third. Plaintiff denied that the Coopers were damaged by the failure of plaintiff's testator to perform the covenants contained in said deeds.

The amended answer of the defendants alleged that the slaves, Elleck and George, died about 1857, and that the services of same were worth one hundred and fifty dollars per annum, and that that amount should also have been credited on the bond now sued upon, if the annuity was payable at all, and that the remainder of said slaves were emancipated under the proclamation of the President in 1863 and by the action of the military authorities in April, 1865.

The case was placed on Calendar No. 1, and called at the March Term of Court, 1877. A motion (of which due notice had been given) was made to dismiss the complaint, on the ground that the plaintiff had improperly joined as defendants in the same complaint the obligor, T. O. P. Vernon, and the surviving executors of the deceased obligor, H. H. Thomson; also a motion to compel plaintiff to amend so as to allow the action against one defendant only; also to compel plaintiff to proceed separately in his action against T. O. P. Vernon and the appellants, all of which motions were refused by the presiding Judge and exceptions taken.

A jury having been sworn in the case, the Court ruled that the defendants, having admitted the allegations of the complaint, were entitled to the opening and reply.

The defendants then put in evidence the following paper, to wit:

"State of South Carolina, }
"Spartanburg District. }

"Know all men by these presents, that I, Peyton Simmons, for and in consideration that T. O. P. Vernon hath this day agreed to pay off and discharge all the tax costs with which I am now or hereafter may be chargeable in the case of James W. Cooper and others against me tried and disposed of at this June Term of the Court of Equity for said District, and hath agreed also to relieve, release, dispense with and protect me against and from all orders and decrees of the said Court of Equity for said District in the said case of Cooper and others against me, and in

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consideration also of *an annuity of the sum of two hundred dollars, secured to be paid to me by the said T. O. P. Vernon for and during the term of my natural life, said annuity dating and beginning on the day when I shall hereafter deliver into the possession of the said T. O. P. Vernon the sixteen negro slaves hereinafter mentioned and named, have this day sold, bargained, conveyed and made over and transferred, and do by these presents sell, bargain, convey, make over and transfer all the following named negro slaves, to wit: Beck, Chany, Josephus, Susanna, Nutty, Isaac, Henry, Vina, Harriett, Cloe, George, Caroline, Alice, Dick and Myra, with all their increase; that is to say, all my right, title and claim to the said negro slaves, said right, title and claim being and during the term of my natural life; and said negro slaves being the same heretofore conveyed by me to James W. Cooper, Jesse Cooper and Thomas Cooper in several deeds, in which several deeds the said life estate conveyed as above to said Vernon was reserved; and do hereby bind myself, my heirs, administrators and executors, to protect and defend the said Vernon, his heirs, executors and administrators in the possession of the said negro slaves, during my life as aforesaid, against the demands and claims of any and all persons setting up title thereto, and especially against the title or claim of any person or persons claiming the said negro slaves under any title, deed or bill of sale heretofore executed by me, hereby declaring null and void the bond securing the annuity aforesaid if the said negro slaves shall hereafter be recovered and taken from the possession of the said Thomas O. P. Vernon, or from the possession of his heirs, executors or administrators whilst I live, in suit at law or equity herein; hav-

ing it understood that I am not to deliver into the actual possession of the said Thomas O. P. Vernon the three negro slaves, Elleck and Dick, now in the possession of Jesse Cooper, and Mira, now in the possession of James W. Cooper, meaning hereby simply to convey my right and title to the said three negro slaves.

"In witness whereof I have hereunto set my hand and seal this the 7th day of June, A. D. one thousand eight hundred and fifty-five.

"Peyton Simmons. [L. S.]

"Signed, sealed and delivered in presence of

"H. H. Thomson.

"J. V. Trimmier."

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*The defendants also put in evidence the bond sued upon in this action. On said bond, and a short distance below the signatures, appears the following endorsement, written in ink, and in handwriting of J. D. Wright, to wit:

Jesse Cooper, one-third.

H. H. Thomson, portion one-half of one third.

T. O. P. Vernon, the same.

James Cooper, one-third.

Hon. T. O. P. Vernon then testified that he and H. H. Thomson signed the bond; that the latter was a surety and died in February, 1858. On cross-examination witness said he thinks H. H. Thomson, at date of bond, had equal interest with himself in the negroes. [Question was here asked whether any, and, if so, what, arrangement was ever entered into between the said obligors and Peyton Simmons as to other persons assuming a portion of the liabilities of the bond. Question was objected to by the plaintiff, and objection sustained by the Court.] Witness further testified that the slaves, at the time of the trade, he supposed were sound. Plaintiff objected to the introduction of any testimony as to the unsoundness of the slaves. Objection overruled by the Court and exceptions taken. Witness then testified that the price agreed to be paid for the use of the slaves was a good price for the use of sound slaves; that witness himself paid most of the annuities, which were paid without objection or complaint on his part, and that he never heard that any complaint of unsoundness of the slaves was made by any of the parties concerned until after this suit was commenced; that no offer to return the slaves to plaintiff's testator had ever been made; that H. H. Thomson subsequently purchased one-half of interest of witness in said slaves; that witness and H. Thomson subsequently entered into an arrangement by which H. H. Thomson obtained the titles of the Coopers to the negro women, Chany and her children, Josephus and Susanna, and to Isaac; and witness obtained the Coopers' titles to the slaves George and Caroline and child; that George died very shortly after he was brought home sick, from a fever contracted while at Peyton Simmons's. The Coopers were to pay two-thirds of the annuities to Peyton Simmons under an agreement made between said Coopers and witness and H. H. Thomson; and witness was to pay one-sixth of the annuities, and H. H. Thomson was to pay also a sixth. The negroes obtained from Simmons were the same negroes whom Sim-

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mons had formerly deeded to the *Coopers, reserving to himself the use for his life. Witness was here asked as to condition of slave Beck at time of sale, and whether he and H. H. Thomson had to incur any expense in providing for her. [This question was objected to. Objection sustained and exception taken.]

Defendants offered in evidence the following papers, to the admissibility of which the plaintiff objected. Objection overruled and exceptions taken. Proved by Judge Vernon, to wit:

"One day after date I promise to pay M. C. Barnett, administrator of the estate of J. W. Cooper, deceased, or bearer, sixty-six dollars and seventy cents, for value received.

"Given under my hand and seal this 19th June, 1863. Peyton Simmons." [L. S.]

"One day after date I promise to pay M. C. Barnett, administrator of the estate of J. W. Cooper, deceased, or bearer, one hundred and forty-three dollars and twenty-one cents, for value received.

"Given under my hand and seal this December 26th, 1862.

"Peyton Simmons." [L. S.]

"One day after date I promise to pay M. C. Barnett, administrator of the estate of J. W. Cooper, deceased, sixty-six dollars and sixty-six cents, for value received.

"Given under my hand and seal, July 4th, 1864. Peyton Simmons."

Judge Vernon further testified that M. C. Barnett was dead.

The testimony of witnesses taken before the Clerk of the Court was then introduced.

Mrs. White testified as to the unsoundness of several of the negroes, to which testimony the plaintiff objected. [Objection overruled and exceptions taken.] That money was paid by the Coopers on the bond up to the freeing of the slaves; she never saw any of said money paid; that she had seen receipts signed by Simmons, some of which state that they were given for the hire of the negroes and some for the annuities on account of the negroes; that at the time Simmons parted with the possession of the slaves their ages were as follows: Myra, sixteen years; Dick, an infant; Elleck, thirty years; Caroline, twenty-five years; George, thirty years, and Cloe, eighteen years; Harriet, Vina, Henry,

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Isaac, Susanna and *Josephus were babies at that time; Chany, thirty-five or forty years old; Beck, very old and worthless.

Several witnesses were then introduced to

prove the value of the hire of a lot of negroes such as is above described, to all of which testimony the plaintiff objected. [The objection was overruled and exceptions taken.] Said witnesses then testified that the hire of such a lot of slaves would be worth but little, if anything, more than their board and clothing: that two hundred dollars would be more than they were worth at that time: that the hire of a man was worth about one hundred dollars per annum, and of a woman about fifty dollars. The price of slaves at that time was as follows: A man from eight hundred to one thousand, a woman from five to seven hundred dollars, a child from two to five hundred dollars: that they did not know the negroes in controversy: that the natural increase of negro women and the growth of negro children paid a good interest on investments in such property: that whilst the hire of the negroes, described as said negroes were at the time of the transfer, was worth very little, it would become more and more valuable with the growth of the children.

The defendants then put in evidence the record from Probate Court of estate of Peyton Simmons, deceased. The will gave to the testator's wife, Clarissa Simmons, all of his estate after the payment of his debts, to be entirely subject to her control and disposal immediately after his death, and constituted her the sole executrix of the will, but she did not qualify as executrix. The administration bond given by plaintiff as administrator with the will annexed was in the sum of one thousand dollars. The letters of administration are dated 28th March, 1874.

The defendants then had the plaintiff sworn. He stated that he was Clerk of the Court: that he had bought the interest of Mrs. Clarissa Simmons in the bond on 14th November, 1873, before the probate of Peyton Simmons's will, and that then Mrs. Simmons had assigned her interest in the bond to him: he gave Mrs. Simmons therefor his own bond for $700, conditioned to pay her an annuity during her life of one hundred dollars. He then applied for letters of administration and brought this suit. No debts have been proved against the estate. The bond sued upon is his individual property, after the payment of the debts of the testator and the expenses of administration: that this bond is about all the estate: that suit was brought on this bond in 1867 by Peyton Sim-

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mons: *that the suit abated by the death of said Simmons. The record of said suit was produced by witness.

The defendants thereupon rested. The plaintiff announced that he had no testimony to offer, and claimed that he was entitled thereby to the reply in the argument before the jury. The Court so ruled, to which ruling the defendants excepted.

After argument the defendants submitted to the Court a written request to charge the jury as follows:

I. That if the jury, from the evidence, believed that the bond sued on is the individual property of F. M. Trimmier, then that the plaintiff could not recover in this action.

II. That under the deed from Simmons to the Coopers, and the decree of the Court of Equity, Simmons's administrator was bound after Simmons's death to deliver the slaves therein mentioned who might be alive, and their increase, to the Coopers or their assigns, or, in case that could not be done, to account for the value thereof.

III. That if the defendant, T. O. P. Vernon, or the testator of the other defendants acquired the right of the Coopers to any of said slaves, and Simmons's administrator failed or was unable to deliver said slaves to the defendants, the defendants have the right to put in their counter claim for the value of said slaves not delivered as aforesaid.

IV. That a contract to furnish the services of a slave for a number of years is not a sale of the slave.

V. That such a contract amounts in law to a hiring only.

VI. That in cases of hiring, when the services of the slave are lost without fault of the hirer, either by death or by emancipation under the Act of Congress, the person hiring should only account for the time he had such services.

VII. That the allegations of unsoundness of slaves as set forth in paragraph 8 of defendant's answer not being denied in the reply of plaintiff, the jury should consider said allegations as true.

All of which requests to charge were refused, and His Honor charged the jury that the plaintiff could, as administrator, sue upon the bond; that the transfer of the slaves by Simmons to Vernon was not a hiring but a sale: that the emancipation of the slaves did not affect plaintiff's right of recovery in this action, and that the emancipation of the slaves relieved Peyton Simmons's

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estate from any *liability for the non-delivery of said slaves to the Coopers or their assigns.

To all of which charges and refusals to charge the defendants excepted.

The plaintiff then submitted to the Court a written request to charge as follows:

I. That the writing on the margin of the bond sued on is not evidence that the plaintiff's testator released either of the obligors to said bond from the payment of any part of said bond.

II. That the agreement between T. O. P. Vernon, H. H. Thomson and the Coopers to divide between themselves the payment of the annuities on said bond was not binding on plaintiff's testator.

III. That the obligors could not be released from their obligation except by deed or

by parol for valuable consideration, and in the latter case the consideration must be proved.

IV. That a written warranty of title alone excludes the warranty of soundness usually implied from a sound price.

V. That the retention of the slaves for ten years without complaint or offer to return them to vendor and the payment of the annuities for six years estops the vendees from pleading failure of consideration.

All of which requests to charge were refused, and His Honor charged that the writing on the margin of the bond might be taken by the jury as evidence that plaintiff's testator may have entered into an agreement to release the obligors from the payment of a part of their obligation; that a written warranty of title does not necessarily exclude an implied warranty of soundness; that there was no law which would prevent the jury from considering the unsoundness of the slaves if they thought any had been proven; and that they could make such abatement of the principal and interest of the bond as they might conclude the testimony authorized.

To all of which charges and refusals to charge the plaintiff excepted.

The jury then brought in a verdict against the defendants for three thousand dollars.

The defendants then made a motion for a new trial on the ground that the verdict was contrary to the plain and uncontradicted evidence, and especially of the evidence relating to the share that each obligor of said bond had to pay. Said motion was also refused by the Court.

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*The plaintiff, thereafter, on the day of April, 1877, entered up two separate judgments herein, making two separate judgment rolls: The first against T. O. P. Vernon for three thousand dollars, with interest from 20th March, 1877, and one hundred and fifty-six dollars and fifty cents costs, and the other against H. H. Thomson and J. S. R. Thomson, as surviving executors of H. H. Thomson, deceased, for a like sum of debt and interest, and for one hundred and fifty-six dollars and twenty-five cents costs.

From which said last mentioned judgment, and from the rulings and charges and refusals to charge as above set forth, the defendants, H. H. Thomson and J. S. R. Thomson, as surviving executors of the last will and testament of H. H. Thomson, deceased, appealed to this Court to reverse said rulings, and to set aside the verdict and judgment herein, and to dismiss said complaint, or, failing in that, to grant a new trial on the grounds that His Honor the presiding Judge erred:

I. In refusing to dismiss the complaint herein.

II. In refusing to compel the plaintiffs to amend so as to allow the action against one defendant only.

III. In refusing to compel plaintiff to bring separate actions against defendants.

IV. In refusing to allow T. O. P. Vernon to testify as to the condition of the slave Beck, and as to the expense incurred in providing for said slave.

V. In refusing to allow defendants the reply in argument before the jury.

VI. In refusing to charge the jury that if they believed that the bond sued on was the individual property of F. M. Trimmier, then that the plaintiff should not recover in the action.

VII. In refusing to charge the jury that if the defendant, T. O. P. Vernon, or the testator of the other defendants acquired the right of the Coopers to any of said slaves, and Simmons's administrator failed or was unable to deliver said slaves to the defendants, the defendants had the right to put in their counter claim for the value of said slaves not delivered as aforesaid.

VIII. In refusing to charge that a contract to furnish the services of a slave for a number of years is not a sale of the slave.

IX. In refusing to charge the jury that such a contract amounts in law to a hiring only.

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*X. In refusing to charge the jury that in cases of hiring, when the services of the slave were lost without fault of the hirer, either by death or by emancipation under the Act of Congress, the person hiring should only account for the time he had such services.

XI. In refusing to charge the jury that the allegations of unsoundness of the slaves, as set forth in defendants' answer, not being denied in the reply of the plaintiff, the jury should consider said allegations as true.

XII. In charging the jury that the plaintiff, as administrator, could sue upon the bond.

XIII. In charging the jury that the transfer of the slaves by Peyton Simmons to T. O. P. Vernon was a sale and not a hiring, and that the fact that the slaves were emancipated did not give the defendants any right to a counter claim or set-off by reason of thereby losing the services of said slaves.

XIV. In charging the jury that the emancipation of the slaves relieved Peyton Simmons's estate from any liability for the nondelivery of any of said slaves, after Peyton Simmons's death, to the Coopers or their assigns.

XV. In refusing to grant a new trial.

And said defendants do appeal from said judgment on the further ground—

XVI. Because the plaintiff having sued in a joint action T. O. P. Vernon and these appellants, and having obtained a single verdict in said joint action, has, without authority of law, entered up two separate judg-

ments, each for the full amount of said verdict and costs—one against T. O. P. Vernon and the other against these appellants, as executors aforesaid.

The plaintiff also gave notice of appeal, and asked that this Court reverse the rulings of His Honor the presiding Judge, to which exceptions were taken by the plaintiff, and that a new trial be granted upon the grounds that His Honor erred.

I. In allowing testimony as to the soundness of the slaves.

II. In allowing testimony as to the value of the hire of the slaves, where the bond sued on shows that the slaves were not hired, but purchased by one of these defendants.

III. In admitting three notes given by plaintiff's intestate to M. C. Barnett, administrator of J. W. Cooper, as evidence of payment by said Cooper on the bond of defendants.

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*IV. In refusing to charge the jury:

1. That the writing on the margin of the bond sued on is not evidence that he released either of the obligors to said bond from the payment of any part of said bond.

2. That the agreement between T. O. P. Vernon, H. H. Thomson and the Coopers to divide between themselves the payment of the annuities on said bond was not binding on plaintiff's testator.

3. That the obligors could not be released from their obligation except by deed, or by parol for valuable consideration, and in the latter case the consideration must be proved.

4. That a written warranty of title alone excludes the warranty of soundness usually implied from a sound price.

5. That the retention of the slaves for ten years without complaint or offer to return them to vendor, and the payment of the annuities for six years, estops the vendees from pleading failure of consideration.

[For subsequent opinion, see 19 S. C. 247.]

J. S. R. Thomson, for defendants.
Evins & Bomar, of counsel.
Bobo & Carlisle, contra.

September 14, 1878. The opinion of the Court was delivered by

HASKELL, A. J. The action is upon a joint and several sealed instrument for the payment of an annuity to Peyton Simmons by T. O. P. Vernon and H. H. Thomson. The plaintiff is the administrator of the goods and effects of the obligee. The defendants are one of the original obligors and the surviving executors of the other. The latter and the plaintiff both appeal. The exceptions which constitute the grounds of appeal are numerous, but may be to some extent classified, and will be considered in the order of the questions to which they respectively pertain.

The first three and the sixteenth grounds of appeal, on the part of the defendants, relate to the first point made in the defendants' answer—"That the plaintiff should not maintain his action because he had joined in the same action as joint defendants the living obligor, T. O. P. Vernon, and the surviving executors of the deceased co-obligor, H. H. Thomson,"—and to the further point that the plaintiff had entered up several judgments upon a single verdict. It was not disputed that the executor of a deceased co-

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obligor *of a joint and several bond may be sued by the obligee. The question is, can the executor be sued together with the surviving obligor in the same action as the deceased co-obligor might have been in his lifetime? Under the former practice in this State, on the decease of one of joint debtors the remedy was by action at law against the survivor, and, further, by a proceeding in equity by which representatives of the deceased were brought in and the estate made liable. The same was the rule in case of an obligation which was both joint and several, with the additional power on the part of the creditor to bring a separate action at law against the representatives of the deceased as well as against the survivor. The reason why the action at law could not be brought jointly against the survivor and the representatives of the deceased is thus stated in Ayer v. Administrator of Buford, (2 Mill., 319 [12 Am. Dec. 677]): "Because the same judgment cannot be rendered against both. The judgment against the survivor would be de bonis propriis, and that against the representatives of the joint contractor de bonis testatoris." See also Chit. Plead., 50.

The question now is, whether the practice as thus established has been changed by the Code of Procedure, which was designed "to revise, simplify and abridge the rules, practice, pleadings and forms of the Court," and "that justice may be administered in a uniform mode of pleading without distinction between law and equity."—Const., Art. V, § 3.

The rule of pleading and practice in cases on contracts joint and several, as above stated, was purely technical, arising, not from the nature of the contract which was the cause of action, but from the inflexibility of the forms of proceedings in the Courts of law, which forced recourse to the Court of Equity. It thus presents one of those instances which the Code was designed to rectify, and we think that it has done so. "Any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the questions involved therein."—§ 141.

"Persons severally liable upon the same obligation or instrument * * * may all, or any of them, be included in the same action at the option of the plaintiff."—§ 143.

As to the liability of the appellants, defendants, in their representative character, had the action been brought against them alone, there can be no doubt; and the fact

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that their testator was jointly *as well as severally liable cannot exclude them from the provisions of this Section, and they are manifestly within the scope of Sections 141 and 143. The Court is aware that there has been conflict of decision in other States upon this point; but, with all deference to the learning and ability of the opinions from which this Court derives aid in construing a new form of procedure, nevertheless they are not of authority, and in this instance the words and the intention of the Legislature are so entirely in harmony with each other that the Court experiences little difficulty in arriving at a conclusion.—Pomeroy on Rem., 354, § 304.

"The only pleading on the part of the defendant is either a demurrer or an answer." —§ 166 Rev. Stat., p. 605.

It is further provided in Section 167 what shall be grounds of demurrer: 1. To the jurisdiction. 2. To the legal capacity of the plaintiff to sue. 3. That there is another action pending, &c. 4. That there is a defect of parties. 5. That several causes of action have been improperly united. Certainly neither of the first four touches the present case, nor does the fifth, for there is but one "cause of action," and the question arises on the joinder of several parties on this single cause.

The last (6) ground of demurrer is "that the complaint does not state facts sufficient to constitute a cause of action." But it is unquestionable that upon a joint and several contract, as this is, the obligee has a right of action against the executors of a deceased obligor. Every case of misjoinder of parties is covered by the sixth subdivision of Section 167; and if there be in the complaint a cause of action against the party and it be not prevented upon one or the other grounds of demurrer, the case must go to trial. Thus circuity and multiplicity of action are prevented by dispensing with the necessity of proceeding by distinct suit in equity or by a separate action at law. This disposes of the question, but it is proper to notice that if the answer of Vernon and the Thomsons was joint, as would be inferred from the brief, it is certain that the defendant, Vernon, had no ground for demurrer, and it is, to say the least, questionable whether the demurrer could have been sustained for either, when jointly made, unless it was good for both. The question of the two separate judgments upon a single verdict still remains, and upon this the statute may not be so clear; but upon reflection the Court has arrived at the conclusion that such is the proper mode. In his commentaries upon the sub-

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ject, now being *considered, Mr. Pomeroy (p. 354, § 304; p. 446, § 407.) deems it hardly necessary to argue to show that the separate judgments must be entered up against the several defendants when the nature of the case so demands. In the cases cited by him (Burgoyne v. Ohio L. J. & T. Co., 5 Ohio, 586; Churchill v. Trapp, 3 Abb. Pr., 306; Eaton v. Elger, 47 N. Y.,) it is held that whenever it is determined that the executor of the deceased co-obligor can be joined with the survivor in an action the judgments should be separate, one against the survivor de bonis propriis and the other against the representative of the deceased de bonis testatoris. And, further, it is held that this is not only a logical sequence of the preceding provision, but that it is clearly comprehended within the permissive provisions relating to judgments themselves.—§ 298 Rev. Stat., p. 639. And in these decisions we concur.

In the language of Dixon, C. J., in Decker v. Trilling, (24 Win., 610,) cited by Mr. Pomeroy, it seems clear "that the judgment should follow the nature of the claim established; and if that is separate and several, as against each defendant, then the judgment should be so." The verdict finds the fact and the Court adjudges accordingly. No practical difficulty arises in forming the judgment roll where (under Section 298) there may be several judgments, some for certain of the defendants, and another or others for plaintiff, &c., for in Section 305, which prescribes what shall constitute the judgment roll, it is expressly provided that it shall be the "pleadings or copies thereof and a copy of the judgment." Thus, for each of the separate judgments, a copy of the pleading would be attached.

But even if the Court had arrived at an opposite conclusion on this point, the judgment would not be severed, but amendment would have been ordered under Sections 197 and 199, the error being such as would not have affected "the substantial rights of the adverse party."

The next point in the order adopted is the sixth ground of appeal—that the Judge erred "in refusing to charge the jury that if they believed that the bond sued on was the individual property of F. M. Trimmier, then that the plaintiff should not recover in the action." It was admitted, and in fact proved, by the evidence produced by defendants, that Trimmier was administrator, and, as such, brought the action on the bond, which was of the goods and effects of Simmons, deceas-

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ed. There was no proof that the bond *was the property of Trimmier. The only proof was that he had bought the interest of the legatee, which could not be ascertained until after the payment of debts, and it was proven that no debts had yet been established.

The personal estate of the deceased vests in the administrator.—1 Wms. on Exec., 546. "At this day the administrator represents the

person of the intestate in relation to his personal estate, which vests in him immediately on the grant of letters of administration, and such grant has relation to the time of the intestate's death." It therefore makes no difference that Trimmier bought the interest of Mrs. Simmons before he took out letters. "He is to be regarded as a trustee, in whom the property of the intestate vests by operation of law, for the use of all those who may be legally entitled to the same, and who is authorized to collect and dispose of the same according to law. * * * As the legal representative of the deceased, he has the same property in the goods of the intestate as the intestate himself had when living, and the same remedies to recover them." The heirs or legatees "have no right of property or right of possession till after partition or delivery by the administrator."—McVaughter v. Elder, 2 Brev., 307; Johns v. Johns, 1 McC. [132]; Williams v. Seabrook, 3 McC., 371; Davis v. Rhame, 1 McC. Eq., 191; Gregory v. Forester, 1 McC. Eq., 318; Farely v. Farely, 1 McC. Eq., 506; Bradford v. Felder, 2 McC. Eq., 168. The administrator was, therefore, the party to bring the action, and the Judge properly instructed the jury "that the plaintiff could, as administrator, sue upon the bond."

The charge asked for by the defendants was wrong, because the point in it was not in the case, the evidence being conclusive, and the fact admitted that the plaintiff did hold the bond as administrator.

The eighth, ninth, tenth and thirteenth grounds of appeal on the part of the defendants are, whether the Judge should charge the jury that the transaction on which the contract was based was not a sale but a hire of the slaves, which were the consideration. It would have been improper had the Judge instructed the jury, as requested, "that a contract to furnish the services of a slave for a number of years is not a sale of the slave; that such a contract amounts in law to a hiring only."

There was really no such issue of fact in the case. The sole evidence upon the nature of the transaction was the statements alleged

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*in the bond on which the action was brought, and in the deed from Simmons to Vernon, which was produced by the defendants. In reference to the legal meaning of the words therein contained, the Judge instructed the jury "the transfer of the slaves by Simmons to Vernon was not a hiring but a sale," and to that exception is taken. The words of the deed are as follows: "Have this day sold, bargained, conveyed and made over and transferred, and do by these presents sell, bargain, convey, make over and transfer, all the following named negro slaves, to wit, * * * with all their increase, that is to say, all my right, title and claim to the said negro slaves; said right, title and claim being and during the term of my natural life, and said negro slaves being the same heretofore conveyed by me to James W. Cooper, Jesse Cooper and Thomas Cooper in several deeds, in which several deeds the life estate, conveyed as above to said Vernon, was reserved," with the usual warranty of title and special warranty against certain claims. The delivery of the slaves in execution of the terms of the deed is admitted. There was not a tittle of other proof of hire, and the only question was whether the words of the deed constituted a bill of sale. On that point the instruction given by the Judge was proper. It is possible, however, that the defendants meant that Peyton Simmons was but a hirer of the slaves himself and could convey or sell no more than what he had.

The meaning of the language in the deed is that the legal title to the property was vested in the Coopers, to take effect at a future day, while Peyton Simmons had in the property a life estate, which he had reserved for himself in his deeds to the Coopers.

The character as well as the legal existence of such an estate, in slaves, is discussed and determined in the case of Alexander v. Burnet, (5 Rich., 189.) and Jaggers v. Estes, (2 Strob. Eq., 343 [49 Am. Dec. 674],) and the cases therein cited.

The estate held by Simmons had not the features of a bailment or hire. There is no contract by the Coopers as bailors; no price for the hire; no reward for the use of the chattels, which is the evidence of hiring. A man cannot hire from himself the use of his own chattels. Simmons remained the possessor of a legal right which had never passed out of him; it consisted of the possession, use and absolute control of the property during his life, with power to convey the whole or part of his interest. He could have hired the property to Vernon for a stipulated time

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and price, or he could *have sold his right, title and interest. The words of the deed are conclusive that he did the latter, and no proof was offered to the contrary. It was a question of legal construction, and the charge of the Judge was proper. If the title held by Simmons was not by him as bailee of the Coopers, but was the reserved right of possession and use, with which he had never parted, and of which he was the legal owner, and he sold and conveyed that right to Vernon, then Vernon occupied the position that Simmons had and cannot be said to be bailee either of Simmons or of the Coopers.

The principles in the cases of Corley v. Cleckley, (Dud., 35.) Bacot v. Parnell, (2 Bail., 425.) and Ripley v. Wightman, (4 McC., 447,) therefore, are not applicable to the present case. It having been a sale of the property, the question of the effect of emancipation does not require consideration, having already been fully determined.—Calhoun v. Calhoun, 2 S. C., 304.

The seventh and fourteenth grounds of appeal are upon the liability of Simmons's estate to the Coopers (from whom Vernon and Thomson subsequently purchased certain of the slaves) on failure to deliver the slaves at Simmons's death; and, second, whether the estate was discharged from that liability by the Act of emancipation. The Judge could not charge upon the first point as requested, for it was not consistent with the testimony in the case. The admissions and the evidence on the part of the defendants establish the fact that the slaves alluded to in this part of the defense actually were delivered long before the death of Simmons. The recital in the bond, which is part of the complaint, alleges the delivery of certain slaves by Simmons to Vernon. The defendants in their answer admit the fact, and further prove that they, Vernon and Thomson, subsequently purchased the interest of the Coopers in certain of the said slaves—being the portion referred to by the defense. It was also proved by the defendants that Thomson had an equal interest with Vernon in the slaves as purchased from Simmons. Thus they had acquired both title and possession, and rendered the delivery by Simmons's estate an impossibility, and are estopped from any such defense. By combining the titles of the Coopers and Simmons's life estate, and having possession of the seven slaves named, the defendants held a good title and emancipation is not a breach.—Calhoun v. Calhoun, supra. It is as if Simmons had conveyed the slaves to Vernon in 1855 absolutely.

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*The questions in the fifth and eleventh grounds are on matters of pleading and practice. The defendants claim that they should have had the reply, and that the allegation of unsoundness in their answer, not having been denied, should have been taken as true and admitted by the plaintiff. The plaintiff was not bound to reply to Section 8 of defendants' answer alleging unsoundness of the slaves, unless it contained matter constituting a counter claim.—Code, § 176.

In the first place, if the answer contains a defense and a counter claim, "they must each be separately stated and refer to the causes of action which they are intended to answer."—§ 173.

There are defenses in answer to complaint which in themselves are cause of action, and may have been set up as counter claims had the defendant so elected. But when such defense is set up and it is not stated that it is a counter claim, and there is no prayer for judgment on it, it will, for purposes of pleading, be regarded as a mere defense, and the plaintiff will not be forced to reply. The plea of unsoundness is more properly a defense, although it is sometimes a cause of action. A counter claim properly sets up a cause of action and prays for judgment. Paragraph 8 of the answer does not meet the requirements. It neither alleges covenant and breach, nor does it demand judgment. Whatever it does allege could have been proved under a general denial. The facts would perhaps have entitled defendant to affirmative relief, for the Code goes to a great extent to allow judgment upon the case made at the trial; but the allegations as they stand do not upon the face of the pleadings set up a counter claim. The position of the respective parties during the trial is, therefore, unaffected, nor is the plaintiff called on to reply.—Code, § 191.

The defendants in the 7th and 14th grounds, already considered, again contend to have a counter claim as assigns of the Coopers. The same rule applies. They did not set it forth in the pleadings as a counter claim, and they controvert it by admitting and proving delivery. There was nothing, therefore, either to entitle the defendants to the reply or to make it error on the part of the Judge to instruct the jury "that the emancipation of the slaves did not affect plaintiff's right of recovery in this action, and that the emancipation of the slaves relieved Peyton Simmons's estate from any liability for non-delivery of the said slaves to the Coopers or their assigns." The fact, as proved by the defense, being that they actually had been delivered, the charge on that point is immaterial.

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*The fourth ground of appeal on the part of defendants will be taken up in connection with points submitted by the plaintiff, who is likewise appellant upon the following grounds: First. "That a written warranty of title alone excludes the warranty of soundness usually 'implied from a sound price.'" The contrary has been determined in the case of Wells v. Spear, (1 McC., 421,) and sustained by subsequent decisions.

Ever since the cases of Wells v. Spear and Banks v. Hughes [1 McCord, 537], it has been held that the implied warranty of soundness is not excluded by a written contract of sale, though it be a specialty and contain a warranty of title.—Wood v. Ashe, 3 Strob., 70. And in Habersham v. Rodrignes, (1 Speers, 314,) the extent of the rule is defined, but its principle is confirmed. The further appeal—"that the obligors could not be released from their obligation except by deed or by parol for valuable consideration, and in the latter case the consideration must be proved,"—is closely allied to the point just considered. Upon the principle that a sound price entitles the purchaser to a sound article, a total failure of consideration is an entire discharge of the obligation and the obligor is released. The Judge, therefore, properly refused to charge as requested.—Timrod v. Shoolbred, 1 Bay, 324 [1 Am. Dec. 620]; Missroon v. Waldo, 2 N. & McC., 77; Com. v. Smith, 9 Rich., 515; Carter & Harden v. Walker, 2 Rich., 40.

Upon this principle of implied warranty of

soundness, it is held in all the cases that evidence of the unsoundness of the property must be admitted. Therefore, "testimony as to the value of the hire of the slaves," or, in correct language of the brief, testimony "to prove the value of the hire of a lot of negroes, such as is above described," was unexceptional as a measure of the damages affected by the alleged unsoundness. In this connection comes up the defendants' fourth ground of appeal—"that the Judge erred in refusing to allow T. O. P. Vernon to testify as to the condition of the slave Beck and as to the expense incurred in providing for said slave." It was not alleged in the answer that this slave was unsound, and the words used indicate that the testimony was not upon unsoundness, on which point the Judge had already ruled. It is immaterial upon what use the testimony was, for on no other quality of the article than soundness is there any implied warranty, and evidence upon any other point is inadmissible.

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*The plaintiff further contends "that the retention of the slaves for ten years without complaint or offer to return them to vendor, and the payment of the annuities for six years, estops the vendees from pleading failure of consideration," and cites Mitchell v. DuBose, 1 Mill., 362. The case is not similar and does not decide the point. The payment of an annuity for part of the time is only partial payment, and it will be found on examination of the authorities that the defense remains as long as the right of action continues.

Byers v. Bostick, 2 Mills, 76: "A deficiency in quantity or a defect in quality or title may now be relied upon either in abatement of the price stipulated or in rescission of the contract in toto."

"It is an equitable defense, superseding the necessity of a cross action by the defendant, whose plea is that to the extent of the diminution in value by reason of the breach of warranty the contract was void ab initio; and, by a parity of reason, where there is a total failure of consideration, it may be shown in bar of the action. Such a defense grows out of the contract itself, which is the cause of action, and is not barred by the Statute of Limitations."—Evans v. Yongue, 8 Rich., 113.

The implied warranty subsists along with the written contract.—Wood v. Ashe, 3 Strob., 72.

But the case of Parker v. Pringle (2 Strob., 242.) is to the point: "The question argued was whether the defendant could in any case avoid the payment of the whole price without a return or tender. * * * All our cases agree that an action may be brought for breach of warranty without a tender or return, and the same rule applies when the same defense is made under our discount law. The effect is that the buyer keeps the article purchased, but he must pay for it such price as it may be worth in its unsound, defective state."

In that case partial payment had been made. It thus is clear that so long as the right of action exists the right of defense coexists, and a tender or return is not necessary, nor is a partial payment a waiver of the right to defend.

It is further excepted to by the plaintiff that there were admitted in evidence "three notes given by plaintiff's intestate to M. C. Barnett, administrator of J. W. Cooper, as evidence of payment by said Cooper on bond of defendants." The notes were evidence of transactions between Simmons and one of the

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Coopers. Mrs. *White, a witness produced by the defendants, testified, without objection being made, "that money was paid by the Coopers on the bond up to the freeing of the slaves." This was not contradicted, and it may be that these notes may have been corroborative, so far as they showed dealings between the parties, and to that extent they were admissible. And there is no evidence that the jury was not properly instructed on this point, or that any request on the part of the plaintiff was refused.

It is further objected by plaintiff that the Judge refused to charge "that the agreement between T. O. P. Vernon, H. H. Thomson and the Coopers to divide between themselves the payment of the annuities on said bond was not binding on plaintiff's testator." And that he refused to charge that the writing on the margin of the bond sued on is not evidence that he released either of the obligors to said bond "from the payment of any part of said bond." It was unnecessary for the Judge to charge that an agreement between the defendant and third persons did not bind the plaintiff. That was not the question, and it would only confuse the jurors to burthen them with legal propositions not in the case. The allegation was that an agreement had been executed and that Simmons was a party to it. The existence of an agreement was proved and seems to be admitted by the plaintiff. The question is, did Simmons recognize that agreement and bind himself by its terms? It is evident that the jury decided this issue in favor of the plaintiff and that the verdict was not affected by the charge of the Judge—at least to the injury of this appellant. It is, then, only left to this Court to decide whether there has been an error at law which requires the case to go back for a new trial.

The charge by the Judge, to which exception is taken, is, in effect, the same as a refusal to charge as requested by the plaintiff. For, if the writings on the bond were evidence of a release and the terms of the release were the same as those contained in an agreement between some of the parties, then the writings on the bond might be taken as

evidence that the agreement existed, was recognized and was instrumental in effecting the release. Payment or satisfaction is a release either in toto or pro tanto. If the writings on the bond were evidence of the satisfaction of the whole or of a part of the bond, then the defendants are to that extent released. And certainly anything which contains evidence, however slight, on the point in issue must go to the jury. The bond and the

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*writings thereon were attached to the complaint as an exhibit and constitute a part thereof and are allegations by the plaintiff. The portions of the marginal writings and endorsements in question are as follows:

"Received, 22d February, 1861, thirty-five dollars, the amount due by the estate of H. H. Thomson, deceased, from Waddy Thomson, executor, including interest from 8th June, 1860, and paid same to Peyton Simmons. J. D. Wright, Attorney.

"April 2, 1861."

"November 3d, 1859, received of the executors of H. H. Thomson, deceased, thirty-four dollars and twenty-nine cents, their portion of the annuity above named, principal and interest, from the first day of June last.

P. Simmons.

"Test:

"R. C. Code."

And in the handwriting of J. D. Wright, in ink, "Jesse Cooper, one-third; H. H. Thomson, portion one-half of one-third; T. O. P. Vernon, the same; James Cooper, one-third."

The figures in the receipts, allowance being made for the interest, concur with the figures of apportionment written below. These receipts may be taken as evidence of an acknowledgment on the part of Simmons that $33.33 per annum constituted full payment of the obligation he held against H. H. Thomson; and if such were established to be the fact it would operate as a release, for it would be equivalent to payment. It is immaterial, in this case, whether the payment of the balance ($166.66) was by money or by a subsequent agreement of equal rank with the first. As to the character of the alleged agreement, it was not called for or questioned, and it is now too late to object to defect of evidence on that point.—Pettigrue v. Sanders, 2 Bail., 549.

Whether the receipt was for a portion paid by executors of H. H. Thomson, or for the whole amount for which Thomson's estate could be held liable, is, we think, a question which might go to the jury.

If it be an acknowledgment that $33.33 is the whole amount for which Thomson is liable, it is evidence of a release. The exception

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*that "there was error in refusing to charge that the obligors could not be discharged except by deed or by parol for valuable consideration, and that the consideration in such case must be proved," again comes up in this connection. The case of Corbett v. Lucas & Dotterer (4 McC., 323,) is relied on by the appellants.

The comparatively recent case of Hope v. Johnston & Cavis (11 Rich., 135,) confirms the decisions in previous cases, although there is a very strong dissenting opinion by Munro, J., and, were the cases similar, the Court would be bound by the authorities.

In note by the Reporter to Hope v. Johnston & Cavis is given a circuit decree by Wardlaw, Ch., as follows: "A debt can be extinguished only by accepting a security of a higher nature, (Mills v. Starr, 2 Bail., 360,) or by actual payment, or by a release, or by some contract equivalent to a release. Payment of money simply on a demand in money amounts merely to a payment pro tanto, and a receipt in full, on such partial payment, is not conclusive, and, as nudum pactum, "may be avoided on proof that payment in full was not actually made. Such a receipt is a mere admission of the party, and, like all admissions, susceptible of explanation and disproof.—Pinnel's case, 5 Co., 117; Eve v. Mosely, 2 Strob., 203; Boulware v. Harrison, 4 Rich. Eq., 317." A receipt is prima facie evidence of payment, being the written affirmation of the creditor.—Dobbin v. Perry, 1 Rich., 33; Wheeler v. Alexander, 1 Strob., 61.

In Hope v. Johnston, and in Eve v. Mosely, "the fact of the payment, being but partial, stands admitted before the Court;" and in the latter case it is said that, without such admission that the payment was only partial, "the receipt would have been evidence of payment of the judgment in full; and if that were contested it would have been a proper subject for an issue." In Cumber v. Wane (1 Smith's Lead. Ca., 451,) "the preceding remarks refer to the question of the legal effect of a partial payment, alleged to have been received in full, when the proof of the payment being but partial stands admitted before the Court. But upon the question whether in point of fact the whole debt is or is not paid, it appears that the acknowledgment of the creditors that the payment is in full is not only competent evidence but is prima facie evidence that the whole is paid. The case of Henderson v. Moore (5 Cranch, 11 [3 L. Ed. 22],) is a strong case to this effect." In that case the opinion by Marshall, C. J., is directly to the point: "A part of the money due on the bond might have been paid

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before, and such an acknowledg*ment upon the receipt of a sum smaller than the amount of the condition of the bond was good evidence upon the plea of payment." This conclusion is entirely in accord with the dictum of the Court in Eve v. Mosely, and not in conflict with the decisions, and appears to sustain the ruling of the Judge in the present case. The receipt is evidence of payment, and it is a question for the jury whether it acknowledged payment in full or in part. It

is immaterial whether the payment of the balance had been by money or by release; if the receipt be a receipt in full it is prima facie evidence of payment, and the lack of consideration must be proved by the plaintiff.

To these questions of fact the receipts themselves and all other evidence which may explain the ambiguity of the receipts alike are pertinent and admissible.

The judgment of the Court below is affirmed and the appeals are dismissed.

WILLARD, C. J., and McIVER, A. J. concurred.

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10 S. C. 191

STATE v. STRICKLAND.

(Columbia. April Term, 1878.)

[*Indictment and Information* ⇐131.]

A count for burglary, which is a felony, and a count for receiving stolen goods, which is a misdemeanor, may be joined in the same indictment.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 424; Dec. Dig. ⇐131.]

[*Indictment and Information* ⇐32.]

A count in an indictment for grand larceny which does not conclude against the form of the statute, &c., or against the peace and dignity of the State, &c., is fatally defective.

[Ed. Note.—Cited in State v. McKettrick, 14 S. C. 350, 351.

For other cases, see Indictment and Information, Cent. Dig. § 124; Dec. Dig. ⇐32.]

Before Northrop, J., at Anderson, September Term, 1877.

This was an indictment against William B. Strickland and two others. William B. Strickland was found guilty on the second count. He moved in arrest of judgment, and, the motion having been refused, he appealed to this Court.

The opinion of the Court contains everything that is necessary to a full understanding of the case.

McGowan & Moore, Whitner & Breazeale, for appellant.

Cothran, Solicitor, contra.

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*September 21, 1878. The opinion of the Court was delivered by

McIVER, A. J. The indictment in this case contains four counts. In the first, the appellant "and other evil-disposed persons, to the jurors unknown," are charged with burglary and larceny in breaking into and entering the dwelling house of one Elias D. Pruitt, with intent to steal the goods of said Pruitt, and stealing therefrom bacon of the value of forty-five dollars and lard of the value of twenty-five dollars. In the second count the same parties are charged with the simple larceny of the same goods. In the third count Benjamin Strickland and Abner Strickland are charged as accessories before the fact to the larceny charged in the second count. And in the fourth count Benjamin and Abner Strickland are charged with the offense of receiving stolen goods, by buying and receiving the goods so stolen as above charged, from the parties charged with the stealing. All of the counts in the indictment, except the second, conclude in the usual form, "contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State," but the second count contains no such conclusion either against the statute or against the peace and dignity of the State. The jury found a verdict of not guilty upon all the counts of the indictment except the second, and upon that their verdict is, "we find Wm. B. Strickland guilty under the second count of this indictment."

A motion in arrest of judgment was made in the Circuit Court on two grounds: 1st. Because the second count of the indictment, under which defendant was convicted, is fatally defective in not containing the necessary conclusion. 2d. Because the indictment is fatally defective in that it contains a count for burglary, a felony, and a count for receiving stolen goods, which is a mere misdemeanor, as two such counts cannot be joined in the same indictment. The motion was refused by the Circuit Judge, and an appeal was taken upon the same grounds as were relied upon in support of the motion below.

We will consider the second ground first. Since the case of the State v. Boise and Strike, (1 McM., 189,) followed by the cases of the State v. Posey, (7 Rich., 490,) and State v. Nelson, (14 Rich., 169 [94 Am. Dec. 130],) there can be no doubt of the correctness of the decision below, so far as this ground for the motion is concerned.

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*The first ground, however, presents a more serious question. The well-established rule of criminal pleading is, that all indictments, whether for offenses at common law or by statute, must conclude against the peace and dignity of the sovereign within whose territory the acts charged were committed, (1 Ch. Cr. Law, 246; Arch. Cr. Pl., 8th edition, 288; Whart. Pr., 11–12,) and this rule has been incorporated into the Constitution of this, as well as many if not all of the other States of the Union. Our Constitution of 1868, in Article IV, Section 31, declares that "all indictments shall conclude against the peace and dignity of the State," which is very much the same as the provision found in Section 2, Article III, of the Constitution of 1790. It is likewise the rule that where an offense is created by statute, or where its nature and degree is changed or the punishment altered by statute, the indictment should, in addition to the conclusion, "contra pacem, &c.," also contain the conclu-

sion contrary to the form of the Act (not Acts in the plural as suggested in the argument in State v. Robins, 1 Strob., 355).—1 Ch. Cr. Law, 290; Arch. Cr. Pl., 290; State v. Riply, 2 Brev., 300; State v. Gray, 14 Rich., 174.

Now, as the count in this indictment, under which the appellant has been convicted, contains neither of these required conclusions, it is very clear that the judgment must be arrested, unless this defective count can be aided by incorporating into it the necessary conclusions from some of the other counts containing such conclusion. It is doubtless true that where an indictment containing several counts, all of which are ignored except the last, in which the party charged is designated as "the said A B," without further description, reference may be had to the first count in which the party charged is designated by his proper name and "additions," as required by the Statute of Additions, (1 H., 5 Ch., 5,) or, to use the language of Chitty in his work on Criminal Law, p. 250, "though every count should appear upon the fact of it to charge the defendant with a distinct offense, yet one count may refer to the matter in any other count so as to avoid unnecessary repetition, as for instance to describe the defendant as 'the said, &c.'; and though the first count should be defective or be rejected by the grand jury, this circumstance will not vitiate the residue." An instance of the application of this principle will be found in the case mentioned by Gould, J., in Phillips v. Trelding, (2 H.

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Bl., 131,) where the in*dictment was for forgery, in which there were three counts charging the forgery and three charging the uttering of the forged paper.

In the first count the prisoner was particularly described, and, the grand jury having ignored the first three counts, an objection was raised that the remaining counts merely described him as "the said A B," without the addition of his degree, estate, mystery or place of residence; but the Judges held that the description was sufficient, as the latter counts might refer to the former. So also in the case of Commonwealth v. Clapp, (16 Gray, 237). The complaint was by Henry H. Dean, of Easton, in the County of Bristol, charging "Eustis K. Clapp, of Easton, in the County of Bristol," as a common seller of liquors, with a second count for a single sale, in which the defendant was described simply as "the said Eustis K. Clapp." The defendant having been convicted on the second and acquitted on the first count, a motion in arrest of judgment was made upon the ground of insufficient description of the defendant in the second count; but the Court held that reference might be had to the first count to make the description complete.

Thus while these authorities establish the proposition that, so far as the description of persons is concerned, one count in an indictment may refer to matter in a preceding count so as to avoid unnecessary repetition, and that if the count so referred to is ignored by the grand jury or rejected by the petit jury, it will not vitiate the other count, they are very far from establishing the proposition contended for by respondent in this case—that in an indictment containing several counts, one of which is fatally defective, in that it omits a material allegation, such defect can be supplied by reference to another count, under which the defendant has been acquitted, containing no such defect, especially when, as in this case, the defective counts contain no words as "the said, &c.," or any like words inviting such reference. It seems to us that there is a vast difference between allegations as to mere matters of description and allegations essential to the legal charging of the offense.

It is a well-established rule of criminal pleading that every indictment for certain offenses must contain certain words. For example: "Every indictment for treason must contain the word 'traitorously,' every indictment for felony must contain the word 'feloniously.'" Now, if in an indictment for some felony, containing several counts, all of the counts should contain the word "feloniously" except one, and upon that alone the

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fendant should be *convicted, and acquitted upon all the others, is it not clear that no judgment for felony could be passed? So here, where the only count in the indictment upon which the defendant had been convicted omits what is equally essential, in fact more so, as it is specially required by the Constitution,—the conclusion—the same result must follow.

That these views are not without the support of adjudicated cases may be seen by reference to the following cases: State v. Soule, 20 Maine, 2 App., 19; Commonwealth v. Carney, 4 Gratt., 546; Baker v. The State, 4 Ark., 56; United States v. Davenport, 1 Deady, 264. The case of Davis v. The State, (19 Ohio, 270,) cited by the counsel for respondent, we do not think in point. That case, in brief, was this: By the Constitution of the State of Ohio it was required that all prosecutions should be carried on "in the name and by the authority of the State of Ohio." This did appear in the caption of the indictment, and all that the case decides is that, it having so appeared in the caption of the indictment, it need not again be averred in each successive count; and hence when the indictment contained several counts, and a nolle prosequi was entered as to the first, the remaining counts will not thereby be rendered defective for want of that averment. Now, as "the caption of the indictment is no part of the finding of the grand jury," (Vandyke v. Dare, 1 Bail., 65,) and as it may be amended at any time by the journals of the Court, (The State v. Williams, 2 McC., 301;

Vandyke v. Dare, supra,) it is very clear that this case throws no light on the question under consideration, as the nolle prosequi could not be regarded as extending to the caption. The case of Rice v. State, (3 Heisk., 220,) principally relied on by the respondent's counsel, does seem to support his view. In that case the Court does say that while "it is held that each count in an indictment must be a complete indictment in itself. * * * This, we think, refers to the description of the offense and not to the formal conclusion. And it seems that the good and bad counts may, by apt reference and averment, become so incorporated in each other that the principal count and the matter borrowed for the other may constitute, together, a complete accusation. The count of the indictment now in judgment, which charges the larceny, does not conclude 'against the peace and dignity of the State,' and, if it stood alone, would be bad for the want of the proper conclusion. But the last count does have the proper con-

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clusion, and we *hold this to be sufficient, and that the conclusion 'against the peace and dignity of the State,' in the last count, relates to all other preceding counts." The Court, however, seems to have distrusted the correctness of its conclusion, for, after saying that there was a general verdict of guilty, and that, according to a well-established rule of criminal pleading, "upon a general verdict, upon an indictment containing several counts, where some are good and others bad, the Court will pronounce judgment upon the good counts upon the presumption that it was to the good counts the verdict attached," and, after saying that this presumption is only prima facie, and, therefore, where the proof set out rebutted such presumption the judgment would be arrested, proceeds as follows: "In this case we cannot say, upon the facts, that the verdict specially attaches to the count alleged to be bad for want of the proper conclusion, and therefore the presumption of law would relieve us of all difficulty on that question, even if we held the exception fatal." We do not think this single decision (and we have been unable to find any other, and none is cited to us,) sufficient to upset what we regard as a well-established rule of pleading —that each count in an indictment must contain all the essential elements of a complete indictment, at least so far as alleging the offense charged is concerned, and that one of those essential elements is the proper conclusion. The gist of every offense, in a legal point of view, and the foundation of the right to punish one who commits it is the fact that it is in violation of some law of the State, and, therefore, the authorities of the State cannot properly render judgment for the punishment of an act which is not alleged to have been done in violation of such law. But even were the case of Rice v. State to be regarded as authority binding upon us, it would not apply to the case now under consideration. That case decides that where the last count in the indictment contains the proper conclusion it may be regarded as relating to all the preceding counts against the same defendant, and thus, where one of the preceding counts contains no such conclusion that defect may be supplied by the last. But in the case now before the Court, the third and fourth counts charge no offense whatever against the appellant, but only against others who are not convicted, and it would be straining the Tennessee decision very far to say that the conclusion of a count against A B could be held to relate to a preceding count against C D.

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*The judgment of the Circuit Court is reversed, and the motion in arrest of judgment is granted.

WILLARD, C. J., and HASKELL, A. J., concurred.

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10 S. C. 197

JACKSON v. PATRICK.

(Columbia. April Term, 1878.)

[*Principal and Surety* ⇐118, 125.]

Where the principal debtor made an assignment of his estate for the benefit of his creditors, a surety for one of the debts secured by the assignment *held* not to be discharged, there being no proof that the creditor had done any positive act affecting injuriously his interest, though he had attended a meeting of the creditors called to determine whether an agent should be appointed.

[Ed. Note.—Cited in McGreery v. Garvin, 39 S. C. 383, 17 S. E. 828.

For other cases, see Principal and Surety, Cent. Dig. §§ 294, 327; Dec. Dig. ⇐118, 125.]

[*Principal and Surety* ⇐97.]

To discharge a surety, it is necessary that the creditor should do some positive act which has that effect, and not merely that he should be passive; or that he should omit some duty to the surety which he was bound to perform.

[Ed. Note.—Cited in Gardner v. Gardner, 23 S. C. 592; Miller v. White, 25 S. C. 237; Greenville v. Ormand, 51 S. C. 124, 28 S. E. 147; Fales & Jenks Machine Co. v. Browning, 68 S. C. 25, 46 S. E. 545; Griffith v. Newell, 69 S. C. 304, 48 S. E. 259; Fretwell v. Carter, 83 S. C. 556, 65 S. E. 829.

For other cases, see Principal and Surety, Cent. Dig. §§ 146–154; Dec. Dig. ⇐97.]

[*Judgment* ⇐429.]

Where a party sued at law has a valid defense to the action which he neglects to make, and allows judgment to be taken against him, he cannot afterwards maintain an equitable proceeding to be relieved from the judgment.

[Ed. Note.—Cited in McNair v. Ingraham, 21 S. C. 74; Freer v. Tupper, Id., 83; Crenshaw v. Julian, 26 S. C. 287, 2 S. E. 133, 4 Am. St. Rep. 719.

For other cases, see Judgment, Cent. Dig. § 808; Dec. Dig. ⇐429.]

[*Execution* ⇐147.]

Where a judgment debtor, served with a rule to show cause why the execution should

not be renewed, has a valid defense which he neglects to make, he is estopped by the judgment renewing the execution, and cannot afterwards be relieved therefrom.

[Ed. Note.—Cited in Bull v. Rowe, 13 S. C. 362; Ivy v. Clawson, 14 S. C. 273; Sullivan v. Shell, 36 S. C. 580, 15 S. E. 722, 31 Am. St. Rep. 894; Babb v. Sullivan, 43 S. C. 440, 21 S. E. 277; Arthur v. Brown, 91 S. C. 324, 74 S. E. 652.

For other cases, see Execution, Cent. Dig. § 397; Dec. Dig. ⟸147.]

Before Kershaw, J., at York, September Term, 1877.

Action by Samuel W. Jackson against J. C. Patrick.

The case will be sufficiently understood from the decree of the Circuit Court and the opinion of this Court.

The decree of His Honor the Circuit Judge is as follows:

Kershaw, J. This action was brought on to be heard at the September Term of the Court of Common Pleas for York County, 1877.

Upon the evidence submitted, and the statements of the complaint, not denied by the answer, I find, as matters of fact:

1. That on the 8th day of September, 1859, plaintiff, as surety for R. L. Simmons and R. P. Jackson, executed with them a joint and several promissory note, to one W. R. Moore, in the sum of six hundred and twenty-five dollars.

2. That on the 19th day of November, 1860, the said note being then still unpaid, the said

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firm of Simmons & Jackson executed a *deed of assignment of all their property and choses in action, in trust for the benefit of all their creditors, (the debt due by said note being in the first class of preferred debts under said assignment,) to Melton & Melton, as assignees and trustees.

3. That on the 29th of November, 1860, R. L. Simmons, of the said firm, executed a deed of assignment of all his real and personal property to Samuel W. Melton, of the said firm of Melton & Melton, for the payment, first, of all his individual debts, and, secondly, to pay any balance of the debts of Simmons & Jackson remaining due after the execution of the trusts of the deed of assignment of Simmons & Jackson, above mentioned, in the same order of preferment.

4. That said deeds of assignment were duly delivered and recorded, and the execution of the trusts therein was duly assumed by the said assignees.

5. That there were no conditions of release, or unlawful reservation of any interest in the said assignors, stipulated in said assignment, and no release required.

6. That a meeting of creditors was called under those assignments, and was attended by the said W. R. Moore, and at said meeting it was determined by the creditors that they would appoint no agent to act with the assignees, but they left the execution of the trusts to the said assignees.

7. That no other meeting of creditors was held under the assignments, and no further steps were taken by them to secure their rights under the assignments.

8. That a sufficient amount of property passed to the assignees, under the said assignments, to pay the preferred debts, including the said promissory note.

9. That the assignees sold the assigned property, with the consent of the meeting of creditors, but no report of their proceedings was ever made by the assignees.

10. That in October, 1861, a judgment was obtained by the said W. R. Moore, against the plaintiff, upon the said promissory note, and an execution was duly entered upon the same, October 31st, 1861.

11. That the said W. R. Moore died on the 15th day of August, 1867, and letters of administration of his estate were granted to J. C. Patrick, the defendant, on the 9th day of March, 1868, by the Ordinary of York County.

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*12. That defendant obtained a renewal of said execution, after due service of notice and summons, at September Term of this Court for 1875, and said renewed execution was issued on the 7th of December, 1875, and a levy made thereunder the same day.

13. That said W. R. Moore received fifty dollars from the attorneys of said assignees October 23d, 1866, to be applied to his said judgment.

14. That plaintiff obtained an order from the Judge of the Sixth Circuit December 20th, 1875, restraining further proceedings upon said judgment until the further order of this Court, and commenced this action, to be relieved from said judgment, on the ground that the surety, the defendant's intestate, has been discharged by the conduct of defendant.

The grounds urged in support of the action are, briefly:

That W. R. Moore accepted under the assignment;

That he virtually appointed the assignees his agents;

That the assignees were the depositaries of the creditors, and the funds were thus under their control;

That the funds assigned may be regarded as collateral security for the debt;

That this security having been lost through the neglect of the creditor, under the circumstances the surety was discharged.

I will present the views I entertain on these several points in the order in which they occur to me.

There can be no doubt that a debtor before judgment has authority to make an assignment under our laws whereby his property may be converted into a trust fund for the payment of debts, and so placed beyond the reach of the ordinary process of law, and

that he might create arbitrary preferences between his creditors in the order of payment. At least it will not be denied that he could do so before the adoption of the bankrupt laws.—Nolon v. Douglas, 2 Hill's Eq., 443 [30 Am. Dec. 368]; Smith v. Campbell, Rice, 366.

Had W. R. Moore, in this case, declined to accept the benefit of the assignment, he could have derived no advantage thereby, and by his acceptance he has lost none. There was no condition of release in this assignment, and by accepting he impaired no remedy he then had against the principal debtor. Hence, so far as the act of acceptance goes, the surety might have been benefited, and could not have been injured.

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*The action of the meeting of creditors, of which Moore was one, did not have the effect of changing the character of the assignees and converting them into mere agents of the creditors.

Moore acquired no more control over them than he would have had had that meeting not been held. The effect of their action in this regard was merely to decline to appoint agents to act with the assignees, as they might have done under the Act of 1828.—6 Stat., 366.

It does not appear in the testimony that the creditors were in error when they contented themselves with leaving their interests in the hands of the eminent counsel composing the firm of Melton & Melton, the assignees, except as an inference from their having made no report.

The assets in the hands of the assignees constituted a fund for the payment of all the debts of the principal debtors, Simmons & Jackson. W. R. Moore had personally no control over the assets. He had an equitable claim to be paid the amount applicable to his debt, in the order in which it stood, pro rata with other creditors of the same class, whenever the assignees were in funds. This claim he might have enforced by an equitable action against the assignees. This right of action was the collateral security in his hands, to the benefit of which the surety was entitled, and might have been made his own. This right of action has not been lost, but still remains, though, most probably, it will not be found so available for good as it might once have been. The creditor has done no act whereby the rights of the surety have been impaired; he has simply abstained from pursuing his remedy against the assignees. The creditor was not bound to do this unless upon the request of the surety.

In the case of Lang v. Brevard, (3 Strob. Eq., 64,) the principle is well stated, as follows: "The prominent and well-defined distinction that pervades all the cases that may be deemed authoritative on the subject is that the surety will be discharged by any acts, on the part of the creditor, of a positive character, whereby the remedy against the principal debtor is lost, so that payment cannot be enforced against him. Such would be the case where, on the part of the creditor, there was a destruction, abandonment or waiver of counter securities. * * * For acts of mere passive sufferance, omission and delay, the surety will not be discharged." It is there added that the rule is the

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more reasonable, "inasmuch *as the surety thus aggrieved has the remedy in his own hands, and, by various alternative modes of procedure, may redress himself. He may convert the passive indulgence and delay of the creditor into a positive wrong, by demanding that he proceed to the collection of his debt. If the requisition be not complied with in a reasonably diligent manner, and the principal become insolvent, it will afford ground for relief."

In that case it was decided that the failure of the creditor to record a mortgage given as collateral security for the debt, whereby the debt was lost, the principal debtor being insolvent, did not release the surety. See also Hampton v. Levy, (1 McC. Eq., 107,) where there is a similar decision. It appears to me that these cases are conclusive against the plaintiff's case—treating the right of the creditor in this case, under the assignment, as a collateral security.

The correctness of the rule as laid down in these cases is recognized in the late case of Muller v. Wadlington, (5 S. C., 342,) where it is said: "If he (the creditor) commit any positive act prejudicial to the security he holds, or omits or neglects any act, on the demand of the surety, which the relation in which he stands imposes as a duty, the loss must fall upon him who has contributed to it, and not on the surety, who has been free from all participation." The rule as thus stated is abreast with the best and latest authorities elsewhere.—1 Story's Eq., §§ 325, 326, and cases cited in note.

In Clark v. Sickler, (19 Sickles, 64 N. Y., 231,) the defendant signed the note as surety in fact for the co-maker, Mott, of which the payee had notice. After the note became due, Mott went to the house of Wright, the payee, for the purpose of paying the note, and offered the money to Wright's wife, who was his agent. She declined to receive it, for the reason that she or her husband had no use for the money and would rather have Mott keep it. Thereafter Mott became insolvent, and so continued until the hearing. After a thorough discussion, and the consideration of an immense array of cases, it was held that the surety was not discharged, the Chief Justice, Church, delivering the opinion of the Court, and the six associate Justices concurring. The Chief Justice says: "The current of authorities, which I think is quite harmonious, establishes that the act which will discharge the surety must be legally in-

jurious or inconsistent with his legal rights." * * * "The other principle referred to is, that the surety may be discharged from an omission of duty, but the surety must inter-

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vene and *request the performance of the duty. * * * Here the surety did nothing. He was not prevented from demanding prosecution by the creditor, nor from paying the note and prosecuting the principal himself."

For these reasons it is adjudged that the action be dismissed, and that the plaintiff pay the defendant his costs and disbursements, to be adjusted by the Clerk, and that he have execution therefor. Also ordered that the injunction be dissolved.

The plaintiff appealed on the following grounds:

1. Because of error in holding that the action of the meeting of the creditors of Simmons & Jackson, of which Moore was one, did not have the effect of changing the character of the assignees and converting them into agents of the creditors.

2. Because of error in holding that Moore acquired no more control over the assignees than he would have had had that meeting not been held.

3. Because of error in holding that the claim of the creditor, Moore, to be paid by the assignees the amount applicable to his debt was only an "equitable" one.

4. Because of error in holding that, under the assignment, the only collateral security in the hands of Moore was his "right of action" against the assignees.

5. Because of error in holding that the creditor was not bound to pursue his remedy against the assignees unless upon the request of the surety.

6. Because of error in not holding that the assets in the hands of the assignees constituted a direct collateral security, which the creditor, after his acceptance, was bound to pursue with due diligence.

7. Because the decree is, in other respects, contrary to the law and the evidence.

Hart & Hart, for appellant.
Allison, Williams, contra.

September 21, 1878. The opinion of the Court was delivered by

McIVER, A. J. The facts of this case are so fully and clearly stated in the decision below that it is wholly unnecessary to repeat

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*them here. Indeed, the Circuit Judge has so fully vindicated the correctness of the conclusion which he has reached that it is difficult to add anything to what he has so well said. That in order to discharge a surety the creditor must do some act of a positive character, either by entering into a valid contract with the principal debtor, varying the terms of the obligation, by extending the time for its performance or otherwise, or by doing some other act prejudicial to the interests of the surety, or he must omit, after demand from the surety, some duty imposed upon him whereby loss results to the surety, is a proposition too well settled to admit of dispute. The inquiry then, in this case is, has the creditor done any such act, or has he, after demand from the surety, omitted the performance of any such duty? The appellant contends that the creditor has done such act by accepting the provisions of the assignment. This involves two questions, one of fact and the other of law: 1. Did the creditor, as matter of fact, accept the terms of the assignment? This fact is alleged in the complaint and denied in the answer, and, as there is no distinct finding by the Circuit Judge upon this issue, it will be necessary to look to the testimony bearing upon it. It is true that the Circuit Judge, in one part of his decision, seems to imply that he treated the case as if the creditor had accepted, and argued that even if he did accept that this would not discharge the surety; but we do not regard this as establishing the fact put in issue by the pleadings. There is no positive evidence that the creditor did, in terms, accept the provisions of the assignment, and it is very clear that there was not only no necessity for the creditor to accept, but that the terms of the deed of assignment did not seem to contemplate anything if the kind on the part of the creditors, as there were no provisions for release, &c. Why, then, should the creditors accept? It is argued by the appellant that though the creditor did not, in terms, accept the provisions of the deed of assignment, yet that such acceptance may be presumed from his acting in conformity with the terms of the deed. Without undertaking to dispute or consider this proposition, we are at a loss to discover any sufficient evidence of the circumstances necessary to raise such a presumption. The only circumstance tending that way, so far as we can see, is the fact that the respondent's intestate attended the meeting of the creditors called to determine the question whether an agent, and, if so, who, should be appointed to act with the assignees, and he, with the other creditors present, simply declined to

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*exercise the privilege given them by the statute in such cases, for the statute does not require, but merely permits, the appointment of such agent. This certainly was not sufficient to show that the creditor accepted the terms of the assignment, especially when taken in connection with the fact that the deed of assignment, so far as disclosed to us, did not provide either expressly or impliedly that the creditors should accept its terms, and with the additional important fact that the creditor proceeded with his suit, which he had previously commenced against the principal debtor, and obtained judgment in due

course of law, which was clearly inconsistent with the idea that he had accepted the terms of the assignment, as one of the main purposes of the assignment, doubtless, was to prevent this very thing, by which costs would be multiplied against the debtor. Indeed, the meeting of creditors for the appointment of an agent to act with the assignees is ordinarily, if not universally, appointed some time before the period has elapsed within which the creditors are allowed to come in and accept the terms of the assignment; and it may well happen that a creditor who has attended such meeting may afterwards be unwilling to accept, for certainly the business capacity, energy and character of the persons who are to administer the assets are important elements for one to consider in determining whether he will accept his pro rata share of such assets in discharge of his debtor. So that even if the deed of assignment required a release, and therefore involved the necessity of an acceptance of its terms, it may well be doubted whether the mere fact that the creditor had attended such meeting and participated in its proceedings would amount to an acceptance of the terms of the assignment. If, therefore, the appellant has failed to establish the fact upon which his legal proposition rests, it is scarcely necessary for us to consider such proposition. But, even assuming the fact to be as contended for by the appellant, it is difficult to see how the act of accepting the assignment could in any respect injure the surety. As we have seen, there was no release required, and there was no extension of time given to the principal debtor, for, on the contrary, the creditor proceeded with his suit then pending against the principal debtor and obtained judgment in due course of law. Hence, even conceding that the conduct of the creditor amounted to an acceptance of the assignment, we do not see how such act could operate as a discharge of the surety.

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*The next inquiry is, has the creditor omitted any duty imposed upon him after demand from the surety that he should perform it? Assuming that it was the duty of the creditor to pursue the assignees and require of them the prompt execution of the trusts which they had assumed, there is not the slightest evidence that the surety ever made any demand upon the creditor so to do. Before the assignment was made the creditor might, upon the demand of the surety, have been required to pursue the principal debtor, and, failing so to do, the surety would have been discharged of loss which thereby fell upon the surety; but mere delay or omission to pursue the principal debtor, without such demand, would not discharge the surety.—Pain v. Packard, 13 Johns. Ch., 174; King v. Baldwin, 17 Johns. Ch., 384, with the notes thereto in 2 Amer. Lead Cases, 255, followed in the recent case of Colgrove v. Tallman, (67 N. Y., 95,) 23 Amer. Rep., 90, and recognized and approved in Lang v. Brevard, 3 Strob. Eq., at page 64.

How, then, is this case altered by the transfer of the assets of the principal debtor into the hands of the assignees? If mere delay to pursue the principal debtor would not be sufficient to discharge the surety, we are unable to see why mere delay in pursuing the assignees could have such an effect. The remarks made by Moses, C. J., in the recent case of Muller v. Wadlington (5 S. C., 347,) seems to us peculiarly applicable to the present inquiry. In that case Bauskett as principal and Wadlington as surety gave to Fair & Marshall seven money bonds, secured by a mortgage of real estate belonging to Bauskett. Muller became the assignee and holder of one of these bonds, the other six remaining in the possession of Fair, who had acquired Marshall's interest. After this assignment to Muller, by an endorsement upon the mortgage, Fair, without the knowledge or consent of Muller, released the lien of the mortgage. In an action upon the bond held by Muller against the surety, Wadlington, it was held that such release did not discharge the surety so far as the bond in the hands of Muller was concerned.

In delivering the opinion of the Court, the late Chief Justice uses this language: "To exonerate the appellant from his liability on the bond because of the alleged loss of the security through the mortgage, it should appear that it resulted from the fault of the creditor. There has been no attempt in any way to connect the respondent, who had the whole legal interest in the bond, with the

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*act of the assumed discharge by Fair. The appellant had as much control over the mortgage as the respondent. Fair stood in a fiduciary relation to both of them. The mortgage enured to their mutual benefit. And if on the one hand it is said by the surety to the creditor, 'you should have assumed control or dominion over the mortgage,' he might well reply, 'you knew of its existence, and, as I have done nothing to destroy its validity, why did you not require the mortgagee who held it to enforce it for your benefit?'"

These remarks may well be applied to the present case. If the surety here complains that the creditor should have taken steps to enforce the performance of their duty by the assignees, whereby the debt might have been paid, the creditor may, with equal propriety, reply: "The deed of assignment was on record; you knew of its existence and of its terms, and, as I have done nothing to destroy its validity, why did you not require the assignees to carry out its provisions for your benefit?" There is no foundation for the distinction attempted to be drawn in the argument that a mortgage is a mere security for the debt, while an assignment is a trans-

fer of property for the payment of the debt. The sole object of a mortgage is to put into the hands of a creditor the means, to the extent of the value of the property mortgaged, of enforcing the payment of his debt; and the purpose of an assignment is the same, except that, instead of the property being put into the hands of the creditor, it is put into the hands of third persons—as, in fact, the mortgage was in the case of Muller v. Wadlington. Nothing but money can be regarded as payment unless it is accepted as such, and the assignment could not operate as payment unless it was so accepted, of which there is no pretense, as no release was required. If the assignment had been made to the creditor, that might possibly make a difference, for in that case active duties would be imposed upon the creditor. Nor are we able to perceive how the fact that the mortgage is given at the time the debt is contracted and the assignment made subsequently can affect the question we are considering. Both, in our view, are mere collateral securities for the payment of the debt, and we are at a loss to see how the time at which they are executed can affect the inquiry.

There is, however, another view of this case which is conclusive against the appellant. It is a well-established rule that "whenever a competent defense shall have existed at law the party who may have neglected to use it will never be permitted to supply the

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*omission and set it up by bill in chancery."—Walker v. Robbins, 14 How., (U. S.) 584 [14 L. Ed. 552]: see also to same effect Creath v. Sims, 5 How., (U. S.) 204 [12 L. Ed. 111]; Sample v. Barnes, 14 How., (U. S.) 70 [14 L. Ed. 330]. This rule has been fully recognized and enforced in this State in a case very similar to the one now under consideration.—Maxwell v. Conner, 1 Hill Eq., 14.

Now, although the Court of Equity, as a separate tribunal, has been abolished, and its powers conferred upon the Court of Common Pleas, this change only affects the mode by which equitable relief is to be sought and the tribunal in which it is obtained. It does not alter the essential principles upon which such relief is obtainable; they remain the same as before. Hence, if the plaintiff's case was not maintainable in the Court of Equity under the rules governing that tribunal, it cannot now be maintained in the Court of Common Pleas.

Under the rule above stated, the plaintiff is not entitled to the relief which he now seeks if he has heretofore had an opportunity, which he neglected to use, of obtaining such relief in another proceeding on the law side of the Court of Common Pleas. That he has had and has neglected such opportunity is unquestionable. For, even if he could not have made the defense (the benefits of which he now seeks to avail himself of) in the original action because it was commenced before the deed of assignment was executed, (although, as judgment was not recovered until nearly a year afterwards, such defense, for aught that appears, might have been interposed,) yet no possible reason is or can be suggested why he could not have set up the discharge which he now contends for when called upon to answer the summons served upon him in September, 1875, but a very short time before the commencement of this action, to show cause why the execution should not be renewed. If it had been paid, or was otherwise discharged, that was the time to set up such payment or discharge; and to permit him now, by another action, to avail himself of the benefits of a defense which could have been as well set up in answer to the summons, would lead, as Daniel, J., says, in Creath v. Sims, (supra,) "to the encouragement of useless and expensive litigation."

It is contended, however, that the judgment in question was invalid, because the defendant therein, who is the plaintiff here, had never been served with process, the acceptance of service being signed by "Clawson & Jackson, defendants' attorneys," which the plaintiff herein says he never authorized

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them to do. Admitting *this to be so, however questionable it may appear to us from the circumstances appearing in the case, it is very clear that it cannot avail the appellant in this proceeding. The proper mode of availing himself of this would be by a proceeding to set aside the judgment for want of service. This action does not even contemplate such a thing, and, on the contrary, the existence and validity of the judgment is distinctly recognized by appellant in the fifth paragraph of his complaint, as it seems to have been impliedly recognized by appellant in a conversation between him and respondent as late as 1866, and there is no allegation of want of service or other defect in the judgment, the sole ground relied upon being that the appellant, as surety, was discharged from his liability under the judgment by reason of the assignment. And when it is remembered that no such ground was set up, or, if set up, that it was overruled, in the answer to the summons issued to renew the execution, it is very clear that it cannot avail the appellant in this action even were the fact fully sustained by the evidence.

The judgment of the Circuit Court is affirmed.

WILLARD, C. J., and HASKELL, A. J., concurred.

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LAY v. LAY.

(Columbia. Nov. Term, 1877.)

[*Executors and Administrators* ⟸301.]

Where an executor makes advances to legatees in unequal proportions, he has the right, after equalizing the payments so as to put all the legatees upon an equal footing, to reimburse himself for such advances out of any surplus of assets that may be in his hands; and if he should die before reimbursing himself, his executor, who, by qualifying as such, has become executor of the first testator, also may make the reimbursement after having equalized the payments.

[Ed. Note.—Cited in Pendergrass v. Pendergrass, 26 S. C. 30, 31, 1 S. E. 45.

For other cases, see Executors and Administrators, Cent. Dig. § 1223; Dec. Dig. ⟸301.]

[*Executors and Administrators* ⟸301.]

The proper mode for the distribution and settlement of the residue of an estate, where there had been payments or advances to some of the legatees in unequal proportions and others had released their interest or made assignments thereof to the executor, prescribed.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1219–1228; Dec. Dig. ⟸301.]

[*Executors and Administrators* ⟸265.]

The executor of a sole executor is the representative not only of his own immediate testator but also of the first testator, and may retain, for the benefit of the estate of the second testator, out of any funds of the first testator that may be in his hand, an amount sufficient to satisfy a claim held by the second estate against the first.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1012; Dec. Dig. ⟸265.]

[*Executors and Administrators* ⟸500.]

An executor who died in 1863, and who had neglected to make annual returns, *held* not to be entitled to commissions.

[Ed. Note.—Cited in Davidson v. Moore, 14 S. C. 266; Tompkins v. Tompkins, 18 S. C. 29; Epperson v. Jackson, 83 S. C. 164, 65 S. E. 217.

For other cases, see Executors and Administrators, Cent. Dig. § 2135; Dec. Dig. ⟸500.]

[This case is also cited in Ex parte Verner, 24 S. C. 596, as to facts.]

Before Cooke, J., at Oconee, February, 1876.

This was an action by Archelaus Lay and Josephine Verner against W. A. Lay, executor, and others.

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*The important facts of the case were as follows:

The action was commenced in February, 1873, for the purpose of obtaining a settlement of the estate of James Lay, deceased, who died in 1860, leaving a last will and testament, by one clause of which he devised and bequeathed the residue of his estate, real and personal, to his "heirs-at-law, to be divided among them in equal shares," and by another appointed his son, Charles Middleton Lay, executor, who, on June 1, 1860, proved the will and qualified as such executor. He left as his heirs-at-law his widow, six children and a grandchild, Josephine Verner, one of the plaintiffs.

The widow, Elizabeth Lay, died in 1864. Charles M. Lay, the executor, died in December, 1863, leaving a will, by which he appointed his son, the defendant, William A. Lay, then a minor, and two other persons his executors. After the death of Charles M. Lay, Jesse Lay and the plaintiff, Archelaus Lay, two of the sons of the testator, sued out letters of administration with the will annexed upon his estate. No one of the executors named in the will of Charles M. Lay qualified thereon until 1866, when William A. Lay, the defendant, alone qualified.

The complaint charged that the defendant, William A. Lay, had a large sum of money in his hands belonging to the estate of the first testator, James Lay; that he was in failing circumstances; that he had made no returns as executor for more than five years, and that he had purchased shares of the legatees for less than their value. It prayed, amongst other things, for the appointment of a Receiver and for an injunction. The injunction was granted and a Referee appointed to take and state the account.

It further appeared that Charles M. Lay had neglected to make returns as executor within twelve months of his death, and that he had made payments to residuary legatees, or some of them, in unequal proportions.

It also further appeared that a note of Calhoun & Lorton for $370, dated 19th September, 1860, payable to C. M. Lay, or bearer, was, after the death of Charles M. Lay, turned over by his widow to Jesse and Archelaus Lay, administrators, as aforesaid, as part of the estate of James Lay, deceased, and was by them delivered to William A. Lay when he assumed the executorship of the said James Lay, and that the note had been collected by the defendant.

The Referee submitted as his report a long and detailed statement of the accounts of the two executors, Charles M. Lay, deceased,

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*and William A. Lay, to which the defendant, William A. Lay, excepted on the following grounds:

1. Because the Referee erred in not recommending, before any distribution is declared amongst the devisees and legatees, the payment to the estate of C. M. Lay, deceased, of thirteen hundred and thirty-four dollars and sixty-nine cents, with interest thereon from the 15th day of February, A. D. 1875, being the amount, including interest to the date aforesaid, which his report shows C. M. Lay, deceased, by virtue of his executorship, is in advance with the estate of his testator, James Lay, deceased, as well as any other amounts which, upon further examination, shall be found due to the estate of the said C. M. Lay, deceased.

II. Because the Referee erroneously states that three of the legatees, A. Lay, Jesse Lay and Mrs. S. E. Boggs, have, by consent of the other legatees, compromised their interests in the estate, and have taken certain amounts set forth in the report in full of their legacies, when the truth is, and he should have so stated, that Jesse Lay alone, of the three named in the report, made such compromise, and the other devisees and legatees consented thereto. The executor, W. A. Lay, held a note on A. Lay for $2,442.65, dated 7th December, 1864, one-sixth of which, amounting, with the interest thereon, to
dollars, was settled to Mrs. Josephine Verner by the said A. Lay, and by him assigned to W. A. Lay, and the note was delivered to A. Lay in consideration of his executing to W. A. Lay an assignment of the interest of himself and Mrs. S. E. Boggs in the estate of James Lay, deceased, and the interest of said A. Lay in the estate of J. M. Lay; and in further consideration of the sum of $181, to be credited on the note, held by the said A. Lay on the estate of C. M. Lay, as paid by William A. Lay; and in further consideration of the assignment of Josephine Verner to the said W. A. Lay of her right, title and interest in so much of the estate of James Lay, deceased, as consists in a note of Mrs. Elizabeth Lay for $1,316.70, dated December 7th, 1864, all of which, except $11.70, is for slaves. "Mrs. Josephine Verner's share of the negro part of said note is hereby relinquished, (the control thereof being given to me by the said Mrs. Verner,) upon condition that the said interest or one-sixth is credited upon the said note, and, to the extent of her share, cancels the same." And also the right, title and interest of Mrs.

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*Josephine Verner in the note or memorandum of myself hereinbefore mentioned, and to be delivered to me, amounting to $2,442.65, dated December 7th, 1864, being the one-sixth part thereof, and which said assignment of her share cancels the same; which assignment was duly executed and delivered to W. A. Lay, and operates to vest in John D. Verner, administrator of A. W. Lay, deceased, J. J. Norton and W. C. Keith, assignees of the interest of Jeptha Lay and the estate of C. M. Lay, who did not release their interest in the note of the said A. Lay, the interest of A. Lay and Mrs. S. E. Boggs in the unadministered and undivided estate of James Lay, deceased, and of their interest in the note of Mrs. Elizabeth Lay, and the interest of A. Lay in the estate of J. M. Lay, because the said W. A. Lay, in delivering up said note of A. Lay, gave up property which he held in trust for the said J. D. Verner, administrator as aforesaid, J. J. Norton and W. C. Keith, assignees as aforesaid, and the estate of C. M. Lay, deceased.

Under the foregoing assignment and statement of facts the Referee should have reported—

1. That the note of Mrs. Elizabeth Lay for $1,316.70, with interest thereon from the 7th of December, 1864, except one-sixth of $11.70, with like interest, belonged to J. D. Verner, administrator of the personal estate of A. W. Lay, deceased, W. C. Keith and J. J. Norton, assignees of Jeptha Lay, deceased, and the estate of C. M. Lay, deceased, and should have recommended the assignment of said note to them on their paying to Mrs. Josephine Verner one-sixth of $11.70 and interest as aforesaid.

2. That the remainder of the undivided and unadministered estate of James Lay, deceased, after equalizing the parties, should be divided into six equal parts, one of which belongs to Mrs. Josephine Verner, and the remaining five to be divided equally between J. D. Verner, administrator of the estate of A. W. Lay, deceased, J. J. Norton and W. C. Keith, assignees of Jeptha Lay, deceased, and the estate of C. M. Lay, deceased.

III. Because he did not allow the estate of C. M. Lay, deceased, former executor, credit for necessaries furnished for Mrs. Elizabeth Lay, widow of James Lay, deceased, and returned by said C. M. Lay in his lifetime, amounting to $61.25.

IV. Because he did not allow the estate of C. M. Lay, deceased, former executor, credit for the necessaries furnished by him to Mrs. Elizabeth Lay, widow of James Lay, deceas-

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ed, and charged on the *account filed by his successor, W. A. Lay, showing condition of estate at time of death of said C. M. Lay, amounting to $132.75.

V. Because he did not allow commissions to C. M. Lay, deceased, on $11,809.53 of the amounts received and returned by him in his lifetime; and,

VI. On $9,508.69 of amounts paid out by him in his lifetime.

VII. Because he did not allow the estate of C. M. Lay, deceased, commissions on the further sums of $186.45 received, and $350.84 paid out by him in his lifetime, and returned by his executor, W. A. Lay.

VIII. Because he did not allow this defendant commissions on amounts received and paid out in 1867, 1869, 1870, 1871, and subsequently.

IX. Because he did not credit the estate of C. M. Lay, deceased, with the note of Calhoun & Lorton for $370, dated 9th September, 1860, turned over by his administratrix to the administrator de bonis non of James Lay's estate, and by them appraised and held as part of said estate.

X. Because there is a manifest error in the accounts submitted by the Referee, in this that the aggregate of the balances found due to the legatees and devisees under the will

of James Lay, deceased, is $3,632.47 less than the amount found due by the executor, Wm. A. Lay.

The decree of His Honor the Circuit Judge was as follows:

Cooke, J. This case comes up on exceptions to the report of the Referee. After hearing argument, it is ordered and adjudged as follows:

First. The first exception of plaintiff, and fifth, sixth, seventh and eighth of the defendants, refer to the subject of commissions. The law in existence at the time of the transactions must govern. The allowance of commissions is not penal, but simply a provision of law which must be applied to transactions which took place whilst the law was in force.

Second. The ninth exception of defendants, made for the estate of C. M. Lay, is overruled. W. A. Lay, the executor, is not charged with the note of Lorton & Calhoun properly, for there is no proof that the note payable to C. M. Lay was the property of James Lay. The report in this respect is confirmed.

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*Third. The first exception of defendants claims error in the report in not charging the bulk of the estate in the hands of W. A. Lay, second executor, with amounts claimed to have been overpaid to the different legatees by the first executor, C. M. Lay, deceased. If such advances were made, the legatees who were so advanced must refund them. The report refusing to charge this amount of $1,334.69 upon the estate in the hands of W. A. Lay, executor, is sustained.

Fourth. The third and fourth exceptions of defendants, as to the Referee refusing to allow necessaries furnished Mrs. Elizabeth Lay in her lifetime, are sustained.

Fifth. The second exception of defendant claims that there is error in the report as to the effect of the compromise with Archelaus Lay. It seems that all parties concurred in giving up the note of A. Lay, upon the consideration of A. Lay and Mrs. Boggs relinquishing their shares in the estate; and as the note was the property of the estate, it would seem that the estate (then reduced to four legatees) should have equal benefit from it; Mrs. Josephine Verner only relinquished her interest in two notes, neither of which has been collected or charged to W. A. Lay, executor. And after giving full effect to her agreement, that is to say, in crediting her sixth on the slave note due by Elizabeth Lay, which has not been collected, and giving up the note of A. Lay, she is entitled to a full share of the estate now distributed. This exception is overruled, and the report in this respect confirmed.

Sixth. It is ordered that the reports be recommitted to the Referee, to make his report according to the principles of this decree, with leave to report any special matter.

Seventh. It appearing that there is a clerical error in the Referee's report in omitting to add the amount found due the estate of James Lay, deceased, by Wm. A. Lay, executor, to the aggregate estate for distribution, (this sum amounting, February 15, 1875, to $6,921.02,) the Referee's report is recommitted for correction in this or any other of a like nature.

The defendant, Wm. A. Lay, appealed on the following grounds:

I. Because His Honor erred in overruling this defendant's first exception to the report of the Referee, and confirming the report, which, after finding the former executor, C.

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M. Lay, deceased, to *be in advance with the estate $1,334.67, besides interest, did not recommend the payment of that sum to his personal representative before distribution.

II. Because His Honor erred in overruling this defendant's second exception to the Referee's report and decreeing that Mrs. Josephine Verner is entitled to one-fourth of the estate of James Lay, deceased, as it now stands.

III. Because His Honor erred in refusing to allow the first executor, C. M. Lay, commissions on amounts received and paid out by him in his lifetime.

IV. Because His Honor erred in overruling the defendant's ninth exception, and refusing to allow the estate of C. M. Lay, deceased, credit for the note of Calhoun & Lorton for $370 and interest.

Norton, Keith, for appellant.

McGowan & Thompson, contra.

October 9, 1878. The opinion of the Court was delivered by

HASKELL, A. J. This action was brought by two of the legatees against the executor of the executor of the testator and the other legatees. The executor, while having assets in amount largely over and above all other claims, made payments to the legatees in unequal proportions and in excess of the money which had come to his hands to an amount reported as $1,334.67, and the account thus stood at the time of his death. The defendant, W. A. Lay, is the executor of the first executor, C. M. Lay, and asks that the estate of the first executor be allowed the reimbursement of this amount before further distributions among the legatees. The Judge ruled that such over-payments, if recoverable at all, must be refunded by the legatees to whom it was made. No negligence or misconduct is charged against the first executor. The question is whether the over-payment made by him can be charged against the estate. "In the course of the administration of estates, executors and administrators often pay debts and legacies upon the entire confidence that the assets are sufficient for all purposes. It may turn out, from unexpected occurrences, that there is a deficiency of assets. Under such circumstances they may be entitled to

no relief at law, but in a Court of equity, if they have acted with good faith and due caution, will be clearly entitled to it upon the

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*ground that otherwise they will be innocently subject to an unjust loss from what the law itself deems an accident."—Story's Eq. Jur., § 90. If the first executor had remained alive and received further sums of money, which were received by the subsequent executor, he would have been, in the ordinary debit and credit account, duly credited with the amount previously overpaid. He would thus have disbursed the amount received, and could only be called to account for having distributed unequally and thus preferred some of the legatees.

If legacies are for specific amounts and the executor pays one in full, he admits assets to pay all. So if, as here, an estate is to be equally distributed among a number, and the executor pays to one legatee a given amount, he admits his ability to pay to each other legatee the same amount.

This is the general rule, though subject to some exceptions, which it is not necessary to specify here, as they do not apply in this case. If the executor chooses, at his risk, to pay in advance, the legatees have no cause to complain, and he is entitled to reimburse himself out of the next money that comes to hand.—Wms. on Exec., *p. 1245; Watts v. Watts, 2 McC. Eq., 78; Wright v. Wright, ib., 185; Livesey v. Livesey, 3 Russ. Ch. Ca., 287.

But the executor cannot retain funds from the estate to repay himself until he has equalized the payments to the other legatees, because, by his payment to some, he admitted assets to pay all to that amount, and for that he must account before he can reimburse himself, for it was not in the eye of the law an advancement. If the assets prove sufficient to equalize the payments, then any surplus must be applied to the reimbursement. There is no reason why this equitable right should not be as good when asked by the representative as when by the executor himself.

The second ground of appeal is from the decree of the Circuit Judge—"Mrs. Josephine Verner is entitled to one-fourth of the estate of James Lay as it now stands." The ruling upon this point depends upon the meaning of the agreement signed by Archelaus Lay which is exhibited in the brief. It will be observed that this agreement was entered into more than a year after this action was begun, and is preceded by the title of the cause; that the parties to it are the plaintiffs and the executor the defendant; that it is attested by the attorneys of the opposing parties and is a compromise or adjustment of as

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much of the case as it comprehends. In *the printed argument for the respondents it is said that Mrs. Verner did not sign the agreement and that it could not affect her rights. But this was corrected in open Court, and the agreement was by all parties admitted to be binding. The only question is, what does it mean? The consideration on the one part is a note held by Wm. A. Lay, as executor of James Lay, against Archelaus Lay, one of the plaintiffs, together with "all demands which as executor of James Lay, deceased, he holds against Archelaus Lay." To induce the executor to surrender this note and all demands, Archelaus Lay, in addition to having given, as it is said, a receipt in full to W. A. Lay, executor, for his share in the estate of James Lay and J. M. Lay, deceased, proceeds in the following words: "I hereby assign, transfer and release to the said Wm. A. Lay all my right, title and interest in the said estates of James Lay and of J. M. Lay; and also the sum of $181, to be credited on the note held by me on the estate of C. M. Lay, (now in suit,) and to be credited thereon as paid by Wm. A. Lay; and also the right, title and interest of Mrs. S. Emmaline Boggs in the estate of her father, James Lay, (which interest I own); * * * and also the right, title and interest of Mrs. Josephine Verner in the note or memorandum of myself, hereinbefore mentioned, and to be delivered to me, amounting to $2,442.65, dated 7th December, 1864, being the one-sixth part thereof, and which said assignment of her share cancels the same."

The assignment and cancellation of Mrs. Verner's share of the note amounts to this: It is an acknowledgment as if the executor had actually collected the one-sixth part to which she would be entitled (for she cancels that amount on the note) and had credited it on the note and paid it over to her (Mrs. Verner) and taken her assignment as a voucher for the amount. This leaves the executor liable to the estate for the remaining five-sixth parts of the note, and charges Mrs. Verner with this one-sixth in addition to what she had received before.

The further provision of the agreement is as follows: "And I also hereby assign, transfer and deliver all the right, title and interest of Mrs. Josephine Verner in so much of the estate of James Lay as consists in a note of Mrs. Elizabeth Lay for slaves, said note for $1,316.70, dated December 7, A. D. 1864, of which $11.70 are not for slaves. Mrs. Josephine Verner's share of the negro part of the said note is hereby relinquished, (the

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control thereof *being given to me by the said Mrs. Verner,) upon condition that the said interest or one-sixth is credited upon the said note, and, to the extent of her share, cancels the same." The same principle of construction must be applied. The cancellation is equivalent to a collection of the amount which is thereby credited on the note, and the assignment is a voucher which charges the amount against Mrs. Verner as if it had been paid, for she cannot release the estate from a portion of the assets and then draw

an equal share from the diminished resources. The executor must be charged, therefore, with having collected one-sixth of this note and be credited as having paid it over to Mrs. Verner. He must be further charged with having received the whole amount of the note which he turned over to Archelaus Lay, for that is payment, and the money on any other demands which the estate of James Lay at that time held against Archelaus. He also is chargeable, as above said, with having received one-sixth of the Elizabeth Lay note. And these sums should be put on the debit side of his account, while he must be credited with the sixth of each note as paid to Mrs. Verner, (Josephine Lovingood,) one of the legatees.

We recur now to the grounds of appeal "that the Judge erred in allowing to Mrs. Josephine Verner one-fourth of the estate of James Lay as it now stands." The view as to Mrs. Verner's share being one-sixth, as expressed in the said agreement, is deemed by this Court entirely correct, and that her position was unchanged by the agreement. The legatees were originally seven in number, and were to receive equally the residuary estate. They were Jeptha Lay, A. W. Lay, A. Lay, Jesse Lay, Mrs. S. E. Boggs, Josephine Lovingood (now Mrs. Verner) and C. M. Lay, the first executor. It is agreed that in 1869 Jesse Lay made a final settlement and gave a receipt in full discharging the estate from all liability to him as legatee. All the other legatees except Mrs. Boggs were parties to the transaction, and she makes no objection. He therefore is out of the way, and the executor must account to the remaining six legatees for the balance of the estate.

Some time after this suit was begun the agreement above cited was entered into, and the interests of the legatees, Archelaus and Mrs. Boggs, were assigned for valuable consideration to William A. Lay.

The estate was not released, and there is no evidence that the transaction was fraudulent, or that the purchase by W. A. Lay of

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*the shares of Archelaus and Mrs. Boggs was for less than their value. It is true that it is alleged in the complaint that W. A. Lay "purchased shares of the legatees for less than their value," but there is no evidence of any such transaction up to that time. In this argument there is an allusion to a certain "receipt in full" at some time previous; but if there was anything wrong in that, it was cured by the act of the parties in this agreement in 1874, which really constituted the only sale of which the Court can take cognizance. This was evidently by way of compromise between the parties litigant, and whoever took part in it is estopped from objecting to the result of their own acts, unless, indeed, the transaction is of such a nature that it is void in law. In a note to Williams on Executors (*p. 1567,) cases were cited to show that "where an executor contracted with legatees for the purchase of their legacies, which were accordingly assigned to a trustee for him in consideration of sums of money less in amount than the legacies, it was admitted that the transaction could not be sustained for the benefit of the executor; and it was also held that the deed of assignment did not operate as a release of the estate, and could not be upheld as against the legatees who executed it for the benefit of their co-legatees."—Ex parte James, 8 Ves., 346.

Redfield on the Law of Wills (2 Vol., 885,) and the cases there cited are to the same point. This doctrine seems to be sound, and decides that whatever may be the result of the agreement as between the parties, it cannot affect or change the rights or increase the shares of the other legatees. As to the contract between the parties, its being in the nature of a compromise puts it on a different footing from an ordinary sale. But if it were a mere sale to the executor, it would nevertheless be good so far as this case is concerned, for it is not complained of. "Although a trustee is not precluded from purchasing the property which has been confided to his care from the cestui que trust, such transactions are rigorously scrutinized and will be set aside unless they are shown to be entirely fair and for a full and adequate consideration."—Lead. Cas. in Eq., Vol. 2, p. 1228; McCants v. Bee, 1 McC. Eq., 383 [16 Am. Dec. 610]. And strongly to the same point is the case of Stallings v. Foreman, (2 Hill Ch., 401,) where the doctrine is discussed, and it is held that an executor may purchase at the sale of the property of his testator, and if he buy for the true value of the goods his purchase is good both in law and equity. We see no distinction in prin-

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ciple, *and this contract, as it stands unimpeached nor charged with fraud, is unquestionably valid.

As was said by Harper, Ch., in Thompson v. Buckner, (2 Hill Eq., 500,) "if it was a fraud on his creditors, the deed [assigning interest in an estate] might still be good as between the parties, and none but his creditors could impeach it. If it were obtained by a fraud practiced on McCullough himself, none but himself or his legal representatives could call it in question." It was held in that case that the conveyance to one who afterwards became administrator was a sufficient accounting on his part. So it is in this case so far as relates to Archelaus Lay and Mrs. Boggs, and Mrs. Verner to the extent that she has gone. W. A. Lay, executor, has accounted entirely to the first two, and as assignee represents their interests, and he has accounted to Mrs. Verner to the extent of the two payments on the notes. To ascertain, then, the proportion of the estate, as it now stands, to which each is entitled, it is

only necessary to say that, the number of the original legatees of the residuary estate being seven, each was entitled to one-seventh in 1869. Jesse released the estate and surrendered his interest, if he had any, to the remaining six legatees. Since that time each has been entitled to one-sixth. Of these six, W. A. Lay represents three—two as assignee and one as executor of C. M. Lay, who was one of the original legatees, and the funds must be distributed accordingly, subject to the rules which have been already indicated, viz.: First, there having been unequal payments made to the legatees, the first application of the funds in hand must be to the equalization of payments on the six legacies (Atcheson v. Robertson, 4 Rich. Eq., 39); second, the debt due to the estate of C. M. Lay, executor, must be paid; and, third, if there be then a residue it should be applied equally to all the legacies. As directed in Whitlock v. Whitlock, (13 Rich. Eq., 165,) the whole amount of estate must be ascertained—all which the executor and the executor of the executor respectively has received or should properly have received from the rights of property of testator. This amount should be carried to the debits of the respective executors. The investments and disbursements and all other proper matters of discharge must be put to the credit of the executor to whom it pertains. The first executor should be credited with all proper disbursements and with all assets of testator left by him and turned over to the second executor. If there be any balance in favor

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of the first executor, *he is entitled to that amount as against the legatees, though he would not be as against creditors. If there be a fund in the hands of the present executor, it should be distributed. But it is admitted that this executor is insolvent and in arrears and has wasted the property. This requires that the Court should leave no room for error in the application of the rule as above laid down—to direct the distribution.

The principal defendant, W. A. Lay, is the executor of the sole executor of the testator, which sole executor was also one of the legatees, and W. A. Lay is further the assignee of two other legatees. The executor of a sole executor "is, to all intents and purposes, the executor and representative of the first testator," (1 Wms. on Ex., 207,) and is the representative of both estates, and, in the words of the same text writer, "an executor of an executor is entitled to retain, out of the assets, debts due from the testator either in his own right or as the executor of the deceased executor."—p. 901. "If the same person be the personal representative both of the creditor and the debtor, he may retain out of the effects of which he is possessed as the representative of the debtor to satisfy the debts due to him as the representative of the creditor." Whatever money, therefore, W. A. Lay, executor, has received, and has not otherwise accounted for as either properly disbursed or now on hand, should be credited to him as having been applied, first, to the satisfaction of the [$1,334.67] over-payment by C. M. Lay, and, next, to the respective legacies which he represents as executor of C. M. Lay and as assignee of Archelaus Lay and Mrs. Boggs; and the claim of C. M. Lay, Archelaus Lay and Mrs. Boggs should be charged with this sum, whatever it may be, before they can be entitled to draw anything from the funds in hand or which may subsequently come in. Or, perhaps, in plainer words, W. A. Lay, executor, is creditor by virtue of these four interests of which he became the representative before he rendered his account. When an executor is creditor he is presumed to retain funds to apply to his own debt, and in the double aspect, as here, of debtor and creditor he cannot claim more until he has accounted for all he has had.

The third ground of appeal is upon the refusal by the Judge to allow the first executor, C. M. Lay, commissions, because he failed to make his return under the Act of 1789: "That if any executor or administrator shall neglect to render such annual accounts he

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*shall not be entitled to any commissions for his trouble in the management of the said estate, and shall, moreover, be liable to be sued for damages by any person or persons interested in the said estate."

The argument for the appellant is that the statute is penal; that it was repealed in 1872, (Rev. Stat., p. 800,) and that when a statute, penal in its nature, has been repealed, the penalty ceases to operate although the cause had existed prior to the repeal. The first question is, was the Act penal? for, if it were not, and, on the other hand, made the annual account a duty of the office, without which the executor could not earn commissions, it would be clear that the commissions were never earned by C. M. Lay. The question was elaborately argued, and numerous cases cited, from which inferences were drawn from the words and expressions used by the Judges. See also Black v. Blakely, 2 McC. Eq., 1 and Wright v. Wright, ib., 185. And considerable stress is laid upon the words "forfeit" and "penalty;" but, according to legal acceptance, the difference between the words, unless made so by the context, is not material. "A penal statute is one which imposes a forfeiture or penalty for transgressing its provisions or for doing a thing prohibited." —Potter's Dwarris on Stat., p. 74. None of these cases are decisive, and, indeed, none of them being directly upon the point, there is marked discrepancy in the dispositions toward which they lean. We think, however, that the question did arise and was determined in Corbin v. Howell, Bail. Eq., 183, and Corbin v. Jones, Rich. Eq. Cas.,

52. The cases are identical, and were decided at January and May Terms, 1831. An administrator of a deceased executor rendered the annual account of the intestate and drew the commissions for his estate. It is unquestioned that an administrator of an executor has nothing to do with the estate of the testator, nor can he in any sense perform a duty of the executor as such. It was argued on the appeal that commissions are intended as a compensation for the several duties required by law, and unless all these duties are performed, commissions are not to be allowed." "That none but the executor or administrator can perform those duties so as to be entitled to commissions, and his administrator is not competent to make a legal return so as to give a right to the commissions." The cases were heard before Chancellor Harper, and he rendered the opinion confirming the circuit decree. It was determined—1. That "it is not a condition precedent to the allowing of commissions that an account shall be rendered, but

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they are allowed on all sums received *and paid away, subject only to be forfeited if the executor or administrator shall neglect to render an account." And, secondly, he says: "Up to the time of his death, if John Howell had thought proper to make a return he would have had commissions for one year preceding; and what John Howell at the time of his death might do, his administrator, representing him, had a right to do afterwards." This latter could not have been said were the annual return the exercise of a function of the office and was for the trouble arising from the discharge of those duties that the executor received compensation. They could not be performed except by the representative of the testator, which the administrator of an executor is not. The word "neglect," in the portion above cited, is italicized in the opinion, and indicates the conclusion at which the Court arrived, viz., that the Act was directed against the person, and imposed a penalty upon him for failure to obey a requirement of the law, and it might as well have been imprisonment or fine as forfeiture of property in the shape of commissions. In Gee v. Hicks, (Rich. Eq. Cas., p. 5,) it was held that the administrator was not bound to prove the annual return before being entitled to commissions, but that the neglect must be proven by the adverse party before the commissions could be disallowed. Regarding the statute as penal, and that it has been absolutely repealed, the State v. Cole, (2 McC., 1,) Allen v. Farrow, (2 Bail., 584.) are the law of the case.

No doctrine of law is better established than that where one commits an offense which is made felony by statute, and then the statute be repealed, he cannot be punished as a felon in respect of that statute.—1 Hawk. P. C., 306, § 10; 1 Hall, 219. And the doctrine applies as well to the imposing and recovery of penalties as to the creating and punishment of felonies. But has the provision in the Act of 1789 been absolutely repealed? It is true that on pages 799–800, Rev. Stat., Chap. CXLVII, the Act of 1789 stands among the list of the Acts repealed. The repealing clause is found on page 768, Rev. Stat., and is as follows: "The following Acts, ordinances and resolves, passed in the several years hereinafter enumerated, have expired, or have been or are hereby expressly repealed, subject to all the provisions of Chapter CXLVI." Chap. CXLVI, Rev. Stat., p. 766, § 3: "The repeal of the Acts and resolves, and parts of Acts and resolves, revised and re-enacted herein, or repugnant to the provisions hereof, shall not

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revive any *law heretofore repealed or suspended, nor any office heretofore abolished." * * * Section 5: "It shall not affect any penalty or forfeiture incurred before it takes effect, under any of the laws repealed, except that where a punishment, penalty or forfeiture is mitigated by the provisions of the General Statutes such provisions may be extended to any judgment pronounced after said appeal."

The provision of the law on the subject of executors, as passed in the General Statutes, cannot be regarded as a mitigation of the penalty imposed by the Act of 1789. The whole of that portion of the Act was repealed, subject to Section 5, p. 766, and substituted therefor is a provision resembling the Act of 1840, 11 Stat., 112, relative to the annual returns by guardians, receivers and other trustees to the Masters and Commissioners in Equity.

The executor or administrator may be cited by Judge of Probate, and punished for contempt if he refuses or fails to show cause why he has failed to make his return. The Act of 1789 is, therefore, of force in the case, and C. M. Lay is not entitled to commissions when he failed to make his returns.

The fourth and last ground of appeal is upon the exception that the Court "did not credit the estate of C. M. Lay, deceased, with the note of Calhoun & Lorton for $370, dated 9th September, 1860." This note was turned over by the administratrix of C. M. Lay to the administratrix de bonis non, &c., of James Lay, and during the minority of W. A. Lay, executor, and was appraised and held as part of the estate. It was afterwards turned over by the administrators to W. A. Lay as part of the assets, and was collected by him. There is no other evidence about it. It is hard to see the embarrassment. The note represents so much money of the estate invested in that manner, and, as such, passed from hand to hand without objection, and the administrators have been discharged.

It cannot be complained of as an investment because it has been collected.

It is the same as if the estate of C. M. Lay had turned over that much cash as part of the assets of estate of James Lay. C. M. Lay must, therefore, be charged with having received such amount, and his estate be credited with having turned it over to the second executor, and thus it is accounted for so far as C. M. Lay is concerned, but remains one of the liabilities of W. A. Lay, who must account for it to the legatees of James.

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*The case is remanded for further proceedings in accordance with the principles contained in this opinion. Motion granted.

WILLARD, C. J., and HASKELL, A. J., concurred.

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CLEVELAND v. COHRS.

(Columbia. April Term, 1878.)

[*Assignments* ⇐78, 79.]

The assignment of a bond secured by a mortgage carries with it the mortgage; but the assignment of a mortgage to secure the payment of a bond does not necessarily carry the bond with it.

[Ed. Note.—Cited in Nichols v. Briggs, 18 S. C. 484; Ballou v. Young, 42 S. C. 176, 20 S. E. 84; Lyles v. Lyles, 71 S. C. 396, 51 S. E. 113.

For other cases, see Assignments, Cent. Dig. §§ 145, 146; Dec. Dig. ⇐78, 79.]

[*Guardian and Ward* ⇐126.]

The equitable owners of a bond and mortgage—as, for instance, the wards of a guardian to whom the bond and mortgage were given for money of the wards loaned by him to the obligor and mortgagor—may maintain an action thereon in their own names.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. § 434; Dec. Dig. ⇐126.]

[*Mortgages* ⇐460.]

[The assignee of a mortgage given to secure a bond cannot maintain an action to forclose without proof of the assignment to him of the bond.]

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1349; Dec. Dig. ⇐460.]

Before Cooke, J., at Charleston, December, 1877.

Action by Jeremiah J. C. Cleveland and Florence Cleveland, his wife, assignees of F. E. McKenzie, against Charles H. Cohrs, to foreclose a mortgage of real estate given by him to Francis E. McKenzie to secure the payment of a bond for $2,500.

The facts upon which the decision turned sufficiently appear from the opinion of the Court.

[For subsequent opinions, see 13 S. C. 397; 18 S. C. 599.]

McCrady & Son, for appellant.

Campbells & Whaley, contra.

October 29, 1878. The opinion of the Court was delivered by

McIVER, A. J. This action was brought by the plaintiffs, as assignees of F. E. McKenzie, against the defendant to foreclose a mortgage of real estate given to secure the payment of a bond. To maintain the action as assignees, it was necessary to show that the bond and mortgage had been assigned to the plaintiffs; and this the plaintiffs have failed to do. The proof shows that the mortgage was duly assigned to the plaintiffs, but in the assignment there is no reference whatever to the bond which it was given to secure; and there is not only no testimony tending to show any assignment of the bond, but, on the contrary, the testimony shows that it was never assigned. There was

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something said about the *bond being lost, but it was not sued upon as a lost bond; and, on the contrary, the allegation in the complaint is that it was duly assigned to the plaintiffs, of which, as we have said, there was no proof. We may add that we do not think that there was sufficient proof of the loss of the bond.

The rule of law is well established that the assignment of the bond carries with it the mortgage, but the assignment of the mortgage does not necessarily carry with it the bond. The bond represents the debt, while the mortgage is a mere security for the payment of such debt. One is the principal, the other is the mere accessory; and while the assignment of the principal carries with it the accessory, the assignment of the accessory does not carry with it the principal.—1 Hilliard on Mort., 236–7; 4 Kent. Comm., 1st ed., 186; Story Eq. Jur., § 1623, note; Wright v. Eaves, 10 Rich. Eq., 582; see also notes to Ryall v. Rowles, in 2 W. & T. Lead. Ca. Eq., Part II, at page (top) 236.

It follows, therefore, that the plaintiffs could not, under the proof made in this case, maintain the action as assignees.

It appears, however, that one of the plaintiffs, Florence, and her sister, Sarah Ann, are the equitable owners of the bond, the Referee having found that it was given to Francis E. McKenzie, as guardian of Sarah Ann and Florence McKenzie, (now Cleveland,) for money in his hands as such guardian, and, under the provisions of the Code, (Pom. on Rem., § 127,) they may, as such equitable owners, bring the action; but as Sarah Ann is not a party, the judgment below cannot be sustained even in this aspect.

The judgment of the Circuit Court is set aside, with leave to the plaintiffs to amend by making the said Sarah Ann McKenzie a party, as well as the legal owner, F. E. McKenzie, if they shall be so advised.

WILLARD, C. J., and HASKELL, A. J., concurred.

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*BARKER v. SMITH.

(Columbia. Nov. Term, 1877.)

[*Vendor and Purchaser* ⟸134.]

Taxes assessed for the State for the fiscal year 1870–71 and for the city of Charleston for the year 1870 upon a lot in the city of Charleston *held* not to constitute an encumbrance upon the property in March, 1873, as between one holding under the owner, as whose property the land was assessed, and his vendee.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 238, 250–254, 258; Dec. Dig. ⟸134.]

[*Taxation* ⟸501.]

In the Acts relating to the taxation and assessment of property which were of force in 1873 there was no provision which in terms made taxes an express lien upon the property taxed, nor could any be implied from the powers therein conferred upon executive or administrative officers in the collection of taxes after such powers had been exhaustively exercised.

[Ed. Note.—Cited in Dickson v. Burckmyer, 67 S. C. 537, 46 S. E. 343.

For other cases, see Taxation, Cent. Dig. § 931; Dec. Dig. ⟸501.]

[*Taxation* ⟸501.]

Where the provisions of the law in relation to advertising and selling property for taxes have been complied with by the officers whose duty it is to arrange for and make the sale, the property ceases to be subject to any lien for taxes, and it makes no difference that the law provides for future legislation to make the tax effective.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 931; Dec. Dig. ⟸501.]

[*Taxation* ⟸513.]

There was no statute of the State or ordinance of the city of Charleston of force in the year 1868 which made city taxes a lien upon real property for a longer period than one year.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 951–955; Dec. Dig. ⟸513.]

[*Municipal Corporations* ⟸116.]

Where the provisions of two ordinances relating to the same subject matter can be reconciled, the latest will not be held to have repealed the first on the ground of repugnancy between the two.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 268–271; Dec. Dig. ⟸116.]

[*Municipal Corporations* ⟸958.]

An ordinance making city taxes a lien for one year only is not repealed by a later ordinance providing that thereafter taxes should constitute a specific lien on the property taxed from the time the liability accrued, and that city taxes should have priority over all private debts or liens.]

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 2032; Dec. Dig. ⟸958.]

Before Cooke, J., at Charleston, November Term, 1877.

This was an action by Theodore G. Barker against William B. Smith for foreclosure of a mortgage.

The case upon which the appeal was heard is as follows:

The complaint is filed for the foreclosure of a mortgage given by the defendant to the plaintiff to secure a bond, a part of the purchase money of a lot of land in the city of Charleston.

The deed of conveyance by the plaintiff to the defendant contains this warranty: "And I do hereby bind myself, and my heirs, executors and administrators, to warrant and forever defend, all and singular, the said premises unto the said William B. Smith, his heirs and assigns, against me and my heirs and all persons whomsoever lawfully claiming or to claim the same or any part thereof."

The conveyance by plaintiff to defendant of this lot was on 25th March, 1873.

The plaintiff purchased at a public sale made by Mrs. Ellen Barker, trustee, on 10th May, 1871.

Mrs. Barker sold under a power contained in a conveyance in trust, by way of mortgage to her by Thaddeus Street, on 18th May, 1868. The price obtained for the property did not pay the debt.

The defense is, that there are certain State and city taxes unpaid by Thaddeus Street upon this property which are claimed by the

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*State and city to constitute liens on it prior to all other liens; that thus they constitute an encumbrance upon the land, against which he is protected by the warranty aforesaid. He offers to pay the balance due on the mortgage, less these city and State taxes, or to pay the whole balance due as soon as the taxes are paid by plaintiff or they are duly adjudged not to be prior liens upon the property.

State Taxes.

In 1870 Thaddeus Street was assessed for total taxes upon property, real and personal, then standing in his name, (this lot being included,) for the fiscal year 1870–71, the sum of $140.55.

No distress was made by the State Treasurer upon his personal property, nor was his property advertised in 1871 or offered for sale for delinquent taxes.

On 12th May, 1874, the Auditor of Charleston County advertised for sale, for delinquent taxes for the years 1868, 1869, 1870, 1871, 1872, 1873, 1874, a large quantity of property. On the list for the year 1870 appears this entry: Street, Thaddeus, house and lot, East Bay. On Monday 18th of May, 1874, the sale was had, and, there being no bidders, this house and lot, the one in question, was entered as forfeited to the State.

City Taxes.

Thaddeus Street was charged on the books of the city of Charleston for taxes on property, real and personal, including this lot, for the year 1870, including penalties and costs, $262.30, and execution issued.

He was also charged on the same books for property, real and personal, including this

lot, for the year 1871, taxes and penalties and costs, $203.67, and execution was issued.

The property has been advertised for sale for taxes, but never has been sold. The taxes, both city and State, with those exceptions, to this time, have been paid. The plaintiff denies that these State and city taxes above stated constituted a lien on this lot of land in the hands of the defendant, and denies that they are protected by the warranty or justify an offset to the bond.

The decree of His Honor the Circuit Judge is as follows:

On hearing the pleadings of this case, it is adjudged and decreed that the State and city taxes referred to in the answer of de-

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fendant *are valid and subsisting liens upon the mortgaged property mentioned and described in the complaint, and that the defendant is entitled to have the same paid by the plaintiff before being required to pay the amount due on his bond to plaintiff, or, if paid by himself, to have the amount so paid credited on his said bond.

If such taxes are paid by plaintiff, it is ordered that the defendant pay to the plaintiff the amount due on his bond; and if paid by himself, that he pay the balance then remaining due.

The plaintiff appealed.

Simonton & Barker, for appellant.

———, contra.

October 29, 1878. The opinion of the Court was delivered by

WILLARD, C. J. The complaint is for the foreclosure of a mortgage given by the defendant to the plaintiff to secure a bond for the purchase money of a lot of land in the city of Charleston. The defendant purchased from the plaintiff with warranty, March 23, 1873, and at the same time gave the bond and mortgage in suit for the purchase money. The defendant disputes that the purchase money is due, alleging that at the time the lot was conveyed to him with warranty it was encumbered by taxes assessed by the State and city of Charleston. The defense appears to be in the nature of a counter claim, based on an alleged breach of the covenant of warranty, and seeks to assess damages for such breach as against a decree on the bond. No question is made before us on the pleadings, nor are they set forth,—the only question being whether the taxes in question were a legal charge upon the lot at the time of the conveyance by the plaintiff to the defendant. The question of the validity of the taxes only, as between the parties to this action, is before us, and is presented upon what, as appears, is an agreed statement of the facts. The plaintiff purchased from Mrs. E. Barker, May 10, 1871. Mrs. Barker sold under a power contained in a conveyance in trust, by way of mortgage to her by T. Street, on May 18, 1868.

The State tax in question was assessed in the year 1870, and, as we conclude from a somewhat imperfect statement, for the fiscal year 1870–1871. At this time the title to the lot appears to have been in Street, subject to the mortgage to Mrs. Barker. It is alleged

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*that "no distress was made by the State Treasurer upon the personal property, nor was his property advertised in 1871 or offered for sale for delinquent taxes." The first question to be considered is whether the State tax levied in the name of T. Street was a lien or charge on the lot in question at the time of the conveyance, with warranty to the defendant, so as to constitute an encumbrance on the land as it regards the covenant of warranty.

The general tax law in force at the time of the assessment in question was that of September 15, 1868, as amended.—14 Stat., 27, amended 14 Stat., 301, 366 and 619. The amendatory Act of March 8, 1871, (14 Stat., 619,) made certain changes as it regarded the times when certain official acts were required to be performed for the purpose of assessing and collecting taxes, but does not affect any of the provisions of the Act of 1868, out of which the present question arises. The Act of September 15, 1868, nowhere declares in terms that taxes assessed on or in respect of lands shall constitute a lien on such lands. Section 79 provides that when taxes, assessments and penalties charged against any parcel or lot of real property shall not be paid on or before a certain day, or collected by distress or otherwise, they should become "delinquent taxes on such real property to be collected in the manner that is or may be prescribed by law," and that if not paid by a designated later day "the delinquent taxes, assessments and penalties of the current year shall be due and collected by the sale of such real estate in the manner that is or may be required by law." This Section, standing by itself, contains a clear authority to sell the specific lot in respect of which the tax is imposed for the satisfaction of the tax and penalties; it also reserves power, by subsequent legislation, to provide for further remedies by way of sale, as is clearly implied in the language "that is or may be prescribed by law." If this authority existed at the time the plaintiff conveyed, with warranty, it is clear that it constituted an encumbrance on the land covered by the covenant. The Act of September 15th contains a specific mode of enforcing the right to sell the lot for the payment of taxes. Section 107 provides for the publication of the list of "delinquent lands," with notice of sale, on a day fixed by law. Section 108 directs when and where the sale shall take place, by whom and in what manner it shall be conducted. All the lands taxed must be offered, and the person offering to take the least quantity thereof, and pay the taxes, assessments and penalties

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charged, shall be the *purchaser. The sale is to be continued from day to day until every parcel shall be "sold or offered for sale." There is a provision that in certain cases the Auditor shall purchase in behalf of the State; but lots in incorporated cities and villages being excluded from this provision, it does not apply to the premises in question situated in the city of Charleston.

It is alleged that the lot in question was not advertised in 1871 or offered for sale for delinquent taxes. Section 112 provides that "if the County Auditor, by inadvertence or mistake, or any other cause, shall have heretofore omitted, or shall hereafter omit, to publish the delinquent list of his County, it shall be his duty, unless all taxes, assessments and penalties charged thereon shall have been paid prior to the next July settlement thereafter of the County Treasurer, to charge the several parcels of real estate described in said list with said taxes, assessments and penalties of the year next succeeding such omission, and record, certify and publish the same as part of the delinquent list of such succeeding year, according to the provisions of this Act."

It does not appear whether the publication of the delinquent list of Charleston for the year 1871 was wholly omitted, or whether such a list was published but the lot in question omitted from it. We are not warranted in assuming a neglect of public duty beyond the direct statement of the case before us, and that is confined to a statement as to the lot in question. Assuming that the delinquent list for Charleston had been duly published, although, for some unexplained reason, the lot in question had been omitted, there appears to have been an exhaustive exercise of all the specific remedies for the sale of the Act then in force. It remains to be considered whether there were any other modes under the Act by which the taxes could be specifically enforced upon the lot in question. This question brings into consideration the general question of the nature of a tax as bearing upon its effect as a lien or encumbrance on land. It is clear, upon principle and authority, that the legislative power may subject all real estate within the State to charge for its ratable share in the support of the government of the State, and may, in like manner, impose a due share of the sums necessary for that purpose upon all persons subject to the authority of the State or owning property, real and personal, within the State, though residing elsewhere, as it regards such property. There are other subjects of the taxing power that do not

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enter into *the present question and need be no further considered than as illustrating the extended nature of the power of taxation independently of the constitutional restrictions imposed upon it. The power clearly implies authority to determine the effect of the imposition of taxes upon such property, real and personal, and upon the rights of the persons so taxed; for power to perform an act primarily implied power to do that which may be necessary to make such act effectual for the end intended, and the end of the taxation of persons or property is to procure money for public purposes, and that involves the conversion of the property taxed or the personal obligation to pay it in money.

It results from the foregoing that the Legislature possesses power to sell all lands subject to taxes, and this power may be delegated for enforcement. In former times delegations of that character were made to private persons, who became farmers of the revenue, but of late years it has been found more consistent with wise administration to confine such powers to the hands of persons strictly official, acting wholly in the interest of the State. Such delegations may be general or special—general where made the duty of a permanent public officer, and special where power to act in a particular instance. A class of instances is conferred temporarily upon an officer having general authority of that character or upon an officer not having such general authority.

It is very clear that whether that authority is delegated to a private farmer of the revenue or to a public officer, and whether it is general or special, its measure is in the act of delegation and not the extent of authority in the premises lodged in the hands of the legislative power. It is not to be presumed in any case that the Legislature in delegating to administrative officers powers of a certain limited and defined character for the collection of taxes intends to confer upon such officers the full measure of authority possessed by itself for that end. There are many powers capable of being exercised by the Legislature that good government demands should be used only in extreme cases, and that discretion as to the proper occasion for their exercise should rest with the Legislature and not be capable of exercise by executive or administrative officers, and among such powers those relating to taxes are prominent.

When, then, a question arises as to the extent of the powers of administrative officers in the imposition and collection of taxes, it cannot be determined by simply considering

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the authority of the *Legislature in the case but the nature and extent of the authority delegated to the particular officers whose powers are to be considered. It is true that the power delegated has the same nature as that from which it was derived by delegation, but it does not necessarily follow that it has the same extent. Therefore, in applying the presumptions that arise from the nature of the power delegated, we may look to the nature of that power as it subsists in the hands

of the Legislature, but in determining its extent the terms of the act of delegating are to be mainly considered. In order to create a lien on land, for the payment of a tax, it is necessary that there should be either a declaration to that effect by some act of the Legislature or necessity for such lien in order to render effective means provided for the enforcement of such tax. This results from the principles already stated, having regard to the nature of such liens. A lien implies a certain right of property in the subject of taxation. General right or authority over property, or dominion, carries with it, as accessory to it, full power of disposition. In that case dominion is the principal, and power of disposition the accessory, for dominion implies more than power of disposition, including also power of possession and protection and the means of making them effectual. Power of disposition may, however, become the principal, and whatever right in rem exists may follow as an accessory. Thus, where power to satisfy a demand by disposing of the property exists, without displacing the ownership or dominion over the property otherwise than as a consequence of the exercise of such power of disposition, the right of the lienor to deal with the property must be measured by the nature and extent of his power of disposition over it. It follows, therefore, that while the Legislature may, as an incident of the enforcement of a tax, create, in terms, a lien that may subsist with or without defined modes of converting such property into money, yet, failing to raise such lien directly, it can only be raised as incidental and subservient to such means as may be authorized for the enforcement of the tax, in which case it becomes an accessory to the power of disposition in respect thereto.

Having in view these principles, two questions present themselves in the present case: First, Has the Legislature, in the Acts affecting this case, declared in terms that a tax imposed on real estate shall constitute a lien on such real estate? and, second, if not, does the character of the powers conferred on the officers charged with the imposition and collection of taxes necessarily imply the

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exist*ence of such lien as a means of rendering them effective? No provision of the tax Act in question appears that can be considered as constituting a lien in terms, and none is asserted; consequently, the only question for consideration relates to the implication of such a power.

It is clear that an implied and subservient power cannot subsist after that from which it is to be implied and to which it is subsequent has ceased to exist. Then, it is only necessary to show that the authority conferred on the administrative officers in the present case had been fully and exhaustively exercised before the sale and warranty, and it follows that there can be no subsisting lien.

In the review of the provisions of law already made, it appeared that the functions of the Auditor, Treasurer and Comptroller General in the present case are exhausted, and it must follow that there is no subsisting lien upon the land. It may be said that the provision of the Act looking to future legislation ought to be considered as affecting the question of the existence of a lien, that it contemplated new grants of authority from time to time as might be necessary to enforce the tax, and that this implied the continued subjection of the land to the tax, which would be equivalent to a lien. This provision has no specific effect, for it is clear that the Legislature may, without any such reservation, provide new or additional modes of enforcing the collection of a tax even after it has been imposed. It is not intended to be said that the burden imposed upon the land by a tax may be increased by legislative enactments subsequent to the imposition of the tax, but merely that the mode of enforcing the tax, considered as a remedy, may be moulded from time to time. In this respect this remedy is assimilated in principle to remedies for the enforcement of ordinary rights. As it was competent for the Legislature without the aid of this provision to make further provisions on the subject, it is clearly not such an effective reservation of power as to be entitled to be weighed as enlarging or defining the powers either of the Legislature or of any administrative officer over any particular tax. The Legislature has not chosen to exercise this power of further legislation as to the means of enforcing the tax in question, while we are only concerned with the inferences that may arise from powers conferred, and need not consider the case of a reservation out of which no active power has flowed. Then, from the foregoing considerations, it must be concluded that at the time of the conveyance of the lot with

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warranty *the State tax imposed in 1871 did not constitute a lien or encumbrance on the land.

The remaining question to be considered is, whether a city tax imposed upon the lot in question, and not paid, constituted a lien upon the lot after the expiration of one year from its imposition. If such lien did not continue after the year, then at the time of the sale and warranty in question it did not constitute an encumbrance on the lot so as to affect the covenant of warranty. Prior to 1868 Charleston city taxes were a specific lien on lands in respect of which they were assessed for one year and no longer.—Goblet v. Guerry, 15 Rich., 152. At that time full power to lay and impose taxes for city pur-

poses and to determine the effect of such taxes and the means of collecting them was committed to the City Council by the Act of 1783, as was held in Goblet v. Guerry.

The only Act of the Legislature passed since that time affecting those powers of the City Council, and prior to the imposition of the tax in question, is the Act of March 1st, 1870, (15 Stat., 408,) but this Act is in terms confined to assessments of taxes on personal property and does not apply to the present case. The decision in Goblet v. Guerry was based on the existence of a city ordinance making city taxes a lien for one year only. The question then arises, was that ordinance repealed by the ordinance of 1868, which is in the following words: "Be it ordained, &c., that hereafter taxes shall constitute a specific lien on the property taxed from the time when the liability for the said tax accrues, and the city taxes shall be paid prior to and in preference to all judgments, mortgages, pledges, debts or other liens of a private character on said property." This ordinance contains no express repealing clause, and can, therefore, be held to have repealed the pre-existing ordinance on the ground of repugnancy only. If the two ordinances can be reconciled together, then no such repugnancy exists. Both ordinances create specific liens; the last fixes the time when that lien shall commence consistently with the former ordinance, but says nothing of its duration. There is nothing to change the period of duration established by the former ordinance. Both may coexist without limiting the proper sense or effect of either.

The provisions making the tax a first lien are the significant feature of the ordinance of 1868, and were clearly intended to supply a defect in this respect that had been pointed out in Goblet v. Guerry. The same rules

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applied to statutes to ascertain their *repealing effect are applicable to ordinances, and their application must lead to the same consequences. If we can find the means of reconciliation, we are bound to apply such means, nor can the fact that the financial resources of a community may be affected lead to any other conclusion than that which flows from the ordinary rules of construction. It follows from this view that there was no authority of the statute or city ordinances in operation to extend the lien of the tax beyond the period recognized in Goblet v. Guerry, and the lien of the tax must be regarded as expired prior to the sale with warranty.

The judgment of the Circuit Court should be set aside and the cause remanded to the circuit for further proceedings in conformity with the foregoing.

McIVER, A. J., and HASKELL, A. J., concurred.

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ROSBOROUGH v. McALILEY.

(Columbia. April Term, 1878.)

[*Principal and Surety* ⇦114.]

Where the administrator of the principal debtor placed in the hands of the creditor choses in action more than sufficient to satisfy the debt, and such creditor, having collected the choses in action, misapplied the money, it was *held* that the sureties of the principal debtor were discharged.

[Ed. Note.—Cited in Waldrop v. Leaman, 30 S. C. 449, 9 S. E. 466; Greenville v. Ormand, 51 S. C. 128, 28 S. E. 147.

For other cases, see Principal and Surety, Cent. Dig. §§ 240–243; Dec. Dig. ⇦114.]

[*Principal and Surety* ⇦114.]

Any positive act done by the creditor which is injurious to the surety, or inconsistent with his rights, discharges him from liability for the debt.

[Ed. Note.—Cited in Gardner v. Gardner, 23 S. C. 592, 593; Kennedy v. Adickes, 37 S. C. 181, 15 S. E. 922; Arthur v. Brown, 91 S. C. 324, 74 S. E. 652.

For other cases, see Principal and Surety, Cent. Dig. §§ 240, 241; Dec. Dig. ⇦114.]

[*Executors and Administrators* ⇦124.]

Where there are several executors, each has entire control over the assets in his possession, and his acts in relation thereto bind the others; and this rule applies to notes taken by the executors for the assets of the estate.

[Ed. Note.—Cited in Chapman v. City Council of Charleston, 30 S. C. 560, 9 S. E. 591, 3 L. R. A. 311; State ex rel. Swinton v. Bates, 38 S. C. 329, 17 S. E. 28.

For other cases, see Executors and Administrators, Cent. Dig. §§ 496–507; Dec. Dig. ⇦124.]

Before Kershaw, J., at Chester, October, 1877.

Action by William H. Rosborough against Samuel McAliley and John L. Harris to recover the amount of a sealed note.

The case is fully stated in the decree of His Honor the Circuit Judge, which is as follows:

Kershaw, J. This action was brought on to be heard at Chester, at the October Term, 1877, upon a question of law made by the pleadings.

The complaint was in the ordinary form, charging the defendants, as two of three makers of a joint several sealed note, pay-

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able one *day after date to James Hemphill and Robert Hemphill, executors of William Moffatt,—the first maker and alleged principal of the note, Richard E. Kennedy, being deceased, and the note having been assigned by the payees to the plaintiff. The note was dated March 10th, 1855, and at the time this action was commenced more than $17,700 were estimated to be due thereon.

To this complaint the defendants put in an answer in due time, and later, by leave of Court, an amended answer.

To these answers the plaintiff demurred "for insufficiency is not stating facts sufficient to constitute a defense."

Every fact, therefore, well pleaded in the answer, is admitted; and if, collectively, they amount in law to a defense to this action, the defendants are entitled to judgment; if otherwise, the plaintiff.

I have endeavored to bestow upon the investigation of this cause that earnest and careful consideration which its importance demands, aided, as I have been, by able and learned arguments of counsel on both sides, worthy of the large interests involved, and have reached a conclusion adverse to the plaintiff.

The answer states, among other facts, the following:

That Richard E. Kennedy, deceased, was the principal, and defendants the sureties, to the note which was executed in the presence of James Hemphill, and made payable to said James Hemphill and Robert Hemphill, as executors of William Moffatt.

That the note remained in the hands of said James Hemphill until about a month before the commencement of this action, (17th March, 1875,) and was then assigned to plaintiff long after the maturity of said note.

That James Hemphill, as executor of said William Moffatt, controlled the business of the said estate exclusively, his coexecutor taking no part in its administration.

That Richard E. Kennedy died in 1855, about six months after the execution of said note, leaving a will and one Langdon C. Hinton administrator upon the estate with the will annexed. That the said administrator selected the said James Hemphill as his adviser and counsel in all matters touching said estate.

That, in pursuance of a direction in the will of said Kennedy, real and personal property of the estate, amounting to $40,000, were sold, and the obligations taken at said sale, as well as the choses in action due the said Kennedy at the time of his death, were placed in the hands of said James Hemphill for

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collection; *and from said obligations and choses in action large sums of money were realized and came into the hands of said James Hemphill, who was repeatedly requested and urged by the said L. C. Hinton, administrator as aforesaid, to pay the said sealed note, the subject of this action, out of the money and choses in action in his hands; but the said Hemphill did not so apply the said moneys in his hands, but paid debts and claims over which said sealed note had priority in law.

That the said James Hemphill had exclusive control of the said sealed note until he delivered it to the plaintiff; and while so in his possession large sums of money were in his hands which belonged to the estate of said R. E. Kennedy, deceased, which the administrator of the said Kennedy often requested to be applied to the payment of said sealed note, which was declined by the said James Hemphill; and the said moneys were, by the hands of said Hemphill, applied to the simple contract debts of the testator.

That the said James Hemphill acting as the attorney of the said administrator, and being at the same time the creditor holding the said sealed note in his possession, did, by his advice and counsel, induce the said administrator to accept the payment of good obligations to a large amount, the property of said estate, Confederate currency of little value, and particularly a large sum of money, $6,000, from one M. S. Hardin, in 1863, a perfectly solvent and responsible party, which defendants alleged, on belief, was upon the faith that said Confederate money would be accepted by the said Hemphill in payment of the said sealed note; but the said Hemphill refused and declined to receive the said Confederate money when offered to be paid by the said administrator in liquidation of said obligation, &c., alleging that, by reason of the facts stated, the defendants had suffered positive damages and injury.

The amended answer also alleges that the said James Hemphill, in February, 1871, was made the Receiver of the estate, both real and personal, of R. E. Kennedy, deceased, and that soon thereafter the said Hinton, the administrator, placed in his hands as Receiver all the assets of said estate; and that the said Receiver received large sums of money from the sales of the real estate of said Kennedy. And defendants allege, upon information and belief, that the said Receiver collected a sum sufficient to have satisfied the said sealed note, the subject of this action, and which was legally applicable to the payment thereof, &c. There are other facts alleged

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*in the answer which the defendants claim contribute to the defense they set up, which I do not transcribe, but may be referred to as tending to sustain the judgment I shall render herein.

I am unwilling to rest the decision upon the ground of laches generally, but hold that the conduct imputed by the answer to Mr. Hemphill, the payee of the note, being admitted, as stated in the answer, operated as a discharge of the sureties to the note in question.

The rule of law is conceded to the full extent claimed by the plaintiff's counsel. I cannot state that rule better than it is found in the case of Clark v. Sickler, (19th Sickles, 64 N. Y., 231,) cited by one of the counsel for plaintiff at the hearing. For the purposes of the plaintiff, that case is as strong, perhaps, as anything authoritative that can be found. It was one of great research, and the decision was concurred in by the full bench of Judges of the Appeal Court of New York, the opinion being delivered by the Chief Justice, Church. He says: "The general rule applicable to the relation of creditor and surety is stated by Judge Story as

follows: If a creditor does any act injurious to the surety or inconsistent with his right, or if he omits to do any act when required by the surety which his duty enjoins him to do, and the omission proves injurious to the surety, the latter will be discharged, and he may set up such conduct as a defense to any suit brought against him.—1 Story's Eq., 325, 326, and cases there cited. The current of authorities, which I think is quite harmonious, establishes that the act which will discharge a surety must be legally injurious or inconsistent with his legal rights.

"An agreement with the principal debtor extending the time of payment or in any way changing the contract made by the surety will have that effect; so the release of a security held by the creditor and the like. * * * It is well settled that mere indulgence will not discharge a surety. The other principle referred to is, that the surety may be discharged from an omission of duty on the part of the creditor, but the surety must intervene and request the performance of the duty. It has been established, accordingly, that if a surety request the creditor to sue, and the latter neglects to do so, the surety will be discharged if the neglect produced injury.—2 K., N. Y., 552. Here there was no request. The surety did nothing. He was not prevented from demanding prosecution by this creditor, nor from paying the note and prosecuting the principal himself."

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*In this case the point decided was that "an offer upon the part of a principal debtor to pay, and an omission so to do because of a request of the creditor that he retain the money, and the subsequent insolvency of the principal, do not discharge a surety."

Our own cases, without having had occasion to apply the rule in any such extreme cases as that, have laid down the principle of the law in almost identical terms.—Lang v. Brevard, 3 Strob. Eq., 64; Hampton v. Levy, 1 C. Ch., 107. In the former case the judgment of the Court in the case of King v. Baldwin (17 Johns. Ch., 384,) is cited and approved, that "when the creditor did an act injurious to the surety, or omitted to do an act, when required, which equity and his duty to the surety enjoined it upon him to do, and which omission was injurious to the surety, in either of these cases the surety would be discharged." There is no difference, therefore, between the Court and the plaintiff's counsel in regard to the principles of law by which this case is to be decided, and it only remains to reconcile with these principles the conclusions at which I have arrived.

One of the allegations of the answer is, that after the death of the principal debtor his administrator placed funds sufficient for the payment of the note in question, belonging to the estate of the principal, and requested him therefrom to pay the note, he being the payee and holder of the note, and he declined so to do, but applied the fund to the payment of other debts of the principal over which the sealed note in question was legally entitled to priority of payment. At the request of the administrator of the debtor, it was the duty of Mr. Hemphill to pay the note when requested by his principal. If the payee had been another than himself, it would have been his duty to have tendered the money for it when in funds, as it is alleged he was; in which case, had the payee refused to receive the money, the surety would have been discharged.—46 Vt., 258. Uniting in himself the two characters of agent and payee, and not complying with the instruction of his principal by applying the funds to the note, he cannot stand on a better footing in regard to the sureties than he would have done had the money been tendered to him in payment of the note by the principal or his personal representative. In the language of the Court already cited in Lang v. Brevard, he "omitted to do an act, when required, which equity and his duty to the surety enjoined it upon him to do." The allegation is that the sureties were "injured and damaged"

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*thereby, and, consequently, the case falls within the rule in every particular, and the sureties were consequently discharged.

In the case last cited it is said that where there was "an obstruction, abandonment or waiver of counter securities" on the part of the creditor the surety would be discharged —a statement well sustained by authority— and it was immaterial whether the surety knew of the existence of the securities or not. —See cases cited in Watson v. Alcock, 19th English Law and Eq. R., 66. Applying this rule to the circumstances alleged, we find that the payee had in his hands funds belonging to the estate of the debtor, which he was directed to pay the debt with by the administrator, who had a right to control the funds; and yet this highest of all securities was voluntarily waived by the payee, in total disregard of the rights of the sureties. The question in principle is simply this: The payee of a note upon which there is a surety has funds in his hands belonging to the principal debtor and subject to his control. This fund the debtor directs to be applied to the note in question, in order that he might relieve the surety, and he fails so to apply it. Can there be any doubt that the surety would in that case be discharged? Yet that is this case.

Again, the amended answer alleges in substance that James Hemphill was made the Receiver of all the assets of the estate of the said R. E. Kennedy, the principal in the note, and collected a sum sufficient to have satisfied the said sealed note, and "which was legally applicable to the payment thereof." Here, again, if this be true, there was an omission to perform a legal duty when he failed to make such application of the funds

in his hands as alleged in the answer, the effect of which was to discharge the sureties.

It is quite clear to my mind that the facts alleged in the answer constitute, if true, a valid defense to the action. The demurrer must, therefore, be overruled.

The effect, however, of this decision will not be to determine the cause necessarily; but the allegations of the answers remain as controverted, by a direct denial or avoidance, under Section 191 of the Code of Procedure.—See Mobley v. Cureton, 6 S. C., 49.

It is, therefore, ordered and adjudged that the demurrer be, and the same is hereby, overruled, and that the defendants have judgment for the costs of the demurrer and the costs and disbursements of the term, to be adjusted by the Clerk.

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*The plaintiff excepted to the foregoing decree, and appealed therefrom on the ground—

In that His Honor Judge Kershaw did not sustain the demurrer of the plaintiff to the answer of the defendants herein.

Rion, for appellant:

I. Plaintiff's case has to do with the acts of James Hemphill as one of the payees of the note, and not as the legal adviser of the administrator of the principal, nor as the Receiver of the estate of the principal. Hemphill may have been right, or he may have been wrong, in his ideas of his duties as attorney or Receiver; but, if wrong, he is responsible in his character as attorney or as Receiver, as the case may be. That James Hemphill is an attorney and solicitor of the Courts of this State of long and eminent standing affords some presumption that he had some good legal objections to the payment of the note in either capacity.

II. There is no allegation in the answer that the sureties requested Hemphill to pay the note.

III. There is no allegation that Hemphill, in his character as payee, was requested to receive payment of the note, nor, farther, that his co-payee was so requested, or consented to the payment. The Court will bear in mind, in this connection, that the two Hemphills were co-payees in their capacity "as co-executors."

IV. But if James Hemphill, in his character as payee, had been requested by the principal to receive payment of the note, and had not received such payment, this would not discharge the sureties from their liability.—Clark v. Sickler, (19 Sickles, 64 N. Y., 231,) and numerous cases there cited.

The Court will observe that in the case now under consideration there is no allegation of a request by the sureties.

Hamilton, contra:

The principle of law by which this case is to be governed, which is condensed from all the authorities, and now universally accepted, is succinctly stated by Judge Story: "If the creditor does any act injurious to the surety or inconsistent with his rights, or if he omits to do any act, when required by the surety, which his duty enjoins him to do, and the omission proves injurious to the

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surety, the latter *will be discharged, and he may set up such conduct as a defense to any suit brought against him.—1 Story's Eq., 325, 326.

The cases of Paine v. Packard (13 Johns. Ch., 154,) and King v. Baldwin (17 Johns. Ch., 384,) have furnished the text from which this rule has been derived by all the writers on this subject, and have controlled subsequent judicial decisions.

In the case of Lang v. Brevard, (3 Strob. Eq., 59,) it is adopted, and the authority of the two last named cases acknowledged. In this case the Court further says: "I will not say that there might not occur a case of outrageous neglect on the part of the creditor in omitting to recover his money from the principal debtor in which the surety would be exonerated."

Let us view this case by the light of this rule and the authorities by which it was established.

The acts injurious to these sureties and inconsistent with their rights, of which they complain against the creditor, are:

1. That being such creditor and attorney and agent of the principal debtor, and having abundant moneys in his hands to pay the note, when requested and urged to do so by his client, he failed to apply said moneys in payment thereof, but of his own motion applied the same to simple contract debts.

By this conduct of the creditor these sureties were deprived of two indispensable privileges—the one the payment of the debt, with the right to be subrogated to the creditor's right as a bond creditor; the other the right to require the creditor to sue the principal debtor, suggesting a devastavit in paying debts out of their legal order, because the creditor had deprived himself from bringing such a suit and was completely estopped by his own acts.

"A surety is at liberty, if he thinks the creditor not sufficiently energetic, to pay the debt, and become subrogated to his right, and may manage the claim to his own satisfaction; it is only where the surety loses his right of subrogation by the act of the creditor that he is discharged."—DeColyer on Surety and Guarantor, 432; Barnes v. Crandall, 11 La. Ann., 119; Hayes v. Ward, 4 Johns. Ch., 123; Code Napoleon, §§ 2007, 2029.

"The surety is generally discharged by the loss, through the fault of the creditor, of securities received by the creditor from the principal debtor."—DeColyer on Surety and Guarantor, 438.

Mr. Hemphill, the creditor, completely disabled himself by his own act from suing the administrator of this estate upon his bond,

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*suggesting a devastavit. He took away the right of subrogation from these sureties had they paid the debt. The assets of the estate were gone by his advice. An action suggesting a devastavit would have been of no avail, as is shown in the case of Hinton v. Kennedy, (3 Rich., N. S. 459,) when this very administrator was excused from his misapplication of the assets, mainly on the ground of the advice given him by Mr. Hemphill, the creditor, acting as his attorney.

The fact that Mr. Hemphill having the funds in his hands to pay this note, and being urged and requested by the administrator to so apply them, amounted to a tender by the administrator and a deposit of the money to the use of the creditor.—DeCollyer, 428; Mitchell v. Merrell, 2 Blacks., Ind.; Broone v. Dysinger, 1 Rawles, (Pa.,) 407; Joselyn v. Eastman, 46 Vt., 258.

There is a case which was much relied upon on circuit as conclusive against these sureties.—Clark v. Sickler, 64 N. Y., 231.

The facts of that case are as follows: Defendant, Sickler, signed as surety for one Mott, of which the payee had notice. The Referee found that after the note became due, Mott, the principal, borrowed the money and went to the house of Wright for the purpose of paying the note, and offered the money to Wright's wife, who was his agent; she declined to receive the money, as she and her husband had no use for it, and would rather that Mott should keep it.

Although we consider this case of doubtful authority, in view of the cases already quoted on the subject of tender, it is apparent that the reason influencing the Court in its decision must have been that the debtor consented to keep the money.

But even if this was not so, our case is much stronger, and is as if the wife of Wright had consented to hold the money, and afterwards Wright, the creditor, had of his own motion applied it to some other debt of Mott's. The case which fits ours, and is quoted with approval in the case of Clark v. Sickler, just mentioned, is that of Sears v. Van Dusen, 23 Mich., 351: "Where one who has purchased a note overdue, the collection of which has been guaranteed by a prior owner thereof, refuses to receive the money when offered to him by the makers, and delays the collection of such note until the makers thereof have failed, such guarantor is discharged." Thus says the last named case.

But there is another which makes even stronger for these sureties: Hurd v. Spencer, 40 Vermont, 581. It was where the cred-

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*itor, having a check for moneys in his hands, properly applicable to the debts for which the surety was liable, applied the same to the payment of other obligations of the principal debtor.

The principle announced is as follows:

"When a creditor has security placed in his hands by the principal on account of the debt, and on which the surety has a right to rely, he has no right to part with it or appropriate it to any other purpose without the consent of the surety; and if he does so, he thereby discharges the surety to the amount of the value of the security."—3 Lead. Cas. in Eq., 552; Perrine v. Insurance Company, 22 Ala. 575.

2. The other injurious act of which these sureties complain is, that by the advice of the creditor, the administrator, the principal received $6,000 in Confederate money, on the faith that the creditor would accept it in payment of his debt; pro tanto, we think the surety would be discharged.

3. Lastly, where the creditor became the Receiver of the estate of the principal, received large sums of money therefrom which were legally applicable to the payment of the note, the subject of this action, and did not so apply the same, the sureties are discharged. Under the circumstances of this case, we think the judgment of this Court should be final. It has been once tried by a jury, and taken from that arbitrament by the motion of the plaintiff himself. It would be a practice to be discouraged by the Courts that he should again return to a jury for trial on the facts. The Circuit Judge was not aware of the fact of its trial by a jury, or we are sure he would not have granted leave to plaintiff to submit the issues again.

October 29, 1878. The opinion of the Court was delivered by

McIVER, A. J. The sole question in this case is whether the respondents were discharged from their liability as sureties on a certain sealed note by reason of the conduct of one of the payees, James Hemphill, who was at the time the holder, towards the principal debtor. The question arises on a demurrer to the answer, upon the ground that it does not state facts sufficient to constitute a defense to the action. Every allegation of fact, therefore, which is well pleaded in the answer must be taken as admitted. For a full statement of these facts reference must be had to the decision of the Court below.

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*The rule "that if a creditor does any act injurious to the surety or inconsistent with his rights, or if he omits to do any act, when required by the surety, which his duty enjoins him to do, and the omission proves injurious to the surety, in all such cases the latter will be discharged," (1 Story Eq., § 325,) is well established and fully recognized in this State.—Lang v. Brevard, 3 Strob. Eq., 64.

The only inquiry, then, in this case is, whether the creditor has done any act injurious to the sureties or inconsistent with their rights. It is alleged in the answer that the

administrator of the principal debtor placed in the hands of the said James Hemphill for collection choses in action to an amount much more than sufficient to pay this debt, and that he realized large sums of money therefrom, out of which he was repeatedly requested and urged by the administrator to pay the sealed note upon which this action was brought, but that, instead of doing so, he applied the money to the payment of simple contract debts, over which this sealed note had priority. If these allegations be true, and, for the purposes of this case, they must be so taken, it is difficult to conceive how there can be a doubt that the creditor has done an act injurious to the sureties and inconsistent with their rights; for here the administrator of the principal debtor had not only placed in the hands of the creditor securities which would furnish the means of paying the debt, but those means had been actually realized, and the creditor, contrary to the request and directions of the administrator, had diverted those means to other and illegal purposes. So that it is very clear that the creditor has done a positive act by misapplying—not simply neglecting to apply—the means furnished him by the principal debtor for the payment of the debt, and that this act was "legally injurious to the sureties and inconsistent with their legal rights;" because the creditor having the right to require the assets of the insolvent estate of his intestate debtor to be applied to this sealed note in preference to simple contract debts, and the sureties being entitled to be subrogated to all the rights which the creditor had to secure the payment of the debt, it necessarily follows that the act of the creditor in misapplying the assets was an act prejudicial to the legal rights of the sureties and that they are thereby discharged. The fact that the sureties made no request to or demand upon the creditor cannot affect the case as it is now presented. The rule, as above stated, presents two distinct grounds upon which sureties may claim a discharge: 1st. Where

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*the creditor does some positive act injurious to the rights of the sureties. 2d. Where, after request or demand from the sureties, he omits to perform some duty enjoined upon him. Such a demand or request would, therefore, have been essential if the ground upon which the discharge of these sureties was claimed had been simply an omission of duty on the part of the creditor; but where, as we have seen, the true ground upon which the sureties claim their discharge is that the creditor has done a positive act which proved injurious to the legal rights of the sureties, no such request or demand is necessary.

The fact that the sealed note in question was made payable to the two Hemphills, as executors, and that only one of them participated in the transactions which it is claimed amounted to a discharge of the sureties, cannot affect the conclusion which we have reached. For, aside from the fact that it is alleged in the answer that "James Hemphill, as executor of the estate of Wm. Moffatt, controlled the business of said estate exclusively, the said Robert Hemphill taking no part in its administration," which allegation is by the demurrer admitted to be true, the rule of law is too well settled to admit of controversy that "co-executors, however numerous, are regarded in law as an individual person, and, by consequence, the acts of any one of them, in respect to the administration of the effects, are deemed to be the acts of all, for they have all a joint and entire authority over the whole property. Hence a release by one of several executors is valid and shall bind the rest."—2 Wms. on Ex., 683, 2d Am. ed.

Nor does the fact that the sealed note in question was not payable to the testator, but was a note taken subsequent to his death, payable to James Hemphill and Robert Hemphill, as executors of William Moffatt, and, therefore, presumably given to secure the payment of the purchase money of property of the testator sold by such executors, alter the case. For it is conclusively shown by the case of Rhame v. Lewis (13 Rich. Eq., 269.) that notes so taken are as much assets of the testator as those made payable to him, and hence, it would seem to follow, would be subject to the same rules as govern the latter in respect to the control which one of two co-executors has over them.

The judgment of the Circuit Court is affirmed.

WILLARD, C. J., and HASKELL, A. J., concurred.

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*SUSONG v. VAIDEN.

(Columbia. April Term, 1878.)

[Reported and annotated in 30 Am. Rep. 50.]

[*Principal and Surety* ⇐22.]

Whatever may be the rule elsewhere, it is the well-settled law of this State that where a joint note is given by a principal debtor and a surety, whose only obligation arises from the fact that he signed the note, the death of such surety—the principal debtor surviving—does not discharge his estate or representatives from the obligation he incurred in giving the note.

[Ed. Note.—Cited in Wiesenfeld, Stern & Co. v. Byrd, 17 S. C. 113.

For other cases, see Principal and Surety, Cent. Dig. § 47; Dec Dig. ⇐22.]

[*Appeal and Error* ⇐1064.]

Erroneous instructions to the jury upon immaterial points which could not affect the verdict is no ground for a new trial.

[Ed. Note.—Cited in State ex rel. Detheridge v. Gilreath, 16 S. C. 102; McLaurin v. Wilson, Id., 412; State v. Pinckney, 22 S. C. 502.

For other cases, see Appeal and Error, Cent. Dig. §§ 4219, 4221–4224; Dec. Dig. ⇐1064.]

[*Principal and Surety* ⟸92.]

The rule that, where the obligation of the surety and principal is joint, the death of the surety leaving the principal surviving, discharges the estate of the surety, is not the rule in this State.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. § 142; Dec. Dig. ⟸92.]

Before Northrop, J., at Union, February, 1877.

Action by Alexander E. Susong against William H. Vaiden, and Margaret E. Bishop as administratrix of L. Gordon Bishop, deceased.

The judgment was for the plaintiff, and the defendant, Margaret E. Bishop, appealed.

The case is fully stated in the opinion of the Court.

Munro & Munro, for appellant:

The action is upon a joint promissory note made by W. H. Vaiden and L. Gordon Bishop, payable to the plaintiff. The note was given for a debt due by Vaiden alone to the plaintiff, and Bishop was a surety only. Bishop, the surety, dying, leaving Vaiden, the principal, surviving, the action is brought against Vaiden and the administratrix of Bishop. Vaiden is insolvent.

The only point in this case is whether the estate of Bishop, the surety, is discharged from the payment of the debt. The note being joint only, the plaintiff cannot recover thereon against Bishop's administratrix.

Upon the death of one of the makers of a joint note his representatives are, at law, discharged, and the survivor alone can be sued.—Towers v. Moor, 2 Vern., 98; Simpson v. Vaughan, 2 Atk., 31; Richter v. Poppenhausen, 42 N. Y., (3 Hand,) 375; Boykin v. Watson's Administrators, 1 Tr. Con. Rep., 157.

If the joint maker, so dying, be a surety merely, his estate is absolutely discharged, both at law and in equity, the survivor only being liable.—Getty v. Binsee, 49 N. Y., (4 Sickels) 385; Pickersgill v. Lahens, 15 Wall., 143; United States v. Price, 9 How., 91; Rawstone v. Parr, 3 Russell, 424, 539.

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*This principle has been well settled and established by the Courts of this country and in England. It is fully discussed in the foregoing cases, wherein numerous authorities, American and English, are cited, all sustaining the doctrine and showing a uniform current of decision.

In the case of United States v. Price, (9 How., 91,) the Court say: "The obligation of a surety arises only from positive contract. The liability is construed strictly, both at law and in equity, and the liability of the surety cannot be extended by implication beyond the terms of his contract. If he contracts jointly with his principal, it is a legal consequence, known to all parties, that his personal estate will be discharged in case he should die before his principal. Such being the law, it may be considered as part of the written condition of the bond, and equity will not interfere to extend the liability as against his estate on the ground that such discharge arises from the mere technicalities of the law."

In Getty v. Binsee, (49 N. Y., 385,) the Court, after saying the survivor is discharged at law, proceed: "It seems to be equally well settled that if the joint obligor, so dying, be a surety, not liable for the debt irrespective of the joint obligation, his estate is absolutely discharged, both at law and in equity, the survivor only being liable. In such case, where the surety owed no debt outside and irrespective of the joint obligation, the contract is the measure and limit of his obligation. He signs a joint contract and incurs a joint liability, and no other. Dying prior to his co-maker, the liability all attaches to the survivor."

In the case of Rawstone v. Parr, (3 Russ., 424, 539,) creditors claimed to prove a joint note against the estate of a deceased surety, the surviving makers and principals being insolvent. The Master of the Rolls allowed the claim, but his decree was reversed by the Chancellor, Lord Lyndhurst.—See also notes to Thomas v. Frazier, 3 Ves., Jr., 399.

The case of Pickersgill v. Lahens, (15 Wall., 143,) is the latest, and is also directly in point. The Court say: "It is very clear that the estate of Lafarge is discharged at law from the payment of the obligation in controversy on the familiar principle that if one of two joint obligors die the debt is extinguished against his representative and the surviving obligor is alone chargeable. It is equally clear that in this class of cases, where the remedy at law is gone, as a general rule a Court of equity will not afford relief,

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for it is not *a principle of equity that every joint covenant shall be treated as if it were joint and several. The Court will not vary the legal effect of the instrument by making it several as well as joint, unless it can see, either by independent testimony or from the nature of the transaction itself, that the parties concerned intended to create a separate as well as a joint liability. If through fraud, ignorance or mistake, the joint obligation does not express the meaning of the parties, it will be reformed so as to conform to it. This has been done where there has been a previous equity which gives the obligee a right to a several indemnity from each of the obligors, as in the case of money lent to both of them. There a Court of equity will enforce the obligation against the representatives of the deceased obligor, although the bond be joint and not several, on the ground that the lending to both creates a moral obligation in both to pay, and that the reasonable presumption is the parties intended their contract to be joint and several, but, through fraud, ig-

norance, mistake or want of skill, failed to accomplish their object. This presumption is never indulged in the case of a mere surety, whose duty is measured alone by the legal force of the bond, and who is under no moral obligation whatever to pay the obligee, independent of his covenant, and, consequently, there is nothing on which to found an equity for the interposition of a Court of chancery. If the surety should die before his principal, his representatives cannot be sued at law, nor will they be charged in equity. The general doctrines on this subject were presented at large in this Court in the case of the United States v. Price, (9 How., 91,) and they are sustained by the text writers and books of report in this country and in England."

The principle is recognized as well settled by the Court of Appeals of this State. Chancellor Harper, delivering the opinion of the Court in the case of Pride v. Boyce, (Rice's Eq., 288,) says: "Upon an examination of the cases, they seem to establish a rule of this sort: that if the joint obligation be created merely by the bond or covenant where there was no previous liability, in that case no relief will be afforded against the estate of the deceased obligor in the event of the insolvency of the survivor; but if there was an antecedent debt to which both parties were liable, as in the case of partners, then the Court infers, without direct proof, that the instrument was made joint by mistake, and relieves, accordingly, by setting it up as a joint and several bond."

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*But it will be said the decisions in South Carolina are otherwise. The cases are three in number, to wit: Executor of Shubrick v. Executor of Livingston, 1 DeS., 320; Lainhart v. Administrator of Reilly, 3 DeS., 590; Smith v. Martin, 4 DeS., 149. These cases are all upon joint bonds, and the estate of the surety was held liable; but the point was not urged that the estate of the surety was discharged because he was surety, but merely because he was dead. The argument was that the estate of a deceased joint obligor is discharged in equity as well as at law—this without reference to his situation, whether as principal or surety. This will appear from the opinion of the Court and the authorities cited by the Court and counsel. Not one of the authorities cited by the Court or counsel in either of the cases sustain the position that the estate of the surety will be held liable. In the first case, (Shubrick v. Livingston,) two authorities only are cited in the opinion, viz., Ratcliffe v. Graves, (Vern., 196,) Skip v. Huey, (3 Atk., 91,) in both of which the bonds were joint and several, and they were cited on another question. Simpson v. Vaughan, (2 Atk., 31,) Bishop v. Church, (2 Ves., 100, 371,) and Rivers v. Kennedy are cited by counsel. In the case of Rivers v. Kennedy the bond was joint and several. In Bishop v. Church the condition of the bond was joint and several, and each of the obligors participated in the consideration. [See this case cited in Hoare v. Contencin, 1 Brown's C. C., 27; Rawstone v. Parr, 3 Russ., 424, 539; Thomas v. Frazier, 3 Ves., 399.] In Simpson v. Vaughan the bond was joint only, but it was given by Nut & Baker, partners, (so styled in the bond,) for a joint loan, and for that reason the Court relieved. But the Lord Chancellor says "it cannot be laid down as an invariable rule that the Court will do it in every case."

In the second case, Lainhart v. Administrator of Reilly, two authorities only are cited, viz., Executors of Shubrick v. Executors of Livingston, supra, and Madox v. Jackson, 3 Atk., 406. In the case of Madox v. Jackson, the bond was joint and several. Lord Thurlow says, in Hoare v. Contencin, 1 Br. C. C., 27: "The case in Atkins [Madox v. Jackson] has nothing to do with it; it is the case of a joint and several bond."

In the third case, Smith v. Martin, (4 DeS., 149,) three cases only are referred to by the Court, viz.: Primrose v. Bromley, Administrator of Mead, 1 Atk., 90; Bishop v. Church, 2 Ves., 100, 371; Thomas v. Frazier, 3 Ves.,

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399. In Primrose v. Bromley, *Moore, Mead and another were assignees of a bankrupt, and gave bond to account for such sums as they, or either of them, might receive. The Lord Chancellor held the bond to be several as well as joint. Besides Mead was a principal and had received moneys as assignee. As to Bishop v. Church, see above. In Thomas v. Frazier, the bond was given by John and Walter Ewer, partners, and the intention of the parties to be bound severally was admitted. The cases cited by counsel are Simpson v. Vaughan and Madox v. Jackson, already referred to.

These cases should be overruled.—1 Kent., 477; Seabrook v. Seabrook, 10 Rich. Eq., 507, 508. But it is not essential to the success of the defendant here that they should be overruled. Each of the three cases are upon bonds, and the obligors bound themselves, their heirs, executors and administrators. Not so here. "Where the obligation exists only in virtue of the covenant, its extent can be measured only in the words in which it is conceived."—Summer v. Powell, 2 Mer., 36. "The surety has a right to stand upon the very terms of his contract. Courts of equity construe their contracts with strictness, and they are not to be bound by implication beyond the very terms of the contract."—Miller v. Stewart, 9 Wheat., 681.

Johnson, contra:

1. The obligation of the two makers of the joint note identical as to the payee.

2. At common law the distinction between joint contracts and contracts joint and several had relation to the remedy.

3. The reason for this distinction was unknown in chancery, and under the Code does not exist.

4. A contract joint in its terms is in effect joint and several.

5. The surviving joint debtor being insolvent, the estate of L. Gordon Bishop is liable for the whole debt.

1. The obligation of the two makers of the joint note is identical as to the payee.

They are both absolutely bound by the terms of the instrument for the payment of the money. The extrinsic fact that one was a surety can raise no equity against the payee, there being no allegations of acts upon the part of the payee that would release a surety. None are pretended.—Carson v. Hill & Jones, 1 McM., 77; Story on Procedure Notes, 1.

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*2. At common law the distinction between joint contracts and contracts joint and several had relation to the remedy.

In Collins v. Griffith, (2 P. Wms., 313,) the Chancellor, speaking of a joint and several obligation, said: "The creditor lent his money upon terms to have a security upon which he might sue the obligors severally if he thought fit." In Ayer v. Admin. of Buford, (2 Mill., 319,) the Court held the estate of the deceased joint debtor was discharged, for the reason that the form of the contract required that the joint debtors should be sued together; and since the same judgment could not be rendered against the survivor and the representatives of the deceased, the survivor and the representatives could not be joined.—11 Johns., 101; Chitty on Bills, 155.

3. The reason for this distinction as to the remedy was unknown in chancery, and under the Code does not exist.

The remedy was only a question of jurisdiction.—Ayer v. Admin. of Buford, 2 Mill., 321. Since there was no plain or adequate remedy at law, the Courts of Equity have uniformly had jurisdiction.—Primrose v. Bromley, 1 Atk., 89; Cowel v. Sikes, 2 Russ., 191; Lainhardt v. Reilly, 3 DeS., 148; Smith v. Martin, 4 DeS., 148.

In Cowel v. Sikes, (2 Russ., 191,) "in a creditor's suit for administering the assets of B, a joint creditor of A and B was permitted to prove, A having become bankrupt, and it appearing that there were no joint assets of A and B."

In Simpson v. Field, (2 Cases in Ch., 22,) the estate of the deceased obligor, being a surety, was held discharged, as the remedy at law had been lost. It had been lost by a strict adherence to the inflexible rules of pleading of the Courts of common law.

Sections 141 and 159 of the Code of Procedure annul the common law rule, adopt the rules of chancery, and all persons "necessary to a complete determination of the questions involved" are to be made parties.—Yorks v. Peck, 9 How. P. R., 201; Voorhies v. Baxter, 1 Abb., 45; West v. Randall, 2 Mason, 181; 2 Atk., 510; Leigh v. Thomas, 3 Ves., 312; Trescot v. Smith, 1 McC. Ch., 301.

This appears to be reasonable, notwithstanding the instrument creating the debt is joint. It is, nevertheless, a debt, and should bind the estate after the death. The obligation makes the estate, and not the person liable.

The administrator representing the intestate can maintain, and is liable to, any action arising ex contractu as effectually as the intestate.—Co. Lit., 209; 1 Comyn on Contracts, *528.

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*4. A contract joint in its terms is in effect joint and several.

This proposition is but a corollary of the preceding. It must be true, since a judgment against joint debtors can be satisfied from the joint property, or the separate property of each.

5. The surviving joint debtor being insolvent, the estate of L. Gordon Bishop is liable for the whole debt.

This is also a corollary of foregoing propositions, but is supported by additional authority and precedents.

The contract of Bishop survives, the remedy remains, the estate is primarily and only liable, and it is expressly held in Lainhardt v. Reilly (3 DeS., 590,) and in Smith v. Martin (4 DeS., 148,) that the estate of a deceased surety is liable for the whole debt, the principal being insolvent.

Therefore His Honor the presiding Judge was correct in directing the jury to find for the plaintiff against the defendants.

October 29, 1878. The opinion of the Court was delivered by

McIVER, A. J. This was an action on a note, of which the following is a copy:

"$100. One day after date we promise to pay A. E. Susong one hundred dollars for value received.

"February 10, 1874.

his
"W. H. + Vaiden.
mark
"L. G. Bishop.

"Witness: J. C. Hix."

The defendant, Vaiden, did not appear, and, therefore, the plaintiff was entitled to judgment against him. The defense set up by the other defendant was that the note being a joint note, and L. G. Bishop having signed the same as surety merely, and not being liable for the debt except by reason of such signing, his estate, upon his death, was absolutely discharged, both in law and equity, and the survivor alone was liable.

The survivorship and insolvency of Vaiden, as well as the fact that the note was given for a debt due by Vaiden alone, Bishop being merely a surety, and having received no benefit from the consideration, were ad-

mitted. On the trial the Circuit Judge charged

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*the jury that the note sued on was in effect a joint and several note, and that the verdict should be for the plaintiff against both defendants, to which charge the appellant excepted. It is obvious that this exception was well taken. We can see no ground whatever to warrant such a charge.—Story on Prom. Notes, § 57; 1 Story Eq. Jur., § 164. The note was, upon its face, plainly a joint and not a joint and several note, and there was no evidence whatever to show the contrary, even if such evidence were admissible under the state of the pleadings. The defendant, who is appellant, requested the Circuit Judge to charge that a note commencing "we promise to pay" is a joint note if signed by two or more. This the Circuit Judge charged, but added the words "under certain circumstances," to which qualifying words appellant excepted. This also was error; for while there are cases which hold that in equity a note signed by a partnership, commencing "we promise," is in effect the joint and several note of the several partners, and while there are other cases which hold that an obligation in form joint may, in equity, be shown to have been so drawn by mistake, and that in fact the real intention was that it should be joint and several, yet there was nothing in this case to warrant any such instruction. For, in determining the correctness of any proposition of law given to the jury for their guidance, we must necessarily look to the circumstances of the case to determine whether it was right in the particular case submitted. We do not sit here for the purpose of determining mere abstract questions of law, but to decide whether the law, as applicable to a particular case made, has been correctly stated. Indeed, we think that the Circuit Judge practically reversed the rule of law, for, as we understand it, the rule is that a note signed by two or more, commencing "we promise to pay," is a joint note and not a joint and several note, but that, under certain circumstances, indicated above, such a note may be treated in equity as a joint and several note. The appellant also requested the Circuit Judge to charge that "upon the death of one of the makers of a joint promissory note, who was not liable for the debt irrespective of the joint obligation, but who signed the note simply as surety, his estate is absolutely discharged both in law and equity and the survivors only are liable."

The Judge charged in accordance with this request, but added "that it had no application to this case," to which additional words appellant excepted. In this also we think

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there was error. For if, *as we have seen, the Court below erred in instructing the jury that the note, though in form joint, was in effect joint and several, then the proposition of law involved in this last mentioned request was not only directly applicable but might be conclusive of the case; because, if such proposition is well founded, then the verdict should have been in favor of the defendant, Bishop. It becomes necessary, then, for us to consider and determine whether such proposition can be maintained; and indeed this was the only question argued here. It must be admitted that this proposition is fully sustained by the authorities outside of this State, a full and fair statement of which will be found in appellant's brief; but, on the other hand, the authorities in this State are to the contrary.—Shubrick v. Livingston, 1 DeS., 322; Lainhardt v. Reilly, 3 DeS., 591; Smith v. Martin, 4 DeS., 151.

These cases distinctly hold that upon the death of one of two or more obligors who was a mere surety, while his estate is discharged at law, it is not in equity. This proposition, while not distinctly decided, inasmuch as the direct question did not arise, seems to have met the approbation of Nott, J., in Trescot v. Smyth, (1 McC. Eq., 304,) and of Cheves, J., in Ayer v. Buford, 2 M. Con. Rep., 321, [12 Am. Dec. 677]. It is very true that Harper, Eq., in Pride v. Boyce, (Rice Eq., 288 [33 Am. Dec. 78]) does say that "upon an examination of the cases they seem to me to establish a rule of this sort: that if the joint obligation be created merely by the bond or covenant, where there was no previous liability, in that case no relief will be afforded against the estate of the deceased obligor in the event of the insolvency of the survivor. But if there was an antecedent debt to which both parties were liable, as in the case of partners, then the Court infers without direct proof that the instrument was made joint by mistake, and relieves accordingly, by setting it up as a joint and several bond; and on a still stronger equity it should seem that where there was an antecedent debt to which the deceased obligor was solely liable, would the Court set it up as his several debt, in favor of the obligee, where the surviving obligor proves insolvent?" This, however, so far as it states the rule as contended for by appellant, was a mere dictum, for the question in Pride v. Boyce was whether the assets of McCauley's estate could be applied to the payment of a joint note signed by McCauley as principal and Pride as surety, and it was held that they could. Indeed, it can scarcely be called a dictum of that distinguished Chan-

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cellor, for it will be observed that he *does not state the rule as one which he approves, but merely as one established by the cases; and an examination of his opinion shows that the cases from which he deduced this rule are all English cases, and he does not mention or refer to a single one of the cases in our State above cited.

It is argued, however, that the decisions

in this State which establish the contrary of the proposition contended for by appellant are all cases on bonds in which the obligors, in terms, bind not only themselves but also their heirs, executors and administrators, while the case now under consideration is an action on a promissory note, by which the makers do not, in terms, bind their heirs, executors and administrators. This is true so far as the form of words go, but in substance and effect the obligation, so far as this point is concerned, is the same under a promissory note as under a bond. In a bond the obligor binds specifically his heirs, executors and administrators, while in a promissory note he does not. But in the case of a bond the obligee can only enforce the ogligation as against the heir to the extent of the value of the land of the obligor which may have descended to him, and as against the executor or administrator to the extent of the value of the assets of the obligor which have or ought to have come into his hands, and this he can in the case of a promissory note. So that we are at a loss to perceive the practical difference in this respect. We do not therefore, think that the decisions in this State should be confined to actions on bonds. The Court evidently did not rest their decisions upon any such ground for, while that circumstance was adverted to in two of the cases, it is not even mentioned in the third.

Again, it has been urged that in order to bring the law in this State into conformity with the law as declared in other States in the Union, as well as by the Supreme Court of the United States, these decisions should be overruled. To this proposition we have given that careful attention which its gravity demands; but, after mature and deliberate consideration, we are unable to give our concurrence to the rule as established elsewhere, and, therefore, we see no reason for disturbing the rule as established by our own decisions. It seems to us that the rule contended for by the appellant had its origin in and rests entirely upon strictly technical doctrines incident to the common law rules of pleading, which are now no longer of force in this State. We are unable to perceive any good ground growing out of the nature

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of the rights and duties incident *to a joint contract upon which it can rest, though we can readily perceive how it grew up, from the nature of the remedies provided, by the old rules of the pleading. By those rules it was not allowable to bring a joint action at law against a living obligor and the representatives of a deceased co-obligor, for the reason only that the judgment against the survivor would be de bonis propriis, while that against the representatives would be de bonis testatoris, and the common law did not tolerate a double judgment in one action. That this was purely technical, and that there was no inherent difficulty in the way, is conclusively shown by the practice of the Court of Equity, and by the practice under the Code of Procedure, under which such judgments have been and are in constant use. By another rule of that system of pleading it was required that where an action was brought upon a joint contract it was necessary that all the living co-contractors should be joined in the action.

These rules lead legitimately to the conclusion that in case of the death of one of two or more joint contractors his representatives were absolutely discharged from any action at law. Then, by the aid of the equity doctrine,—that where a surety is not bound at law he will not be made liable in equity,—the conclusion was reached that upon the death of one of two or more joint obligors, who is liable only as a surety, his estate is absolutely discharged both at law and in equity. The fault of this reasoning, as it seems to us, is to be found in the fact that the distinction between being discharged from suit at law and being discharged from the obligation to perform the contract is lost sight of. There is no difficulty in understanding how, under the common law rules of pleading, the estate of the deceased co-obligor could not be pursued in an action at law, and how it could be properly said that such estate was discharged from such action; but it is not only difficult but absolutely impossible for us to understand how the death of the party can discharge his estate from his obligation to fulfill his contract. The remedy at law may have been gone because of the want of proper machinery in that Court to put it into practical operation, but the duty to perform the contract still remains—the obligation is not discharged. There is nothing in the nature of the rights and duties growing out of joint contracts which warrants the conclusion that the death of one of the co-contractors destroys the right or discharges the obligation which grows out of such contracts. It is said that the surety by signing a joint

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contract incurs a joint liability *and no other. If this be true, carried to its legitimate result, it would necessarily lead to the conclusion that when a joint judgment is recovered upon a joint contract, against two or more obligors, their joint property could alone be made liable, whereas we know the contrary to be well established law, and that the judgment in such a case may be enforced as well against the separate property of either of the co-obligors as against their joint property. We do not think, therefore, that the authorities which have been relied upon as sustaining the proposition contended for by the appellant rest upon a satisfactory foundation, and we are unwilling to overrule the decisions in this State establishing the contrary. Indeed, since the adoption of the Code of Procedure, which, in conformity to the requirement of

the Constitution, has provided that justice shall be administered in a uniform mode of pleading without distinction between law and equity, we can see no reason why the representatives of a deceased co-obligor, who was a mere surety, may not be joined with the surviving obligor in an action upon a joint bond or note, as in this case.

While, therefore, as we have seen, errors were committed by the Circuit Judge in his charge to the jury, we do not regard such errors as material in this case; for upon the principles herein established the verdict should have been as it was, and we do not, therefore, feel called upon to disturb it because of errors which could not change the result of the case. For as the case made depended exclusively upon the question of law above determined, it was the duty of the Circuit Judge to have instructed the jury to find for the plaintiff against both of the defendants; and although the reasons assigned by the Circuit Judge for such instruction are not well founded in law, yet as the instruction was right in itself it must be sustained.

The judgment of the Circuit Court is affirmed.

WILLARD, C. J., and HASKELL, A. J., concurred.

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10 S. C. *259

*WAGNER v. PEGUES.

(Columbia. Nov. Term, 1877.)

[*Execution* ⟸171.]

Equity will not relieve against an execution on the ground of irregularity in the proceedings under which it was obtained.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 501; Dec. Dig. ⟸171.]

[*Execution* ⟸172.]

No one but the defendant in execution can make objection to the execution on the ground of irregularity.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 522; Dec. Dig. ⟸172.]

[*Execution* ⟸102, 171.]

Equity will not enjoin a judgment creditor from enforcing his execution against lands in the hands of a purchaser from the judgment debtor on the ground that ten years had elapsed since the purchase was made or on the ground generally of laches in enforcing the execution.

[Ed. Note.—Cited in Latimer v. Ballew, 41 S. C. 521, 19 S. E. 792, 44 Am. St. Rep. 748.

For other cases, see Execution, Cent. Dig. §§ 203, 508, 509; Dec. Dig. ⟸102, 171.]

[This case is also cited in Pegues v. Warley, 14 S. C. 187, as to facts.]

Before Townsend, J., at Darlington, June, 1876.

This was an action by Theodore D. Wagner and Rowena Warley against Samuel W. Pegues for an injunction to restrain the sale of a tract of land.

His Honor refused the relief demanded and made a decree dismissing the complaint. The defendants appealed.

The case will be sufficiently understood from the opinion of this Court.

Spain, for appellant.

Hudson, contra.

November 18, 1878. The opinion of the Court was delivered by

KERSHAW, Circuit Judge, (acting as Associate Justice). On the 31st of December, 1862, John P. Zimmerman conveyed in fee, for a valuable consideration, to the plaintiff, Theodore D. Wagner, a certain tract of land described in the pleadings. Wagner entered upon the land and remained in quiet possession until the 17th May, 1866, when he conveyed to Mr. Warley, the plaintiff's (Rowena's) intestate, with covenant of warranty against all persons whomsoever. Both deeds were duly recorded. Warley entered and held possession of the premises from the time of the conveyance to him until his death, and the plaintiff Rowena, who is his widow, has remained in possession to the present time.

This action was commenced January 6th, 1873. The defendant holds a judgment, which was duly entered in Darlington, where Zimmerman resided, October 27th, 1860, upon which execution was sued out and entered, and the lien created thereby attached to all the property owned by Zimmerman at that

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time or subsequently *acquired. Zimmerman died intestate, in 1863, seized and possessed of a large estate, real and personal. June 20th, 1868, the administrators of Zimmerman filed a bill against the defendant, Pegues, and others, to enjoin creditors and marshal the assets. The judgment of Pegues was the only one established under this bill against the estate. The bill for some reasons was dismissed, and another was filed, by the same plaintiffs, November 3, 1871, for the same purposes, and also to have dower assigned to the widow of Zimmerman in certain lands of the estate. To this bill there was no answer made by Pegues, and an order was made therein enjoining all the creditors except Pegues. Under that proceeding the lands of Zimmerman were sold at a great sacrifice. Pegues became a purchaser to the extent of $1,468.35 and gave his bonds for the amount. Considerable personal estate went into the hands of the administrators of Zimmerman, which, it is alleged, was wasted, and debts were paid by them out of their order. Of the proceeds of the lands sold, $195 was paid to the widow of Zimmerman (who was also one of the administrators) on account of dower, any further payment on that account being prohibited by order until account should be taken. Pegues was a resident of Alabama during all these proceedings. In April, 1867, on affidavits tending to show the loss of Pegues's execution against Zimmerman, an or-

der of Court was made granting a new execution, without notice to the administrators, and a levy was made of a tract of land called "Jack's Bay," February 10th, 1868, which, if then sold, would probably have paid the judgment debt. In December, 1869, without any disposition of the former levy, the execution was levied on the land in question here. This execution appears never to have been returned. November 8th, 1872, by leave of Court, a new execution was ordered to issue, and on the 11th of the same month there was a levy thereunder made upon the land here in question, and it was advertised for sale in January, 1873.

The plaintiffs in this action seek to enjoin said sales and to remove the lien of the judgment as a cloud upon the plaintiffs' title. We proceed to consider the questions presented by the appeal.

One of the matters complained of by the plaintiffs was, that the execution under which defendant proceeded was null and void for certain alleged irregularities of proceeding. For this it is sufficient to say that the powers of equity cannot be invoked to restrain an execution on the ground of irregularity.

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*In the Attorney General v. Baker, (9 Rich. Eq., 531,) it is said to be well established that the process of a Court cannot be collaterally assailed. It belonged to the Court of law to annul a process issued under its authority, and ample means are provided for correcting any erroneous orders of Court concerning executions.

The authorities cited by counsel for the respondents sustain the proposition that no one but the defendant in execution can make the objection on the ground of irregularity. Appellants' counsel has, however, insisted here most strongly upon other grounds. It is argued that the conveyance of the land by Zimmerman to Wagner vested the fee in the latter and it was rightfully conveyed to Warley; that the continuity of rightful possession was not broken by the transfer from Wagner to Warley; that these possessions being continuous and rightful, the defendant could not after ten years from their commencement enforce his judgment against the land. These propositions were urged with much zeal, force and learning. But whatever may be their soundness in point of law, (of which we pronounce no opinion,) we do not find that they are before us for consideration in this case. To grant the relief sought here on these grounds would be to commit the Court to the exercise of equitable jurisdiction quia timet and enjoin possible or threatened proceedings in the Courts in all cases where it might be made to appear that the Statutes of Limitation would bar such proceedings when they came to be instituted. For this position we can find no authority.

The gravamen of appellants' case, and that which would seem most to afford equitable grounds entitling them to relief, is found in the charges of laches on the part of the defendant in standing by and suffering the wasting of the debtor's estate for so long a time and until irreparable injury has been wrought by the failure of the assets and the insolvency of the sureties to the administration bond, &c.

If the defendant has neglected any duty which equity imposes on him in favor of the plaintiffs, then this Court must intervene to protect them against the consequences of such neglect. But we are unable to find in the case anything culpable in the conduct of the defendant—any violation of right of which plaintiffs can here complain. The authorities cited abundantly show that a judgment creditor cannot be compelled to resort to any one of several sources to obtain satisfaction, even in favor of purchasers from the

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debtor *subsequent to the judgment. He has a right to select what property shall be sold under his execution.—Longworth v. Screven, 2 Hill, 298 [27 Am. Dec. 381]; McAliley v. Barber, 4 S. C., 45; Moore v. Wright, 14 Rich. Eq., 132.

According to the principles of these decisions, no duty devolved upon the defendant to protect the interests of the plaintiffs by guarding the assets of Zimmerman or enforcing his judgment against other lands of the debtor. If it was important to the interests of the plaintiffs, they may have taken upon themselves the burden of such litigation as was necessary to protect them, and cannot shift it upon the defendant. The only case we have found that would seem to entitle the plaintiffs to the relief claimed is that of Hurd v. Eaton, (28 Ill., 122,) which does determine that where a judgment creditor may collect his debt from property which the debtor has not conveyed, but refuses or neglects to do so, he will be enjoined from proceeding against lands in the hands of purchasers for value from the debtor.

If that decision did not conflict with our own authorities, we may have held the defendant to have lost his remedy against the plaintiff's land by his failure to proceed against the other property bound by his judgment; but we must stand upon our own authorities. Upon examination of the facts of the case, it will be seen, however, that the Court there was well warranted in coming to the conclusion it did without violating any principle held here. The judgment creditor who was enjoined in that case had, before seeking to enforce his execution against the property in the hands of the vendee of his debts, expressly waived the lien of his judgment on other property of the debtor sufficient to pay his debt and suffered it to be sold and applied to a junior judgment. This afforded a sufficient ground of equity to entitle the vendee of the debtor

to an injunction. There is no equity in this case to authorize the relief prayed under our decisions.

The judgment below is affirmed and the appeal dismissed.

WILLARD, C. J., and HASKELL, A. J., concurred.

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10 S. C. *263

*TERRY v. MARTIN.

(Columbia. April Term, 1878.)

[*Banks and Banking* ⇐49.]

Under the charter of a bank declaring the stockholders liable for redemption of the bills and notes of the bank "in proportion to the number of shares that each" stockholder "may hold and possess," no action lies against an individual stockholder to recover the proportion for which he is liable to the bill holders under the charter, nor to recover any debt he may owe the bank for unpaid parts of his subscription to the stock. The action, it seems, should be against all the stockholders.

[Ed. Note.—Cited in Bird & Co. v. Calvert, 22 S. C. 297.

For other cases, see Banks and Banking, Cent. Dig. § 76; Dec. Dig. ⇐49.]

Before Maher, J., at Beaufort, December, 1874.

This was an action by Harvey Terry against Alfred M. Martin.

The complaint alleged that under an Act passed 13th February, 1854, by the General Assembly of the State of Georgia, the Merchants' and Planters' Bank, located at Savannah, was duly incorporated with a capital of two millions of dollars, divided into twenty thousand shares of $100 each. That Section 15 of the charter was as follows:

"And be it further enacted, That the persons and property of the stockholders shall at all times be liable, pledged and bound for the redemption of the bills and notes at any time issued, in proportion to the number of shares that each individual and corporation may hold and possess, and that such liability shall not be discharged by a sale and transfer of stock, unless at the time of such sale the sale was made for a good and valuable consideration, and was a bona fide transaction, and the bank was in a sound and solvent condition at the time of sale, in which event such liability shall not continue beyond six months after such sale and transfer."

That plaintiff was the bona fide owner and holder of bills of the said bank to the amount of $62,729, payment of which had been demanded of the bank and refused by it; that the bank was insolvent and utterly unable to redeem its bills and notes; that the defendant was the owner and holder of four hundred and eighty-six shares of the capital stock of said bank, on which has been paid the sum of $12,630, leaving still due and unpaid thereon the sum of $35,970; that the sum last mentioned is a portion of the capital stock of the bank, and is a trust fund appropriated by law and the charter of the corporation to the payment of the notes of said bank.

The complaint demanded judgment against the defendant for the sum of $62,822, with interest and costs from the date of the action.

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*The defendant demurred to the complaint on the ground, inter alia, of a defect of parties defendant in the omission of the other stockholders of the bank. His Honor the Circuit Judge sustained the demurrer upon one of the grounds taken, that is to say, for a defect of parties plaintiff, giving the plaintiff leave to amend by making all creditors who may choose to come in parties plaintiff, but overruled it upon all other grounds, including the one above stated of a defect of parties defendant.

The defendant appealed upon the ground, inter alia, that the other stockholders of the bank are necessary parties defendant.

Colcock & Son, for appellant.

Corbin & Stone, contra.

November 20, 1878. The opinion of the Court was delivered by

HASKELL, A. J. This action was brought by the plaintiff as a holder of bills issued by the Merchants' and Planters' Bank, of Savannah, in the State of Georgia, against the defendant as a stockholder, and as a debtor of said bank. The prayer is for judgment for the whole amount of the bills. The said amount greatly exceeds the value of the stock held by the defendant, and exceeds the liability of the stockholder to the bank for his unpaid subscription. The plaintiff rests his claim against the defendant upon both the liability under the statute as a stockholder, and the liability, if any exists, for unpaid subscription. The defendant demurred for defect of parties plaintiff and parties defendant and for other grounds. The demurrer was sustained for defect of parties plaintiff, and it was ordered that the complaint be amended by the admission of all other creditors of the said bank. The complaint has been thus amended. The demurrer was in all other respects overruled. The defendant appeals, and one of the grounds of appeal is "that the other stockholders are necessary parties defendants."

The statute under which the plaintiff claims against the defendant as a stockholder is in the charter of the bank granted by the State of Georgia, and is as follows: "Sec. 15. And be it further enacted, That the persons and property of the stockholders shall at all times be liable, pledged and bound for the redemption of the bills and notes at any time issued in proportion to the number of

shares that such individual and corporation
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may hold and possess." *"Individual liability is repugnant to the law of corporations and qualifies in this case an exemption which would otherwise exist. Stockholders in such cases are liable according to the plain meaning of the terms employed by the Legislature and not otherwise."—Carroll et al. v. Green et al. 2 Otto, 509 [23 L. Ed. 738].

The charter renders the stockholders liable "for the redemption of the bills and notes," but not for other debts of the bank; right of action against stockholders as such is, therefore, confined to the bill holders. With this distinction the language of the Court in Carroll et al. v. Green et al. is applicable. "All [bill holders] therefore in this case stood upon a footing of equality and were entitled to share alike in the proceeds of the litigation. The remedy against the stockholders was necessarily in equity."—Pollard v. Bailey, 20 Wall., 521 [22 L. Ed. 376]; [Atchison v. Peterson, 20 Wall.] 512 [22 L. Ed. 414].

"The case of Pollard v. Bailey (20 Wall., 520 [2 L. Ed. 376],) is an authority against the maintenance of a separate action by one creditor who seeks to obtain his entire debt to the possible exclusion of others similarly situated. The proper proceeding is in equity, where all the claims can be presented, all the liabilities of the stockholders ascertained and a just distribution made."—Terry v. Tubman, 2 Otto, 156 [23 L. Ed. 537].

The action in the above case was by a holder of bills issued by the Bank of Augusta, Georgia, against a stockholder of the said bank liable under the charter in terms perhaps more explicit than in that of the Merchants' and Planters' Bank. Whatever may have been the original intention of the plaintiff in the present action, there can be no question that it comes before this Court in the nature of a proceeding in equity for the benefit of the plaintiff "and all others in like condition." The question, therefore, is whether any additional parties defendants are necessary to the final settlement and determination of the rights involved. It is not shown that any judgment involving a construction of this charter has been rendered in the Courts of Georgia, and perhaps it would be premature to indicate a conclusion on that point further than may be unavoidably necessary. Whether or not the plaintiff could have maintained a separate action at law against the individual stockholder, he has proceeded in equity for the benefit of himself and all other persons in like condition who may see fit to come in. We can perceive no difference between the principles which would govern the respective liabilities
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of the stockholders under such a *charter and those which control in a case where the stockholders, not being made liable by the charter, had made dividends of the capital stock among themselves before the debts of the bank were paid.—See Angell & Ames on Corporations, §§ 596, 600, and the cases there cited.

"In the case of this bank [Hallowell and Augusta Bank] a Court of chancery would probably sustain a bill by one or more of the creditors of the bank in behalf of all who should choose to come in against all the stockholders. * * * It could then be ascertained how much was due in the whole to all who should choose to adopt this remedy and what had been received by each stockholder."—Vore v. Grant, 15 Mass., 505.

Every stockholder would be liable pro rata, according to the number of his shares to contribute to the amount necessary to redeem all the bills which might be proved in this proceeding. The liability of each stockholder is not limited by a definite rule, as in Carroll et al. v. Green et al., but they are liable for the whole amount not redeemed by the bank. Such a remedy "can be obtained in equity only, for a Court of common law is incapable of administering any just relief, since it has no power of bringing all the proper parties before the Court, or of ascertaining the full amount of the debts, the mode of contribution, the number of contributors, or the cross equities and liabilities which may be absolutely required for a proper adjustment of the rights of all parties as well as of the creditors."—Story's Eq. Jur., § 1252.

In the case of the Sackett's Harbour Bank v. Blake et al., relied on by the respondent, the Court says: "The state of facts disclosed by the evidence authorized the complainants to maintain their bill without joining the other stockholders as defendants."—3 Rich. Eq., 225. The extent of the liability of each stockholder was fixed by the charter; every other stockholder except the defendant had already paid to the extent of his liability, and the debt yet due exceeded the liability of the defendant. No other parties could be necessary to the determination of the amount due or recoverable. But in the case before us the legal liability of the defendant cannot be ascertained without an account of the assets of the bank, its unpaid bills and other debts, and a determination of the proportionate liability of the other stockholders. The complaint alleges existing assets of the bank—unpaid subscriptions—which, perhaps, alone would be sufficient to redeem the bills.
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It is clear that the plaintiff *has no right of action against the defendant and for that unpaid subscription. It is a debt to the bank, and there is no privity between the parties. If he resorts to equity to subject choses in action to the payment of his judgment, the bank must be a party. Besides, "the subscription enures to the benefit of all creditors, while the individual liability, under

the charter, operates only in favor of bill holders."—Terry v. Anderson, 5 Otto, 636 [24 L. Ed. 365].

"It appears to the Court a misapprehension to suppose that as between the creditors of a corporation and a defaulting subscriber any trust exists. The fiduciary relation may be between the creditors and the corporation, but the contract of the subscriber to the stock is direct and single. No privity exists between him as an individual and any creditor of the corporation. He can only be reached by the creditor through the corporation; and this is the only equity of the creditor, to wit, to be subrogated pro hac vice to the rights of the corporation. If the rights of the corporation are lost, or their remedy barred, the creditor has no equity to revive them."—The South Carolina Manufacturing Company v. Bank, 6 Rich. Eq., 227.

Thus we do not perceive how, as bill holders or as general creditors, the plaintiff, "and all others in like condition," can maintain this action against a single stockholder. If the plaintiff had proceeded in equity against the bank and all the stockholders in the State of Georgia, and an accounting had been had, and a decree or judgment obtained by which the rights and liabilities of all parties had been definitively settled, the case would have been very different. The liability of each stockholder would have been fixed, and the rights of the plaintiff could have been enforced; but, as it is, we are unable to perceive how he can proceed. It is unnecessary, therefore, at this time to consider the other grounds of appeal.

In the case of Crease et al. v. Babcock et al., (10 Met., 525,) the statutory liability is very similar. It was held "not only that all the bill holders should be made plaintiffs, but, also, that all the stockholders who were such when the charter of the bank expired should be made defendants."—Page 534. It was further held, in the same case, that each stockholder was liable for the whole amount represented by his stock and for no more. The reason for the rule that all stockholders who are within the terms of the charter must be made parties is made obvious when we perceive that they are severally liable, and that unless they are all joined in the pro-

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ceeding *one or a few might be made liable for the whole amount of unpaid bills while the others would escape. This would be against equity, or would compel multiplicity of action, which is contrary to the purposes of the Courts of equity. Such was the opinion and the reasons upon which the conclusions rested in Crease et al. v. Babcock et al., and we think that the principles are applicable. The case of Pollard v. Bailey, (20 Wall., 520 [22 L. Ed. 376],) is in point, and yet stronger than the case of Crease v. Babcock.

The decision is reversed and the case remanded. The demurrer for parties defendants must be sustained.

Motion granted.

WILLARD, C. J., and McIVER, A. J., concurred.

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10 S. C. 268

HILL v. WATSON.

(Columbia, April Term, 1878.)

[*Judgment* ⟸355.]

Under the Act of 1869, re-enacted in Revised Statutes, page 497, authorizing erroneous judgments to be vacated on motion, a judgment cannot be vacated or set aside for error of law in the judgment itself, but only for error of fact, to be shown by satisfactory proof.

[Ed. Note.—Cited in Truett v. Rains, 17 S. C. 454.

For other cases, see Judgment, Cent. Dig. § 692; Dec. Dig. ⟸355.]

[*Judgment* ⟸355.]

A judgment rendered in 1869 upon a contract for the purchase money of slaves, declaring such contract null and void, cannot be vacated or set aside under the said Act of 1869, the error in such judgment being one of law in the judgment itself not apparent upon its face.

[Ed. Note.—Cited in Yates v. Gridley, 16 S. C. 496.

For other cases, see Judgment, Cent. Dig. § 692; Dec. Dig. ⟸355.]

[*Judgment* ⟸336.]

In what cases relief may be had under the Act of 1869, (Rev. Stat., p. 497,) authorizing the Judge of the Circuit to vacate on motion erroneous judgments considered by the Court.

[Ed. Note.—Cited in Durant v. Philpot, 16 S. C. 126; Yates v. Gridley, Id. 500, 501; Ex parte Carolina National Bank, 56 S. C. 20, 33 S. E. 781.

For other cases, see Judgment, Cent. Dig. §§ 724, 746; Dec. Dig. ⟸336.]

[*Judgment* ⟸392.]

["Proof," as used in Rev. St. p. 497, allowing a judgment to be set aside on "satisfactory proof," is synonymous with "evidence."]

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 754; Dec. Dig. ⟸392.]

Before Northrop, J., at Newberry, October, 1876.

This was a motion to vacate an order confirming a report of a Referee made in 1869 in the case of John L. Hill and others against Joseph Watson as administrator of Thomas Watson, deceased, and others.

The case will be fully understood from the judgment of His Honor the presiding Judge, which is as follows:

Northrop, J. To correctly apprehend the motion now under consideration, it may not be amiss to repeat, somewhat in their chronological order, the events which enter to make up the history of this action.

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*The plaintiffs exhibited their bill in the then Court of Equity on the 17th day of May, 1866, praying for a partition of the lands be-

longing to the estate of Thomas Watson, deceased, amongst his next of kin, and for other relief. Subsequent to the date at which the bill was filed it was discovered that the estate of Thomas Watson, deceased, was much embarrassed by debt, and, under some circumstances, might be rendered insolvent; and, in view of these facts, the creditors were by an order required to present their demands and establish them as provided by law.

By an order made by Judge J. M. Rutland, bearing date the 12th day of March, A. D. 1869, all matters of account were referred to Thomas M. Lake, Esq., as Referee, who was required to report upon the same, to marshal the estate of the said Thomas Watson, deceased, and to require all creditors of his estate to render and establish the same, as required by law, on or before the 1st day of May, A. D. 1869.

Before the said Referee several creditors, as required by the order of Judge Rutland, presented their respective demands, amongst whom were Sebastian Kraft, James H. Williams, Gideon A. Glenn, as administrator of the estate of Joseph Shelton, deceased, each proffering a sealed note against the estate of Thomas Watson. The consideration of each of the several sealed notes just recited was proved to have been the purchase money of negro slaves. Thomas M. Lake, as said Referee, filed his report on the 9th day of July, 1869, wherein, amongst other things, he refused to allow the said demands of the said Sebastian Kraft, James H. Williams and Gideon A. Glenn, as aforesaid, upon the sole ground that the consideration of the same was purchase money of negro slaves, which, by the laws of South Carolina, rendered them null and void.

To this report exceptions were taken, which came up to be heard before His Honor L. Boozer, Judge of the Fifth Circuit, and on the 17th day of November, 1869, the exceptions were overruled and the report confirmed. No appeal was taken therefrom. To those creditors whose claims were favorably considered by said report of Thomas M. Lake, Esq., as Referee, certain funds then in Court were applied. But it is admitted and abundantly shown that there are other assets of the estate of Thomas Watson, deceased, which yet await distribution.

The creditors, Sebastian Kraft and James H. Williams, after due notice, applied to this

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Court, in open Court, on the 6th day of *October, A. D. 1871, by a motion to vacate and set aside as erroneous the judgment of Judge L. Boozer, dated the 17th day of November, A. D. 1869, upon the following grounds, to wit:

1. Because His Honor Judge Boozer erred in deciding the claims of these creditors illegal and void because given for the purchase money of negro slaves; and also that His Honor the Circuit Judge further erred in deciding the bond of Joseph Watson, administrator of the estate of Thomas Watson, deceased, void, it having been given for the purchase money of negro slaves.

2. Because His Honor the Circuit Judge erred in deciding that the Act of the General Assembly of this State declaring all obligations given to secure the purchase money of slaves null and void was constitutional.

The basis of this application to me by the creditors mentioned heretofore was that the Act of the General Assembly, passed in 1869, (§ 14, Stat., 214, 81,) authorized Circuit Courts to vacate and set aside judgment upon satisfactory proof being made to the Judge that the said judgments are erroneous and ought to be set aside, with the single proviso that, except under causes arising under the provisional government of South Carolina, no motion should be entertained for a new trial in any cause unless the motion be made within two years after the judgment rendered.

A similar motion was made by Messrs. Simpson & Simpson, attorneys of O. H. P. Fant, who presented the sealed note to Gideon A. Glenn, as administrator of Joseph Shelton, deceased, which had also been excluded from any participation in the application of the funds belonging to the estate of Thomas Watson, deceased, on the same ground as that of Kraft and Williams, viz., consideration being the purchase money of slaves. This claim of Fant had the additional ingredient that Fant had been compelled to pay a large sum, say $683.67, with interest from the 17th of November, 1869, (he having been the surety of the said Thomas Watson on said note,) subsequent to the decree of Judge Boozer, heretofore referred to, and the application to be let in and establish the demand was made while the fund from which it is to be paid is still in Court.

When the motion was first made in October, 1871, before His Honor Judge M. Moses, he hesitated, he said although its justice was manifest, to grant it, because no proof of error other than the record itself was offered. His impression, he stated, was that other proof was necessary. Under such cir-

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cumstances he postponed the *further consideration of the matter. Afterwards, when the matter was again called up, he signified his intention to grant the motion, and had an order prepared to that effect, of which, indeed, this order is a mere copy. He failed, however, on account of the order having been mislaid, to sign it. The matter now comes before me. I concur entirely with Judge Moses in the conclusions that he had reached. The motion was made within the time allowed by the Act, and its justice is too apparent to need other than a statement of the facts to sustain it. Indeed, the counsel who opposed the motion admitted that

substantial justice was on the side of the moving parties. He resisted on the ground that the Act referred to is unconstitutional, being contrary to Section 20 of Article II, and Sections 1 and 4 of Article IV, of the Constitution of this State.

Section 20 of Article II reads as follows: "Every Act or resolution having the force of law shall relate to but one subject, and that shall be expressed in the title." The Act referred to was approved on the 16th day of March, 1869, and its first Section has been incorporated into the General Statutes of this State. The title of the Act is "An Act to empower the Judges of the Circuit to grant relief in case of erroneous judgments obtained during the existence of the provisional government of South Carolina;" and it is very apparent to my mind that it relates "but to one subject," which is "expressed in the title."

In the most general sense, the subject of a statute is some right, obligation or power, either public or private, created, modified or destroyed, for the purpose of allowing some end, either of public or private advantage, which constitutes the object of the statute. Where the rights, obligations or powers which are the subject of the statute appertain to a public function of the government, to be exercised through or by means of a public office, such office, by its established title, or the public officer who holds it, by his name of office, is, according to parliamentary usage and common understanding, the immediate and direct subject of the statute.—Morton, Bliss & Co. v. Comptroller General, 4 S. C., 442.

Section 1 of Article IV of the Constitution is that Section which provides for the establishment of the Supreme and Circuit Courts of this State, and Section 4 declares what shall be the jurisdiction of the Supreme Court. I cannot see that the Act is contrary to either of these Sections. I therefore feel compelled to grant the motion.

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*It is ordered and adjudged that the decree or order referred to of Judge L. Boozer, made 17th November, 1869, and the report of the Referee, which it confirms, be vacated and set aside, and that it be referred to Silas Johnstone, Esq., to ascertain and report the amount of the debts outstanding against the said Thomas Watson, deceased, as well as those in favor of the parties herein named as the others, and to marshal the assets of said deceased, with leave to report any special matter. It is further ordered that any of the parties of these proceedings have leave to apply at chambers for such other orders as may be necessary herein, after giving five days' notice of such application to the attorneys for the other parties.

The plaintiffs appealed on the following grounds:

1st. Because Section 2 of Chapter CV, General Statutes, 497, relied on by the Court to sustain its jurisdiction in pronouncing the said judgment, is in conflict with Section 20, Article II, of the Constitution of the State of South Carolina.

2d. Because said Act is in conflict with Section 4 of Chapter IV of the Constitution of the State of South Carolina.

3d. Because Section 2 of Chapter CV, General Statutes, 497, without reference to its unconstitutionality, is not applicable to this case and in no wise sustains the judgment herein appealed from.

Baxter, for appellant.

Johnstone, contra.

November 20, 1878. The opinion of the Court was delivered by

HASKELL, A. J. In this cause a final order was set aside by the Circuit Judge, after the lapse of considerable time, on motion, upon the ground that the order was erroneous in law. The authority for such proceeding relied on by the Circuit Judge is the Act of 1869, p. 214, re-enacted in the General Statutes, (Rev. Stat., 497): "In case a judgment or decree has been or hereafter shall be rendered by a Court of Common Pleas or Equity, it shall be lawful for either party, plaintiff or defendant, to move before the presiding Judge of the circuit in which said judgment was obtained to vacate or set aside said judgment, upon satisfactory proof being made to said Judge that said judgment is

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erroneous and ought to *be set aside; and upon such proof being made, the presiding Judge is hereby authorized to vacate and set aside said judgment and to order a trial de novo."

It is unnecessary to recite the rest of the Act. The Court has been but little aided by argument or authorities on either side in this case; but as the Act seems to have caused considerable doubt and confusion, it is well to have a conclusion upon it, and it will receive as much attention as the pressure of the labor on hand admits. Both in the Court of law and that of equity in this State there had been previous to the passage of this Act power under certain circumstances to set aside judgments or decrees and to grant a trial de novo, or a rehearing, or a new hearing by bill of review, as the case might be. All the power which had previously been in the two Courts was, by the Constitution of 1868, vested in the Court of Common Pleas, with some exceptions unimportant, and which do not bear upon the question, but the distinct modes of procedure were preserved, although in the same Court, until by the adoption of the Code of Procedure, in 1870, the proceedings were merged and became identical in form. It was in this interval that the Act of 1869 was passed. It is plain that the Act was intended to make the mode of procedure

the same in both Courts, and the mode adopted was, by motion, the same as it previously had been in the Common Pleas, but differing from what it had been in equity, where the application for a rehearing before decree filed was by petition, and after decree filed was by bill of review, which could not be filed until leave was granted.

The two years' proviso limiting the time in which a motion for "a new trial" may be made needs no consideration here, and it is doubtful on the face of the Act whether it legitimately relates to the preceding portion. Beyond this change in the mode of procedure, by which the same method is prescribed to both Courts, it is difficult to see any new law in the first portion of the Act. It confines the Judges to facts as the only grounds upon which the motion may be granted under this Act, for it says "upon satisfactory proof being made to said Judge that such judgment is erroneous and ought to be set aside, and upon such proof being made, the presiding Judge is hereby authorized, &c." "Proof" taken literally is the "perfection of evidence," (Bouv. L. D.) or is the "effect of evidence."—1 Greenleaf on Ev., § 1. But as in common use the end is often confounded with the means, so in language "proof" is

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*often used as a synonym with "evidence," and in this ordinary sense it manifestly is used in this Act, which, then, would read "upon satisfactory evidence." Evidence "in legal acceptation includes all the means by which any alleged matter of fact, the truth of which is submitted to investigation, is established or disproved."—Ibid. Questions of fact alone are susceptible of proof, and when technical words are used in a statute they must be given their technical meaning. The Judge, therefore, fould be confined to the consideration of facts in arriving at his conclusion whether the judgment is erroneous and should be set aside. The Act confers no further power than the decision of what is satisfactory proof. It is not even the proof of facts satisfactory to his mind, but it is proof satisfactory to his mind of facts upon which the law would pronounce that the judgment is erroneous and should be set aside.

There are, however, some errors of law in the proceedings or judgment which are established by the proof of facts, and which may be included within the meaning of this Act. We will best explain them by briefly stating the principles which controlled the practice both in law and equity.

It was a settled proposition of law "that motions to set aside judgments for irregularity, defect or error are competent before our Court of Common Pleas in all cases where the writ of error would be in England. See Mooney v. Welsh, (1 Mills, 133,) in which case substitution of a motion here in open Court in the place of a writ of error there is fully considered and decided, and has been acted upon ever since; Barns v. Branch, 3 McC., 19."—Mills & Co. v. Mills & Dickson, 6 Rich., 487.

The subject is discussed in every form in the numerous cases which naturally arose. See Surtell v. Brilsford, 2 Bay, 333; Mooney v. Welsh, 1 Mills, 133; Muir v. Muirhead, 2 Brev., 215; Posey v. Underwood, 1 Hill, 263; Farrow v. Dial, 1 McMullan, 293 [36 Am. Dec. 267]; Ingram v. Belk, 2 Rich., 111; Ingram v. Belk, 2 Strob., 208 [47 Am. Dec. 591]; Williams v. Lanneau, 4 Strob., 27; Haigler v. Hay, 2 Rich., 324; Crane v. Martin, 4 Rich., 251.

The practice in all the cases is regulated by the rules which govern in cases of writs of error in England, and the grounds upon which the judgment may be set aside are the same. The English practice (which is our own) is best expressed by quoting from a leading authority on practice: "If a judgment in the King's Bench be erroneous in matters of fact only and not in point of law,

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it may *be reversed in the same Court by writ of error coram nobis or quæ coram nobis resident, * * * as where the defendant, being under age, appeared by attorney, or the defendant was a married woman at the time of commencing the suit, or died before verdict or interlocutory judgment; for error in fact is not the error of the Judges, and reversing is not reversing their own judgment. So upon a judgment in the King's Bench, if there be error in the process or through the default of the clerks, it may be reversed in the same Court by writ of error coram nobis. But if an erroneous judgment be given in the King's Bench and the error lie in the judgment itself and not in the process, a writ of error does not lie in the same Court upon such judgment."—Tidd's Pr., 1056–8.

So in 2 Saunders, 101, note: "Error may be brought in the same Court where the judgment was given when the error is not assigned for any fault in the Court, but for some defect in the execution of the process or through the default of the clerks. * * * So a writ of error may be brought in the same Court for an error in fact. * * * But if the error be in the judgment itself and not in the process, a writ of error does not lie in the same Court, but must be brought in another."

The reason why the same Court as gave judgment can set aside the judgment on error of fact, fraud, misrepresentation, duress, abuse of process, &c., (Posey v. Underwood, 1 Hill, 263,) is "because error in fact is not the error of the Judges; therefore the reversion of such judgment is not reversing their own judgment."—2 Sellon's Practice, 400.

Thus, the proceeding may be had in the same Court where the error lies in mistake or deviation from the truth in matters of fact or in mistake or deviation from law by parties or by the subordinate officers of the

Court during process. These latter may be called errors in law, but they are not errors of law in the judgment, for they occurred not in the judgment, but in process, and must be apparent in the record. The mode of procedure in equity by which to set aside a decree and get a rehearing or new hearing is distinctly stated in Simpson v. Downs, 5 Rich. Eq., 421. If the application be made before the filing of the decree, it must be by petition and for a rehearing; if after the filing of the decree, the remedy can only be had by application in proper form for leave to file a bill of review.

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*The most recent case in which the power of the Court on the question of rehearing is distinctly stated is that of Hunt v. Smith, 3 Rich. Eq., 465. On page 540, "a bill of review," says Dargan, Ch., who delivered the opinion, "and a motion for a rehearing are entertained on similar grounds. There are but two grounds on which either of these proceedings will lie: First. They will be entertained on account of error of law, apparent upon the face of the decree, and any part of the record may be resorted to for the purpose of making such error of law in the decree manifest. * * * The other ground upon which a bill of review or a motion for a rehearing will be entertained is newly-discovered testimony." He then proceeds to discuss the character of the testimony. The rule as thus laid down is much stronger than in any of the preceding cases. But the application was made to the Court of Appeals for a rehearing by that Court, and was made before the decision was rendered or pronounced. With this explanation the rule is entirely in accord with that laid down in the case of Jeannerett v. Radford, (Rich. Eq. Cas., 469,) by the learned Chancellor before whom the petition for rehearing was heard, and by whom the difference between the rules in the English practice and our own is most clearly stated. On the rehearing he thus states the rule: "It was decided by the late Court of Appeals in equity that after a full and final hearing the Court is not at liberty to open cases for rehearing on account of error in the decree.—Burn v. Poang, 3 DeS., 596. The present Court of Appeals, in the case of Haskell v. Raoul, (1 McC. Eq., 22,) held the same opinion. The Court, to be sure, decides on the ground that the specific motion had been disposed of by the former Court, but strongly intimates the concurrence in the doctrine established. If the Court of Appeals cannot rehear its own decree, it would seem to follow that this Court cannot rehear a decree sanctioned by that Court. In England there can be no rehearing after an appeal to the House of Lords. But by the Act of Assembly of 1808 orders and decrees of the Judges not appealed from 'shall have the same effect with decrees sanctioned by the Court of Appeals.'—7 Stat., 304. I think that I ought to rehear so as to correct any apparent error of a decree delivered by myself, provided the application be made before the time for appealing has elapsed. * * * I have said 'a decree made by myself,' for my authority to rehear the decree of another Chancellor for error apparent would be more than questionable." * * * See also Hinnin v. Pickett,

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(2 Hill *Eq., 351,) which was a case where the ground for rehearing was newly-discovered evidence.

In Manigault v. Deas, (Bail. Eq., 283,) the point decided in Haskell v. Raoul is affirmed —"that a bill of review will not lie for error in law apparent on the face of the decree. This is a point regarded as settled, and both policy and the safety of suitors require that it should not be open for argument."

The motion for rehearing before the decree is filed is analogous to the motion for new trial at the same term before judgment entered up, and the correction of error of law apparent upon the face of the decree is governed by nearly the same rules as the correction of judgment, as in Mooney v. Welch, (Mills, 133,) for error apparent upon the record. It must be such an error in law, apparent on the face of the decree, as is "obvious on a mere statement, when the correction can be made consistently with the principles of the decree itself."—Perkins v. Lang, 1 McC. Eq., 31, note.

In this State it has never extended further since a Court of Appeals in Equity has been established. The remedy has been by appeal, and by the Act of 1808 the orders and decrees of a Chancellor sitting on circuit, when not appealed from, have ever had the same force and effect as decrees of the Court of Appeals. Where a decree was impeached for fraud, or to be set aside or suspended for error in fact, the proceeding was by original bill. To this remedy the Act of 1869 would apply, and the grounds for the motion could be established by evidence.

The Code of Procedure, adopted in 1870, and re-enacted, together with the Act of 1869, (the latter, that of 1869, being altered by the omission of mention of the Court of Equity, and being applicable only to judgments in Common Pleas,) provides, by Section 197, special remedy in case of "mistake, inadvertence, surprise or excusable neglect," provided the application be made within one year after the party has had notice of the judgment, order or other proceeding of which he complains. The Code, in Title II, Chapter I, Revised Statutes, p. 651, further enacts (Section 349) that "the only mode of reviewing a judgment or order in a civil or criminal action shall be that prescribed by this Title." The only exception to review by appeal is in the case of orders "made out of Court without notice to the adverse party."

The view that we take of the Act of 1869 as it was enacted, or as it was re-enacted in the Revised Statutes, p. 497, confines the

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*meaning of the Act to the method of procedure, and recognizes in it no change in the legal grounds upon which the relief either at law or in equity would previously have been granted or refused.

There is no error apparent on the face of the decretal order made by the Circuit Judge in 1869, nor is error of fact, fraud, abuse of process, mistake or surprise alleged. The decretal order sustained the constitutionality of an ordinance and statute which were afterwards pronounced to be in violation of the Constitution of the United States. No appeal was taken from the order, and it is the law of that case just as much as if it had been confirmed by the Court of last resort. —Dupont v. Johnson, Bail. Eq., 279; Britton v. Johnson, Dud. Eq., 24; Act 1808, 7 Stat., 304. But it is needless to cite further authority than that already adduced upon so well-established a proposition, which has not been changed or altered by the Act of 1869.

The judgment appealed from is reversed and the motion granted.

WILLARD, C. J., and McIVER, A. J., concurred.

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10 S. C. 278

HARRISON v. MANUFACTURING COMPANY.

(Columbia. April Term, 1878.)

[*Judgment* ⇐292.]

The entry in the judgment book is the judgment in the cause, and not necessarily the judgment roll; and a copy thereof is the transcript which may be filed in another County.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 572; Dec. Dig. ⇐292.]

[*Judgment* ⇐292.]

A certificate by the Clerk of the Court "that the foregoing is a correct transcript from the docket of judgments kept in my office," *held* to be sufficient to entitle the transcript to be considered as a judgment when filed in another County.

[Ed. Note.—Cited in Clark v. Melton, 19 S. C. 509.

For other cases, see Judgment, Cent. Dig. § 572; Dec. Dig. ⇐292.]

[*Judgment* ⇐301.]

Motion to amend a judgment may be made as well upon the transcript filed in another County as upon the original judgment.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 592; Dec. Dig. ⇐301.]

[*Judgment* ⇐772.]

An order upon a summons to show cause declaring a judgment a lien on the real property of defendants makes the original judgment or transcript, as the case may be, valid and binding from the entry of such order.

[Ed. Note.—Cited in Hardin v. Melton, 28 S. C. 47, 4 S. E. 805, 9 S. E. 423; Kennedy v. Kennedy, 86 S. C. 498, 68 S. E. 669.

For other cases, see Judgment, Cent. Dig. § 1329; Dec. Dig. ⇐772.]

Before Thomson, J., at Aiken, April Term, 1878.

This was a rule to show cause, issued in a case entitled W. H. Harrison, assignee of John M. Clark & Sons, against the Southern Porcelain Manufacturing Company.

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*The case is stated in a brief, of which the following is a copy:

This is a rule to show cause, issued by Judge Thomas Thomson at the April extra term, 1878, of the Court of Common Pleas for Aiken County. The rule was based on the affidavit on behalf of the appellant showing that the Sheriff, the respondent, had received from sales of the real estate of the defendant company on sales day in December, A. D. 1877, and January, A. D. 1878, the sum of $1,647.28, which the appellant claimed should be applied in payment of the above judgment.

The return to the rule admitted the reception of the money, but stated that the Sheriff had been notified in writing by the attorneys of J. L. & H. W. Addison, who also held a judgment against the defendant company, that said money was applicable to said Addison judgment and not to the Harrison (appellant) judgment.

At the hearing, the appellant, Harrison, introduced the following evidence:

I. Transcript of judgment, of which the following is an exact copy:

Names of parties against whom judgments have been obtained—The Southern Porcelain Manufacturing Company. Attorney—J. P. Carroll.

Names of parties in whose favor judgments have been obtained—J. M. Clark & Sons. Attorney—J. L. Addison.

Damages and costs—Amount of judgment, $4,955.90. Interest from 1st March, 1871. Attorney's costs, $15.00. Clerk's costs, $5.87½. Sheriff's, $3.50. Costs on appeal Supreme Court—Attorney's costs, $160.00. Clerk's Circuit Court, $10.00. Administering 4 oaths, $2.00. Clerk Supreme Court, $4.50. Printing argument for Supreme Court, $5.00. J. Jones, for recording, $4.50. Sheriff Richardson, 40 cents. Total amount costs and disbursements, $210.77½.

Filed on the day of , 18 office, , 18 .

I certify that the foregoing is a correct transcript from the docket of judgments kept in my office.

[Seal.] Jesse Jones, Clerk C. C. P.

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*The following endorsement appears on the back of said transcript:

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The State of South Carolina,
County of Edgefield.

John M. Clark & Sons, Plaintiffs,
Against
The Southern Porcelain Manufacturing Company, Defendants.

Transcript of Judgment.

J. L. Addison,
Plaintiffs' Attorney.

Amount and interest.....	$6,858 06
Costs and disbursements.....	210 77½
	$7,068 83½

Filed 9th August, 1876.
Filed 12th August, 1876.
Charles Edmonston.
C. C. P. & G. S.

All of said endorsement is in the handwriting of J. L. Addison, Esq., except the number of the judgment roll in Aiken County, "283," and the words "filed 12th August, 1876, Charles Edmonston, C. C. P. & G. S.," which are in the handwriting of Charles Edmonston, then Clerk of the Court of Aiken County. Said transcript was docketed in Aiken on said 12th of August, 1876.

II. Summons to make a judgment a lien:

State of South Carolina, County of Aiken.
In the Court of Common Pleas.
W. H. Harrison, Assignee of J. M. Clark & Sons, Plaintiff,
Against
The Southern Porcelain Manufacturing Company, Defendants.

Summons to Make a Judgment a Lien.

To the Southern Porcelain Manufacturing Company:

Whereas judgment was obtained in the

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Circuit Court for the *County of Edgefield and State of South Carolina, on the 1st day of March, A. D. 1871, in the above entitled cause against the defendants; and whereas the said judgment was docketed in this County on the 9th day of August, 1876, —the said judgment being for $4,955.90, with costs and interest,—and it is desired to make said judgment a lien in accordance with the Act of the General Assembly of the said State, approved the 25th day of November, 1873, and the Acts amendatory thereto:

Now, therefore, you are summoned to appear at the term of the Circuit Court to be held for said County on the second Monday of September, A. D. 1877, and then and there show cause, if any you have, why said judgment should not be revived and become a lien on all the real property of the said judgment debtor in this County according to law.

D. S. Henderson,
Plaintiff's Attorney.

Dated 6th August, A. D. 1877.

Said summons was served on T. J. Davies, President of the company, on the 9th day of August, 1877. At the September Term, 1877, Judge Reed passed the following order:

"The within summons having been served on T. J. Davies, President of the Southern Porcelain Manufacturing Company, the defendant, and no appearance having been made in answer to said summons, ordered that the same be filed in the office of the Clerk of the Court of Aiken County, and that the judgment therein mentioned be, and the same is hereby, declared a lien on all of the real property of defendants in this County for ten years. J. P. Reed.

"September 10th, 1877."

Said summons was filed in his office by the Clerk of the Court of Aiken County, and entered on the abstract of judgments on the 10th of September, A. D. 1877.

III. Execution issued on above transcript, dated 9th August, 1876, marked as received by Sheriff 12th August, 1876.

IV. Renewal execution on said judgment, issued and lodged with Sheriff 7th December, A. D. 1877.

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*V. The following transcript from Edgefield (which has never been filed in Aiken):

Names of parties against whom judgments have been obtained—Southern Porcelain Manufacturing Company.

Names of parties in whose favor judgments have been obtained—John M. Clark & Sons. Attorney—J. L. Addison.

Damages and Costs—Amount of judgment, $4,955.90. Interest from 7th March, 1871. Attorney's costs, $15.00. Clerk's costs, $5.87. Sheriff's costs, $3.50. Total amount costs and disbursements, $4,980.27.

Filed on the ——— day of ———, 18—.

Clerk's Office, Edgefield, February 14th, 1878.

I certify that the foregoing is a correct transcript from the docket of judgments kept in my office.

[Seal.] O. F. Cheatham, Clerk.

The respondent, M. T. Holley, Sheriff, at the hearing, produced the notice of the attorneys of Addison & Addison warning him not to pay out the money in question to any other judgment than theirs; also the judgment roll in the case of J. L. & H. W. Addison against the Southern Porcelain Manufacturing Company, which showed that their judgment was entered up and docketed on the 4th day of October, 1877, and execution issued same day. It is admitted that this judgment and execution complies with the law in all respects.

The judgment of His Honor the Circuit Judge is as follows:

Thomson, J. M. T. Holley, Sheriff of Aiken County, was ruled to show cause why he had not paid the sum of $1,647.28, alleged to be in his hands, to W. H. Harrison, assignee of the above case. He made return in substance that he had been notified by Mr. Croft, attorney for Addison & Addison, judgment creditors of the defendant, that W. H. Harrison claimed under a transcript of a judgment alleged to be irregular and void, and that they (the Addisons) were entitled to the money. The Sheriff called the attention of the Court to these conflicting claims. The funds in his hands arose from the sale of realty. A portion of the money had been paid to older liens without objection, leaving the question of right to the balance in his hands to be determined by the Court.

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*It was alleged for W. H. Harrison that his judgment had been docketed years before in the Clerk's office at Edgefield; that on the 12th of August, A. D. 1876, a transcript of the judgment was docketed in the office of the Clerk of the Court at Aiken; that the transcript was a lien on the land of defendant from such time, and was entitled to the proceeds of sale accordingly. W. H. Harrison also produced a summons to make the judgment a lien, on which was endorsed the order of Judge Reed, 10th September, A. D. 1877, declaring it a lien for ten years. The judgment of Addison & Addison was docketed in the Clerk's office at Aiken on the 4th of October, A. D. 1877, to which there was no exception.

The validity of the transcript was the question in the case. Section 305 of the Code (Rev. Stat., 640,) provides "that transcript of a final judgment, directing in whole or in part the payment of money, may be docketed with the Clerk of the Court of Common Pleas in any other County, and when so docketed shall have the same force and effect as a judgment of that Court."

To understand what a transcript should contain, it is necessary to ascertain the requisites of a judgment.

The judgment should contain (amongst other things) the title of the case, a general description of the Court, the names of the parties, the term of the Court, how judgment has been obtained, (by default or otherwise,) the relief granted and determination of the action.—2 Till. and Shearm., 693.

An execution follows the judgment, and on page 642, Rev. Stat., the contents of an execution are set forth: The execution must refer intelligibly to the judgment, stating the Court, the County where the judgment roll is filed, the names of the parties, the amount of the judgment, if it be for money, the amount actually due thereon and the time of docketing in the County to which the execution is issued.—4 Wait's Pr., 16.

An abstract is a less quantity containing the virtue and force of a greater quantity. —2 Barrett, 4. A transcript is generally defined a copy, and is more comprehensive than an abstract.

Tested by the above rules, the transcript in question is deficient in not a few particulars. The term of the Court, the time when judgment was obtained, in what County, the character of the judgment, when docketed or filed, the customary recitals and determination of the cause, are wanting. In the opinion of the Court the transcript is so defective as to create no lien upon the property of

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*the defendant. It is urged, however, that the power of amendment be exercised by the Court, so that, referring to the record at Edgefield, information may be drawn therefrom and the transcript amended in its defective parts. If the certificate to the transcript be correct, the judgment may be defective, as the certificate does not show when the judgment was docketed or filed at Edgefield.

But the obvious objection to the amendment is, that the rights of third parties have intervened, and no amendment can be allowed which would have the effect of displacing their vested rights.—4 Wait's Pr., 670; 1 Wait's Dig., p. 82, § 77.

Though such amendment would be allowed between the parties and against the defendant seeking to set the judgment aside.—1 Wait's Dig., p. 83, § 78; McKee v. Tyson, 10 Abb., 392.

Nor is W. H. Harrison aided by the summons to make the transcript a lien. The A. A. 1874–75, p. 891, provides "that no judgment shall constitute a lien, etc., unless a transcript thereof is lodged in the office of the Clerk of the Court of Common Pleas of the County where the property of the judgment debtor may be situate." Such transcript means a valid, legal one; and the summons to make the judgment a lien being based upon it must fall with the defective transcript.

It is adjudged and ordered that the rule against Sheriff Holley in the case aforesaid be dismissed. That Sheriff Holley apply the money in his hands arising from sales of the property of defendant in payment of costs of this rule, and then to the satisfaction of the judgment of Addison & Addison, if so much be in his hands.

That leave to amend the transcript is granted, and upon amendment made it shall have effect nunc pro tunc as between the assignee Harrison and the Porcelain Manufacturing Company.

W. H. Harrison, assignee, excepted to the foregoing decree, and appealed therefrom on the following grounds:

1st. That His Honor erred in holding that the transcript from Edgefield, filed in the Clerk's office at Aiken on the 12th of August,

1876, was so defective as not to create a lien on the defendant's property.

2d. That His Honor erred in not allowing said transcript, if defective, to be amended as against the claims of Addison & Addison.

3d. That His Honor erred in dismissing the rule.

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*4th. That His Honor erred in not ordering the respondent to pay the money to the judgment of the appellant.

Henderson, for appellant:

The first question for the attention of the Court is the finding of the Circuit Judge that the transcript of the Clark judgment (assigned to the appellant, and which was docketed in the Clerk's office at Aiken on the 12th of August, 1876,) "is so defective as to create no lien upon the property of the defendants." It is submitted that said finding is erroneous. The Circuit Judge seems not to regard the paper submitted as no transcript, but as a defective transcript,—so "defective" as not to create a lien. The whole paper, its face and endorsement, should be construed together as a whole. Its endorsement shows that it is from Edgefield County, and that it is a judgment; its face shows the names of the judgment debtors and creditors, and the amount of judgment, and the time from which the judgment draws interest (which must be presumed to be its date); that the case has been to the Supreme Court, and that the judgment is filed in the office of the Clerk who signs it. The letters "C. C. P." to the name of the Clerk shows the Court, and the seal shows the County. True, there is no date (by inadvertence) to the certificate, but the date of docketing and filing in Aiken County, on the 12th of August, 1876, in the handwriting of the Clerk of the Court of Common Pleas for Aiken County, shows that the paper was in existence long before the rendition of the Addison judgment and properly filed in Aiken.

It was contended by respondent's counsel, at the hearing below, that the paper was not a "transcript of a final judgment," within the meaning of Section 305 of the Code, and that a "transcript of a judgment" means a copy of the judgment; and the corresponding Section of the New York Code (Section 282) was referred to as showing that a wrong practice has sprung up in this State by taking, in pursuance with said Section, a "transcript of the docket" of judgments instead of a transcript of the judgment. We are relieved from here repeating our argument that the paper in its outline is fully a transcript of a judgment in the meaning and intent of Section 305 of our Code by the finding of the Judge that it is a defective transcript.

We could hardly imagine that a form which has been sanctioned by a practice throughout the State for nearly ten years,

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and by *the use of which the titles to so much land has been effected, could be assailed by such a technical construction of a statute which, if it means anything, clearly and in all legal contemplation only directs a mode of giving notice of the existence of a judgment.

How, then, should the paper in question be construed in order to ascertain its efficacy or deficiency? It is submitted we should look more to the substance than the form. Section 268 of our Code (the same words being used in the New York and California Codes) defines "a judgment [as] the final determination of the rights of the parties in the action." In Freeman on Judgments, (2d ed.,) Section 47, we find: "Whatever may have been requisite formerly, it is evident that the sufficiency of the writing claimed to be a judgment must, at least under the Code, be tested by its substance rather than its form. If it corresponds with the definition of a judgment as established by the Code—if it appears to have been intended by some competent tribunal as the determination of the rights of the parties to an action, and shows in intelligible language the relief granted—its claim to confidence will not be lessened by a want of technical form, nor by the absence of language commonly deemed especially appropriate to formal judicial records. The entry of a judgment, like every other composition, should be comprised of those words which will express the idea intended to be conveyed with the utmost accuracy. It should also be a model of brevity, and contain no unnecessary directions."—Same authorities, §§ 50, 51.

The Court is especially referred to the very conclusive cases of Sears v. Burnham, 17 N. Y., (3 Smith,) 445, and Fish v. Emerson, 44 N. Y., (5 Hand,) 376. Upon these authorities we confidently submit that the paper in question is not "so defective as to create no lien on the property of the defendants," especially as against the Addisons, who had notice of its existence. They, copartners in business, resident attorneys at Edgefield, and one of them the attorney of Clark & Sons, and he actually having transferred said transcript to Aiken County, as appears by his endorsement in writing upon its back.

The Circuit Judge erred in finding that the appellant is not "aided by the summons to make the transcript a lien."

(a) The summons was not "to make the transcript a lien," but, as shown on its face, "to make [a] the judgment a lien."

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*The summons recited the judgment as being obtained at Edgefield, in the Circuit Court, on the 1st of March, 1871, and specified the names of the parties and the amount, and that the said judgment had been docketed in Aiken County. The question at issue, then, between the parties to that summons was the validity of that judgment. If the transcript was necessary to the creation of

the lien under the Act of 1874–75, p. 891, or if its defectiveness was a defense to said creation, the company defendant should have made it; but, to the contrary, they made default, and on the 10th of September, A. D. 1877, before the Addison judgment was obtained or entered, Judge Reed passed, in open Court, a solemn order declaring said judgment a lien for ten years, said order being based upon facts which embraced not only the transcript but the judgment itself.

(b) The judgment in question, having been obtained before the amendment to the Code in question, was not a lien on the lands of the defendants until a levy was made and certain acts done in the Clerk's office. The judgment was obtained in Edgefield County, where the defendant corporation resided, and where their land was then situate; afterwards, to wit, in October, 1872, Aiken County was formed, and the property of the defendants and their residence became in Aiken County. Hence the summons had to issue from the Common Pleas of Aiken, and the case on the summons was tried and determined in Aiken.

Suppose that Clark & Sons had not sued defendants until Aiken was formed, yet if judgment had been obtained before the Addisons', no question of priority could be raised. What is the difference in the case raised on the summons? Certainly no one would doubt but that the Common Pleas of Aiken could exercise jurisdiction to revive a judgment obtained in Edgefield when the land to be effected by the judgment was in Aiken.

(c) There is a strong distinction between "another" County and the "new" County, which contains a part of the County where the original judgment was obtained. Whatever rights were held or existed on the defendants' property were not divested by the placing of that part of the County in a new County.

"The erection of a new County subsequently to the docketing of the judgment, including in its limits the land of the debtor, does not release or otherwise affect the lien."—Freeman on Judgments, § 385.

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*(d) For all intents and purposes the proceedings had under the summons to make the judgment a lien was a case and trial between the parties to it, and Judge Reed's order adjudicated the facts raised in the summons.

His order was final, and cannot be treated as a nullity, especially in a collateral way.

Were there oppression, or fraud even, as between the parties to the action, unless said fraud was for the purpose of delaying, defeating or hindering creditors, other creditors cannot complain—they are estopped.—Peters v. Smith, 4 Rich. Eq., 203; Picket v. Picket, 2 Hill Ch., 471.

Even admitting that "the transcript is so defective as to create no lien on the property of the defendants," and that the alleged defect therein has not been cured by the order of Judge Reed on the "summons to make the judgment a lien," we submit that the Circuit Judge erred in not allowing the transcript to be amended as against the claim of Addison & Addison.

He admits the ample authority given under the Code to amend a judgment, "after trial" as between the parties, by his leave to amend, but alleges that no amendment can be allowed which will interfere with the rights of third parties intervening. The question is, what third parties are intended? and the authorities say not junior judgment creditors with notice, but bona fide purchasers. We are in a Court of equity, and strict law should give way to equity.

"Where a judgment had been actually vacated, but the order vacating it was subsequently set aside, the original lien of the creditor was restored and enforced as against junior judgment creditors, no equities in favor of bona fide purchasers or encumbrances having intervened."—King v. Harris, 30 Barb., 471; Geller v. Hoyt, 7 How., 265.

In Hunt v. Grant (19 Wend., 90,) a docket of a judgment was amended nunc pro tunc by increasing the amount from $3,000 to $30,000. Numerous judgments had been recovered against the defendants after that in question had been docketed, but by the amendment the plaintiff obtained a preference over them all. The Court, by Brunson, J., say: "If the three creditors who appear had given credit or granted indulgence to the defendants, if they had omitted any diligence in attempting to secure their debts, or had in any other way acted on the supposition that

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the plaintiff's *judgment was no more than $3,000, it would be proper to protect them from an unrestricted amendment of the docket, but nothing of the kind is alleged; * * * they rely wholly on the fact * * * that they have subsequent judgments, and, consequently, may be affected by correcting the docket."

Did the Addisons ever act on the faith of Clark & Sons having no lien? Certainly not. They knew of it, and one took part in obtaining it. And to them may be said: "No man can take advantage of his own wrong."

To the same effect are the cases of Hart v. Reynolds, to be found in a note in Chichester v. Cande, 3 Cowen, 39; Man v. Brooks, 7 How., 449; also Freeman on Judgments, §§ 66, 67, 71.

Aldrich, Croft, contra:

The questions before the Court may be briefly stated thus:

1. Is the paper termed in these proceedings "the transcript from Edgefield" in law a transcript of judgment?

2. If it is, is it not fatally defective?

3. Can it be amended?

4. Does Judge Reed's order of 10th September, 1877, aid it?

5. Is not the Circuit Judge's order correct?

Let us refer to the law of this State as to transcript of judgment, next the law of New York, and then note the difference:

"A transcript of a final judgment, directing, in whole or in part, the payment of money, may be docketed with the Clerk of the Court of Common Pleas in any other County, and when so docketed shall have the same force and effect as a judgment of that Court."—Code, § 305, subdiv. 2; Rev. Stat., p. 640.

"Upon filing a judgment roll upon a judgment, directing, in whole or in part, the payment of money, it may be docketed with the Clerk of the County where the judgment roll was filed, and in any other County upon the filing of the Clerk thereof a transcript of the original 'docket,' and shall be a lien on the real property in the County where the same is docketed."—New York Code, § 282.

Our Act uses the expression "a transcript of a final judgment;" that of New York says "a transcript of the original 'docket.'"

The two Codes are similar (ours being a transcript of the New York Code) for many Sections just preceding the passages quoted; but when we reach the subject of transcripts

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of judgment, the *framers of our Code expressed their intentions in a single sentence of four lines and rejected the provisions of the New York Code, which cover an entire page.

Our Code is founded upon that of New York. Generally it is an exact copy, and the annotated Codes of New York are, as a matter of convenience, almost exclusively used. Our legal forms are, as a rule, imported whole and intact from New York. Perhaps the true solution of the question before this Court is that this difference in the two Codes has escaped the notice of the profession.

"A judgment is the final determination of the rights of the parties in the action."—Code, § 268; Rev. Stat., p. 630; New York Code, § 245.

"Unless the party or his attorney shall furnish a judgment roll, the Clerk, immediately after entering the judgment," shall make up the judgment roll, and that roll must in all cases include "a copy of the judgment."—Code, § 305; Rev. Stat., p. 640; New York Code, § 281.

This paper called the "transcript of judgment from Edgefield" does not state how it was obtained, whether on failure of defendant to answer, on a verdict, or report of Referee, by confession, or for want of a reply to an answer. The Code provides a form of judgment in each of the above cases, and it is a transcript of the New York Code in every instance.

Again, it is the duty of the Clerk "to sign officially all judgments and state the time when each is signed and entered."

There is nothing in the "transcript of judgment from Edgefield" as to its being signed or entered by the Clerk or any one else.

Section 288 of the Code says the Clerk shall make an entry in his minutes, specifying * * * "the verdict, and either the judgment rendered thereon," &c.

That is wanting here. What was the judgment?

Just here it is well to note that the word "docket" is used in our Code, also in that of New York.

Section 10, subdiv. 5, Rev. Stat., p. 177, provides for a "docket." After enumerating the various kinds, it says: "No cause shall be entered on the docket except by the Clerk or his deputy, nor by him until the pleadings are made up. The dockets for the Court shall be regularly preserved as a record of the Court, and shall show, in separate columns, the number of cause, number of term, names of parties, cause of action, plaintiff's attor-

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ney, defendant's *attorney, (and, in the Sessions, prosecutor's name,) order of the last Court, and place for the event of suit, to be entered by the Judge."

Suppose the New York law to exist here,—would this "transcript from Edgefield" be "a transcript of the 'docket'"? A docket is one of the records of the Court. But what does the present "transcript" say as to the "number of term," "cause of action," "order of the last Court," and what has the Judge entered in the "place" reserved for him to enter the "event of suit"? The "transcript" is silent, meaningless and a nullity.

We cannot expect to find much authority on this subject, as our Code, so far as it refers to the subject under discussion, is new. That refers to "transcripts of judgment." The New York authorities are not in point, because they refer to "transcripts of dockets," separate and clearly defined subjects.

Before leaving the subject of dockets, I would call to the attention of the Court two matters of which it will take notice: That for a docket to be such it must be that of some Court. The "transcript" from Edgefield does not say of what Court's docket it is a transcript, whether the Court of Common Pleas, Probate Court, or that of a Trial Justice. We can guess that it is not taken from the Sessions docket—if guessing can aid a record.

If we are satisfied that our Code means what it says, "a transcript of final judgment," our next inquiry is, what is a transcript?

We maintain that it means a copy—nothing more, nothing less; just as we use in Court a copy of the former judgment when such is pleaded as an estoppel, or the certified copy of the lost deed, and not an abstract. Transcript, exemplification and copy are synonymous terms; any dictionary will show this.

Transcript.—"That which has been transcribed; a writing made from and according to an original; a writing or composition con-

sisting of the same words with the original; a written copy."—Webster's Dictionary.

It is derived from the Latin, is a compound word, made up of trans, across, over, and scribere, to write.

Exemplification.—"That which exemplifies; a copy: a transcript; an attested copy or transcript, under seal, of a record." It is taken from the Latin exemplum, example, and facere, to make.—Webster's Dictionary.

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*Copy.—"A pattern for writing; transcript."—Webster's Dictionary.

"Transcript is a copy of any original writing or deed, &c., where it is written over again or exemplified."—3 Tomlinson's Law Dictionary, 631; 2 Bouvier's Law Dictionary, 605.

The word was used in 34th and 35th Henry VIII, Chap. 14, (now repealed,) and ever since it has been in legal phraseology used to denote a copy. In fact, it seems to have been used in that sense from the beginning of language.

If, then, a transcript is a certified copy of a judgment, our next inquiry is, what are the essentials of a judgment, without which it cannot exist, and is "the transcript of judgment from Edgefield" wanting in any essential particulars, and what?

We have seen that the Clerk must sign all judgments, stating the time when it was signed and where entered, also that the present "transcript" is wanting in these particulars.

"The complaint shall contain the title of the cause, specifying the name of the Court in which the action is brought, the name of the County in which the plaintiff desires the trial to be had," [this latter clause is changed by recent legislation, but the change has no bearing on the question,] "and the names of the parties to the action—plaintiff and defendant."

"A plain and concise statement of the facts constituting a cause of action."—Code, § 165; Rev. Stat., 604.

"A judgment is the decision or sentence of the law, given by a Court of justice or other competent tribunal, as the result of proceedings instituted therein."—1 Bouv. Inst., p. 264, § 676.

The complaint is the basis upon which the judgment rests, and the execution is the result of the judgment; it must refer to the judgment, and its validity consists in the truth of the recitals. The execution must be directed to the Sheriff, * * * attested by the Clerk, * * * and must intelligibly refer to the judgment, stating the Court, the County where the judgment roll or transcript is filed, the names of the parties, the amount of the judgment, if it be for money, and the amount actually due thereon, and the time of docketing to which the execution is issued.—Code, § 312; Rev. Stat., p. 642.

This "transcript" does not state "the name of the Court in which the action is brought,"

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the "name of the County;" it does *not even give the name of the State; it does not recite "a plain and concise statement of the facts constituting a cause of action," &c.

A judgment to be valid must be rendered by a Court of competent jurisdiction, but we must know the name of the Court to ascertain its jurisdiction. The venue must be stated; here it is wanting. Without knowing the venue we cannot ascertain the jurisdiction, as every Court in this State, except the Supreme Court, depends upon territorial limits for its jurisdiction. I need not refer to the statutes on this subject—they are too familiar.

Then our "transcript from Edgefield" was obtained in an unknown Court, an unknown State, an unknown County—I should say a nameless Court, State and County, for neither are stated. But, worse still, the judgment is not given, for in the transcript we find no copy of a judgment, not even a Judge's name, not even a date.

I will not discuss the question whether or not this "transcript" created a lien on defendants' property; for if it fails as a judgment, its lien, which is the consequence of the judgment, being a part, an element, of the whole, falls with it.

Does Judge Reed's order of September 10th, 1877, aid the defective judgment?

When the Harrison judgment was obtained, according to the recitals in the summons to make the Harrison judgment a lien on real estate, it did not constitute such a lien. A judgment did not then bind real estate, save when execution was duly issued. It was obtained under Section 313 of the Code, now repealed. The summons to make it a lien was issued under and in pursuance of Section 14, to be found on page 498, 15 Statutes at Large, which provides * * * "and in cases where judgments have been obtained since the 1st day of March, A. D. 1870, a like lien may be obtained by the service of a summons upon the judgment debtor * * * to show cause, if any he or they may have, why said judgment should not be and become a lien in accordance with provisions of this Act; and if no sufficient cause be shown to the contrary, said judgment shall be and become a lien on all the real property of the judgment debtor in the County where entered," &c.

The object of this amendment was twofold: First, to make future judgments a lien on real estate in the County where entered; and second, to provide a means by which those judgments obtained between the date of the adoption of the Code and the passage

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of *the amendment might be placed upon an equality. The only difference was that the one constituted a lien upon real estate, while the other did not. The amendment provides that a summons shall issue upon what? The

judgment. And for what purpose? For the defendant to show cause why "said judgment" [the one already obtained under the prior law] should not become a lien in accordance with the provisions of the amendment. If no sufficient cause is shown to the contrary "said judgment" shall be and become a lien, &c. These proceedings under the amendment presuppose an old judgment; they apply to that only. Their object is not to make a new judgment, but only to add a new element to the old judgment, to wit, to make it a lien upon real estate. Now, if the judgment never existed, or was a nullity, then no new element could be added to it. Recording a deed is prescribed by law, yet no one would say that recording would make a defective deed valid. So with a mortgage. The object of recording the mortgage and the service of summons under the amendment is, in many respects, to accomplish similar ends —to make their lien legal and valid. Therefore the proceedings by summons under the amendment were nugatory, for we have shown that the "transcript from Edgefield," being invalid, would not support the proceedings.

As to the amendments sought, they cannot be granted for three reasons:

1. It does not appear that a proper motion to amend was made; such a motion should state in what particular the amendment is sought. A general motion to amend anything and everything is no motion at all. It is too uncertain, and the Court will pass it without consideration. "An order granting leave to amend generally, without stating in what particular, is, it seems, irregular."—Thompson v. Malone, 13 Rich., 252.

2. Because to amend a record there must be something on the face of the record to amend by. The face of the record should show the mistake, and also show how that mistake may be corrected. Here the record shows no Court. How will this Court undertake to say it was obtained in any Court at all, and which? The same may be said in regard to the State, County, date, cause of action, nature of judgment, &c. What appears upon the record by which we can make these numerous amendments?—Thompson v. Malone, 13 Rich., 252; Brown v. Hillegas, 2 Hill, 448; Bank v. Condy, 1 Hill, 209.

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*"Process which does not contain the name of any Court is not amendable."—Ward v. Stringham, 1 Code R., 118; Anonymous, 1 Code R., 75.

The transcript when filed constitutes the judgment; it is a judgment in itself, and has no connection with any other.—R. S., 640; 15 Stat., 498.

3. An amendment will not be allowed when its effect will be to prejudice the rights of third parties. As between the parties to the record, an amendment, nunc pro tunc, may be granted when it does not interfere with the vested rights of third parties. Here, then, is no question as to the regularity and validity of the Addison judgment, and if the Harrison judgment is amended the effect will be either to divest the Addison judgment of its vested lien or to make it a second lien. Practically it will take the money from the Addisons, who are in no default, and give it to Harrison, whose proceedings are defective in every particular.—Gough v. Walker, 1 Nott & McC., 479; Galpin v. Fishburne, 3 McC., 22.

There is another view of this question of amendment which we think precludes appellant's right to amend. This is a motion, or ought to be.—Code, § 417. It should be in writing, and notice should have been served on the defendant.—Code, § 418. The Southern Porcelain Company ought to be a party to this motion to amend.

November 20, 1878. The opinion of the Court was delivered by

HASKELL, A. J. As stated in the Court below, "the validity of the transcript [of judgment] was the question in the case," and the Circuit Judge decides that "the transcript" is so defective as to create no lien.

The decision rests upon the legal presumption that the transcript lodged cannot be a copy of a judgment, for it does not contain the requisites of a judgment; or upon this: that if the transcript be correct, the judgment is defective and constitutes no lien. There is attached to the "transcript" a certificate "that the foregoing is a correct transcript from the docket of judgments kept in my office.

"[Seal.] Jesse Jones, C. C. C. P."

And no evidence was produced to show that the certificate was erroneous. Can it be said that there is error upon the face of the

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*transcript? A judgment is defined to be "the final determination of the rights of the parties in the action."—Rev. Stat., 630, § 268. It must be signed officially by the Clerk.—Rev. Stat., 181.

There may be several separate and distinct judgments in the same case determining the rights of the several parties. Judgments on verdicts and on the findings of fact by the Court are subject to the same rule, as also judgments where there are only questions of law. The law of "judgments," in cases of trial by jury, therefore, has, of necessity, been changed, and we find that the Act of 1839 has undergone important modifications. —Rev. Stat., 173, 184. The provisions on the subject in the Code evidently design the adoption of the method formerly pursued in the Courts of equity, and in place of the book of decrees has adopted for cases in law as well as in equity (the distinction in name having been abolished) a "judgment book." Rev. Stat., p. 640, § 303: "The Clerk shall keep among the records of the Court a book

for the entry of judgments, to be called the judgment book." Section 304: "The judgment shall be entered in the judgment book, and shall specify clearly the relief granted, or other determination of the action."

It is obvious, on examination of the whole system, that the change is radical, and that the formalities of the postea have been done away with, and the record of the judgment is no longer, as formerly, in the judgment roll, but in the "judgment book," which, by Section 303, is made a book of record. That the judgment roll is not the best evidence of a judgment is clear from Section 305, p. 640, Revised Statutes, which defines the judgment roll as consisting of, in some cases, copies of the pleadings, in other cases the original pleadings; but in all cases, in addition to the pleadings, or copies thereof, there must be attached, not the judgment, but a "copy of the judgment." We are then to look for what constitutes a judgment, first, to the statutes which have introduced this new procedure. We have already cited the definition of a judgment and what the Clerk is commanded to enter in the judgment book. If the judgment, thus entered, specifies clearly the "relief granted, or other determination of the action," it is sufficient in law.

The transcript before us stated the names of the parties against whom the judgment has been obtained; the names of parties in whose favor judgment has been obtained; the amount of the judgment that it was for; damages and costs; the items of costs and disbursements, and the day from which inter-

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est on the judgment *begins to run. And it is followed by a certificate, signed and sealed, by "Jesse Jones, C. C. C. P.," "that the foregoing is a correct transcript from the docket of judgments kept in my office." Jesse Jones, C. C. C. P., is a public officer, and, as such, is known, and his identity is not disputed; he is an officer in the County of Edgefield, and the words "in my office" are equivalent to "the office of the Clerk of the Circuit Court for the County of Edgefield," for by statute (Rev. Stat., 504, § 3,) the Clerk of the Court must have a seal, and "each seal shall, in the legend, have the name of the Court in which it is used." The decision seems also to assume that "docket of judgments" means "abstract of judgments." There is a book called "abstract of judgments," and if the Clerk meant to designate that book he should have used the proper title. So, it may be said, on the other hand, he should have used the name "judgment book." But neither in law nor justice should an innocent party be made to suffer by the carelessness of another if it can be remedied. The first meaning attached to the word "docket" is a formal record of judicial proceedings.—Bouv. Law Dic. As a secondary meaning, the same authority says: "Docket is also said to be a brief writing, on a small piece of paper or parchment, containing the substance of a larger writing." The first meaning will effect justice, for about the justice of the case, the law being equal there can be no question, while the latter will impose hardship. There being no evidence to the contrary, "docket," &c., may then be taken to mean "the formal record" of the judgments, and that is contained in the judgment book. If it were necessary, there might be doubt whether the opposing creditors, who are joint plaintiffs, are not estopped from interfering with the priority of the appellant's judgment, for one of them certainly had notice, and, as attorney for the appellant, procured the transcript now in question, and has endorsed upon it the statements, in lack of which the transcript is charged with being defective. But that will not be considered.

As already indicated, we cannot perceive that it must in law be presumed that the transcript is not a copy of the judgment, and are of opinion that, there being no evidence to the contrary, the certificate of the Clerk must be received as true, and that the "docket of judgments" may be taken as designating the "judgment book." It is true that the transcript does not contain the signature of the Clerk of the Court, but that is not the

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judgment,—*it is merely the official evidence,—and that must be presumed. We regard the body of the judgment, certified by the same seal as stamped the original judgment, to be sufficient. The other question, perhaps, does not properly arise, but it is intimated in the decision that if the transcript be correct the original is no judgment. The views already expressed dispose of that objection, except, perhaps, with regard to the absence of date of entry of the judgment. The certificate of the Clerk, Jesse Jones, bears no date upon its face, but we think the statement of the date from which the interest runs on the judgment might be taken to designate the term of the Court at which judgment was obtained, while the date of the filing of the transcript in the office of the Clerk of the Court at Aiken is the only date which affects the rights of judgment creditors and the defendants' property in that County, under the amendatory Act of 1873, (page 499,) which is the Act on which the case must stand. Taking the transcript, then, to be correct, it is of the same force as the original. Let it be said that the original judgment is defective in form:—under the powers conferred by the Code such defect can be cured by the Court.—§§ 196, 199. The transcript being of the same force and effect as a judgment of that Court where it is filed, (§ 305 of the Code,) the motion to amend or cure the defect may be made on the transcript as well as on the original. Summons was served on the defendants in this case, reciting the judgment, and when and where obtained, and when docketed in Aiken, and

reciting the Act of 1873, and calling upon the defendants to show cause "why the said judgment should not be revived and become a lien on all the real property," &c. No appearance having been made by the defendants, the order bearing date September 10th, 1877, was made by the Circuit Judge, whereby the judgment was declared a lien. The judgment held by the creditors who claim precedence bears date subsequent to this order. After that order there was a subsisting judgment between the parties in the Court in Aiken having a lien upon the real property of the defendants in that County, and it could be assailed only upon such grounds as would have availed had it originally been entered in proper manner in that County.

The judgment of the Circuit Judge is reversed and the cause remanded for such further proceedings as may be necessary.

Motion granted.

WILLARD, C. J., and McIVER, A. J., concurred.

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10 S. C. *299

*THE STATE, ex rel. INGRAM, v. KENNINGTON.

(Columbia. April Term, 1878.)

[*Counties* ⇐191.]

County Commissioners cannot be compelled by mandamus to levy a special tax at any other time or manner than that fixed by law for the levy and collection of State and County taxes.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 305; Dec. Dig. ⇐191.]

[*Mandamus* ⇐13.]

Where the right to a mandamus is founded upon the refusal of the respondent to perform some legal duty, the question as to the relator's right to the mandamus cannot be considered until the duty to perform the act arises and has been refused.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 43; Dec. Dig. ⇐13.]

This was a petition to the Supreme Court by Silas Ingram against J. T. Kennington and others, as the Board of County Commissioners of Lancaster County, praying for a writ of mandamus to compel the respondents to levy and collect a special tax sufficient to satisfy a claim held by the relator against the Board of County Commissioners.

The facts were as follows:

On or about the 4th day of March, 1878, the respondents, pursuant to the provisions of the Act entitled "An Act to authorize County Commissioners to submit to the qualified electors of their several Counties a proposition to alter the fence law and to provide for effectuating the same," approved June 7th, 1877, made a contract with the relator for the erection of a fence containing three hundred and ninety-three panels, at forty cents per panel, amounting in the whole to $157.20, and promised the relator to levy and collect the tax for the payment of said sum at the same time and in the same manner as the other taxes should be levied and collected for the then fiscal year.

The contract was finished and accepted by the Commissioners on the 14th of March, 1878. On the 21st of March, 1878, the supply Bill was passed by the Legislature restricting the amount of taxes to be levied by the Commissioners for the whole line of fence to one and one-half mills. The whole line of fence which was built under the contracts made on the 4th of March, 1878, was about fifteen miles in length, and the contracts amounted in the aggregate to about $5,000,—to pay which would require a levy of about eight mills on the dollar of all the property liable to the payment of the tax.

The respondents levied and collected the tax of one and one-half mills on the dollar and paid the relator his pro rata share.

Allison & Connors, for relator.
Wylie & Hough, contra.

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*November 21, 1878. The opinion of the Court was delivered by

WILLARD, C. J. The relator seeks a mandamus to compel the defendants, as County Commissioners, to levy a tax under the provisions of the Act of June 7th, 1877, (16 Stat., 251,) for the payment of an amount alleged to be due him under a contract made by said Commissioners in pursuance of such Act, at a time and in a manner different from that prescribed by law for the levy and collection of State and County taxes. This cannot be done, as the Act directs that the tax shall be "collected at the same time and in the same manner as other State and County taxes are levied and collected."

The supply Bill for the year 1878 fixed the amount to be raised by the respondents as County Commissioners; and as the amount claimed by the relator was not then due, no provision was made for levying a tax for its payment. The County Commissioners have no authority by law to levy a special tax at any other time than that fixed by law for the annual State and County taxes; and as they had no authority to comply with the relator's demand in that respect, they have been guilty of no refusal to perform any duty imposed upon them by law, and, therefore, no ground exists for subjecting them to the writ of mandamus. Nor can the general question discussed as to the duty of the respondents to levy a tax independently of the provisions of the annual supply Bill be considered. It is to be presumed that the Legislature, if it shall assume to limit the amount to be raised by the next levy, will have due regard to the demand of the relator. At all events, the relator has no right to demand action on the part of the County Commission-

ers until provision is made for the next annual levy by a supply Bill, and, therefore, the County Commissioners cannot be placed as it regards such future levy in the position of having refused anything that the relator has a right to demand. This remedy, then, that hinges upon a refusal on demand to perform some act of legal duty, cannot be obtained against them.

The rule to show cause must be discharged.

McIVER, A. J., and HASKELL, A. J., concurred.

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10 S. C. *301

*THE STATE, ex rel. O'NEALE, v. FICKLING.

(Columbia. April Term, 1878.)

[*Justices of the Peace* ⇐36.]

A petition under § 12, Chapter LXXXIV, Gen. Stat., 435, by a landlord to eject his tenant, is not an action within the meaning of the term as used in Sections 81, 82, 83 and 84 of the Code of Procedure.

[Ed. Note.—Cited in State ex rel. Nesbitt v. Marshall, 24 S. C. 507.

For other cases, see Justices of the Peace, Cent. Dig. § 91; Dec. Dig. ⇐36.]

[*Prohibition* ⇐11.]

In a proceeding under § 12, Chapter LXXXIV, Gen. Stat., 435, by a landlord to eject his tenant at will, the question whether the relation of landlord and tenant existed is one of fact for the Trial Justice, and, if it existed, whether it was of the character required by the Act; and if his conclusion is erroneous, that is no ground for a writ of prohibition.

[Ed. Note.—Cited in State ex rel. Nesbitt v. Marshall, 24 S. C. 508; State ex rel. Sawyer v. Fort, Id., 519, 520; Swygert v. Goodwin, 32 S. C. 148, 10 S. E. 933.

For other cases, see Prohibition, Cent. Dig. § 36; Dec. Dig. ⇐11.]

[*Prohibition* ⇐10.]

The only ground for a writ of prohibition in such cases is, that the issue was not within the jurisdiction of the Trial Justice.

[Ed. Note.—Cited in State ex rel. Sawyer v. Fort, 24 S. C. 517; Holladay v. Hodge, 84 S. C. 95, 65 S. E. 952.

For other cases, see Prohibition, Cent. Dig. §§ 37-56; Dec. Dig. ⇐10.]

Before Shaw, J., at Richland, April Term, 1878.

This was a petition by Leora A. O'Neale praying for a writ of prohibition to restrain Francis W. Fickling, Trial Justice, and David Utley from the further prosecution of an action, so called in the petition, which the said David Utley had commenced before the said Trial Justice to eject the petitioner from certain premises in the city of Columbia of which the said David Utley claimed to be the owner in fee and that the petitioner was his tenant at will.

The case was as follows:

On April 8th, 1878, a summons was issued by Francis W. Fickling, Trial Justice, directed to the petitioner, requiring her to show cause before him within ten days from the personal service of this notice why she should not be ejected from the premises now occupied by her, situate in the city of Columbia, and now the property of David Utley, according to the Act passed 19th December, 1866. The summons was based on the affidavit of an agent of David Utley, stating that the petitioner was tenant at will of David Utley of the premises in question and that she held possession thereof and refused to surrender the same. The summons was returnable on April 18th, and on that day the parties appeared before the Trial Justice. The petitioner answered the summons, denying that she was the tenant at will of the said David Utley; that he had any title to the premises, and alleging that she herself was the owner thereof in fee.

Testimony was heard and witnesses examined before the Trial Justice, but before he had announced his judgment the proceedings were suspended by an order under the petition in this case.

The petition further stated that the petitioner had filed a proper undertaking according to the provisions of Section 83 of the

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Code *of Procedure, and requested the Trial Justice to countersign her answer to the summons of the said David Utley and deliver the same to him, and to "discontinue said action as required by Section of said Code."

On April 25th, 1878, His Honor the presiding Judge filed an order denying the writ of prohibition prayed for.

The petitioner appealed on the following grounds:

1. Because His Honor erred in not holding that the proceedings sought to be prohibited is an action, and, as it relates to real estate, the Trial Justice was without jurisdiction at all.

2. Because His Honor erred in not holding that, the same being an action, the Trial Justice could only consider it under the limitations of Sections 81, 82, 83, 84 of the Code of Procedure, and, upon the fact appearing by the return that the provisions of those Sections were complied with by the relator, the jurisdiction of the Trial Justice was terminated thereby, and that the prohibition should issue.

3. Because His Honor erred in refusing to grant the writ, when the fact appeared on the face of the return that the relator was not the tenant at will of the respondent, David Utley.

4. Because the order of His Honor refusing the writ is otherwise contrary to law.

Clark, Monteith, for petitioner.

Pope, contra.

November 21, 1878. The opinion of the Court was delivered by

WILLARD, C. J. This is an appeal from a judgment refusing a writ of prohibition.

The proceeding sought to be asserted was brought by the respondent, D. Utley, before the respondent, F. W. Fickling, as Trial Justice, to eject the relator, L. A. O'Neale, from certain premises alleged to be held by her as tenant at will of the said Utley. The relator joined issue on the petition, denying the existence of a tenancy at will, alleging want of title in the petitioner and title in herself.

The petition was filed under Section 12, Chapter LXXXIV, of the General Statutes, page 435.

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*The first ground of appeal is for error in holding that the proceeding was not an action. The Section in question was enacted prior to the adoption of the Code of Procedure, at a time when it could not in any sense be regarded as an action, nor is anything pointed out in the Code that can have the effect of changing its nature.

If the jurisdiction conferred by the statute in question is to be regarded as constituting an action, then, under Section 74 of the Code, it is denied to a Trial Justice. That this was not intended is evident from the fact that this Section was re-enacted as part of the General Statutes after the Code took effect. It follows that subdivision 2 of Section 81 of the Code, that excludes Trial Justices from the cognizance of "civil actions" where the title to land is in question, is inapplicable to the case. The second ground of appeal is disposed of by the conclusion just reached. The provisions of Sections 81, 82, 83 and 84, providing for removing proceedings from the jurisdiction of Trial Justices, are, in terms, confined to cases of actions pending before a Trial Justice, and do not apply to special statutory proceedings of a summary character.

The third ground of appeal is that it appeared on the face of the return that the relator was not a tenant at will of the respondent, D. Utley. It was for the Trial Justice to ascertain by proofs whether the relation of landlord and tenant existed between the parties, and, if a tenancy existed, whether it was of the character that the statute required. If the Trial Justice arrived at an erroneous conclusion, that is no ground for prohibition. The only ground on which the prohibition can be properly asked is that the issue was placed by law beyond his jurisdiction to determine the truth or falsehood of the allegations, or to proceed to judgment should the allegations of the defense fail of proof.

The fourth ground is general, and presents no question for consideration.

An order affirming the judgment of the Circuit Court has already been entered.

McIVER, A. J., and HASKELL, A. J., concurred.

10 S. C. *304

*CHANDLER v. GERATY.

(Columbia. April Term, 1878.)

The decision in this case as reported in 5 S. C., 501, explained.

[*Evidence* ⟸113.]

Where a tract of land is sold as a plantation, its fitness for culture is the chief, but not the only, element of value, and on the trial of an issue to determine its value it is error to confine the examination of the witnesses to the question as to the fitness of the land for culture.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 290; Dec. Dig. ⟸113.]

[*Compromise and Settlement* ⟸5; *Evidence* ⟸213.]

Propositions for a compromise made by a party to an action *held* to have been properly excluded as testimony against him, it being the policy of the law to encourage compromises and not to discourage them by holding the party to his offer.

[Ed. Note.—Cited in Lynn v. Thomson, 17 S. C. 136; Frick & Co. v. Wilson, 36 S. C. 69, 15 S. E. 331; Tenhet v. Atlantic Coast Line R. Co., 82 S. C. 467, 64 S. E. 232.

For other cases, see Compromise and Settlement, Cent. Dig. § 12; Dec. Dig. ⟸5; Evidence, Cent. Dig. § 745; Dec. Dig. ⟸213.]

Before Wallace, J., at Charleston, February, 1878.

This was a second trial of the case of Chandler v. Geraty, reported 5 S. C., 501, to which report reference should be had for a full understanding of the case as now reported.

At this second trial the plaintiff offered his own testimony, taken by commission, to the effect, amongst other things, that during the negotiation for the purchase of "Martin's Point," Geraty represented that it was the best location on the river for a store, and that his (Geraty's) main object in buying the land was to get the point for a store, and that he cared very little about the land for cultivation; that there was a dwelling house on the place near the landing, a store near the landing, a cotton house and some negro houses; that Geraty knew the land before he purchased it; that at the time of the agreement to sell there was nothing said about the number of acres which the tract contained, but it was afterwards agreed that there should be a survey to ascertain what was the number of acres, and Geraty then proposed that if the plaintiff "would discount $500 he would take the place without having a survey."

The defendants objected to the testimony taken by commission, and His Honor excluded it, holding that the only issue was as to the fitness of the place for culture, and that such testimony was irrelevant. Other testimony was offered by the plaintiff, to which objections were made and sustained, and the defendants were allowed to introduce a plat of the land, dated in 1822, without calling the party who made it, and also a certified copy of a former deed of conveyance of the

same land without notice; and a witness for the defendants was allowed to testify that he was perfectly familiar with the lands in dispute, and that the plat and deed given in evidence correctly represented the amount of

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land (eight hun*dred acres) which the tract contained and the quantity of marsh and upland.

The jury found for the plaintiff $57.33, and he appealed.

Campbells & Whaley, for appellant.
DeSaussure & Son, contra.

November 22, 1878. The opinion of the Court was delivered by

McIVER, A. J. The action in this case was upon a bond given to secure the payment of the purchase money of a plantation on Wadmalaw Island. The condition of the bond contains these words: "This bond subject to an apportionment, if, on a survey, there proves a deficiency of the land for the purchase of which this bond is given."

The plantation was represented as containing twelve hundred acres, a part of which was marsh and a part high land. On the survey there proved to be a deficiency of over seven hundred acres, leaving only one hundred and eighty-nine acres of high land and two hundred and fifty-seven acres of marsh land, and the question was, how much should the bond be reduced by reason of such deficiency? By a previous decision of this Court, (5 S. C., 501,) it was determined that the land was sold as a plantation, and, therefore, fitness for culture was the chief element of value and that, to carry into effect the true intent of the contract, it was necessary to reduce the sum to be paid to the actual value of the property sold, which value must be ascertained by considering the gross price at which the twelve hundred acres was estimated, and the relative quantities and values of the two kinds of land the tract was then assumed to contain, as well as the relative quantities and values of the two kinds of land which the tract was ascertained by the survey actually to contain. This we understand to be the proper construction of that decision, by which, of course, we, as well as the Circuit Court, must now be guided. The Circuit Judge, however, seems to have construed that decision as if it held that fitness for culture was not merely the chief but the only element of value. It may be very true that, in estimating the value of a plantation, fitness for culture is the chief element to be considered, but it is not true that it is the only element. The location of a plantation, its convenience to market, &c., often constitutes a very material element in estimating

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*the value of a tract of land as a plantation. So, too, the improvements upon it appurtenant to agricultural purposes often add greatly to the value of a place which is bought and sold exclusively for planting purposes. It is every day's experience that a plantation well supplied with barns, stables and other structures necessary for farming purposes will sell for more—is of more real value—even when purchased only as a plantation, than one of a similar quality of soil, or of equal fitness for culture, without these necessary conveniences. Even the condition of the fencing often affects the saleable value of a plantation. So that to confine the testimony strictly, as was done, to the fitness of the land for culture, was not in accordance with a correct view of the former decision of this Court, and was erroneous.

One of the witnesses was asked: "What was the most valuable part of this property as a plantation? How would the products of the place reach the market?" These questions were objected to and the objection was sustained. In this we think there was error, for it was excluding an inquiry into what, as we have seen, was one of the elements of value in a plantation—its accessibility to market. Certainly if a purchaser buys a plantation represented as fronting on the water, by means of which easy access to market may be had, and it should turn out that the water front, embracing a narrow strip of but a few acres, is covered by a paramount title, whereby access to market is cut off, or rendered much more expensive and difficult, it would not do to say that the value of the plantation, merely as a plantation, is impaired only to the extent of the value of these few acres, estimated solely with a view to their fitness for culture. Again, if a purchaser of a plantation loses, by paramount title, a single acre upon which the farm buildings happen to be located, no one would contend that the purchase money should be reduced only to the extent of the value of this one acre, estimated solely with a view to its fitness for culture. The correct rule would be to estimate, not what was the value of the buildings, because they might be much more expensive than was necessary for farming purposes, but how much is the value of the land as a plantation diminished by the loss of this acre containing the farm buildings. So, on the other hand, if a plantation well supplied with all the necessary improvements, and having convenient and easy access to the market, is purchased at a gross price, and there should prove to be a deficiency in some part of it, not affecting

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these conveniences, *it surely will not do to say that, in ascertaining the amount to which the purchase money should be reduced, the part so lost must be estimated as of equal value per acre with the part containing the improvements and affording the conveniences to market, which perhaps enhanced largely the gross value of the place, simply

because all of the land was of equal fertility or equally fitted for culture. The deficiency contemplated by the contract in this case was not merely a deficiency in quantity but in value also. Hence, in determining how the bond is to be apportioned, all the elements of value in the place as a plantation must be considered, and to confine the testimony to one of those elements, even though it be the chief one, was error.

The other exceptions taken to the rulings below we do not think can be sustained.

The letters of Geraty, by which the appellant proposed to show his knowledge of the boundaries of the land and the area thereof, as well as his estimate of the value of the deficiency in the land, were properly excluded. In the first place, the letters set forth in the case, submitted by the appellant, do not show any such knowledge; but, if they did, the terms of the contract provided that this should be determined, not by any knowledge or estimate of the parties, but by a survey; and it would be clearly incompetent to vary this material part of the contract by substituting any other mode of measurement for that fixed by the contract—the survey—unless there had been evidence showing that the parties had agreed to vary or waive this material part of the contract, and there was no such evidence. For the same reason, so much of the testimony of the plaintiff as related to the same matter was incompetent. We are unable to perceive how this kind of testimony could have availed the plaintiff to show fraud on the part of the defendants, even were it allowable to do so under the state of the pleadings. The defendants may have had, and doubtless did have, a general idea of the extent and boundaries of the place, but the very fact that a special provision was inserted in the contract whereby these matters were to be determined by a survey shows that defendants were not governed and were not expected to be governed by their previous knowledge of the area or boundaries of the land.

So much of the plaintiff's testimony as tended to show the value of the land on account of the eligible site it afforded for a store, and that this was a consideration

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moving the defendants to make the *purchase, was inconsistent with the principles established by the former decision of this Court, and was, therefore, properly excluded. As to what is called the estimate which the defendants placed upon the amount of the deficiency, by their offers to agree to certain specified reductions of the amount of the bond, it is very manifest that such testimony was properly ruled out. These propositions were made simply with a view to avoid litigation, and it is against the policy of the law to discourage parties from attempts to settle their differences by holding them up to any propositions they may make in the course of negotiations for that purpose after such negotiations have failed. The amount of it was simply this: we will settle upon the proposed terms if you are willing to do so, otherwise the Court must determine. The refusal of the plaintiff to accede to the terms proposed released the defendants from their offers, and the case must be considered as if no offers of a settlement had been made.

The objection to the use of the copy plat and deed was properly overruled for the reasons stated by the Circuit Judge.—See also Lawry v. Pinson, 2 Bail., 324 [23 Am. Dec. 140].

The judgment of the Circuit Court is set aside and a new trial ordered.

WILLARD, C. J., concurred.

HASKELL, A. J., dissenting. I cannot concur, as I perceive no inconsistency in the ruling of the Circuit Judge under the previous decision of this Court in the same case.

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10 S. C. 308

REEVES v. SIMS.

(Columbia. April Term, 1878.)

[*Execution* ⇐272.]

Where lands are sold by Sheriff under execution against B, and A forbids the sale, claiming the land as hers, that is sufficient notice of her title to a purchaser.

[Ed. Note.—Cited in Adickes v. Lowry, 15 S. C. 133; McPherson v. McPherson, 21 S. C. 268, 274.

For other cases, see Execution, Cent. Dig. § 785; Dec. Dig. ⇐272.]

[*Pleading* ⇐382.]

In an action to recover the possession of land under pleadings which allege merely that the plaintiff is seized in fee and which contains a denial of the allegations of the complaint, it is competent for the defendant to introduce evidence at the trial tending to show that the plaintiff held the land as trustee for defendant.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 1287; Dec. Dig. ⇐382.]

Before Mackey, J., at Lancaster, September Term, 1877.

This was an action by James B. Reeves against Amanda Sims to recover the possession of lands.

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*The complaint alleged that the plaintiff is seized in fee of the premises and that the defendant is in possession. The answer merely contained a general denial of the allegations of the complaint.

At the trial the plaintiff gave in evidence: First, two deeds, dated in 1869, by which the defendant conveyed the land in dispute to one James A. P. Blackmon; second, a deed from James A. P. Blackmon to Samuel B. Sims for the same land, dated in 1871; third, a judgment of James B. Reeves against Sam-

uel B. Sims, execution thereon lodged in the Sheriff's office, levy on the land in dispute, sale thereunder, and a conveyance in March, 1875, by the Sheriff to the plaintiff.

The defendant contended that the deeds by herself to Blackmon were fraudulent and void, and gave evidence for the purpose of establishing the fraud. She also testified to facts tending to show that Blackmon held the land as a trustee for her. She further testified that she was present at the Sheriff's sale under which the plaintiff claimed and that she forbid the sale.

The plaintiff objected to the introduction of evidence tending to show fraud, on the ground that no fraud was alleged in the answer. The objection was overruled.

The plaintiff's counsel then requested the Court to charge as follows:

"That, even should they believe the testimony of the defendant, if the plaintiff, James B. Reeves, had no notice or knowledge of the alleged fraud or of the alleged trust in favor of defendant before his purchase of the land at Sheriff's sale, then their verdict should be for plaintiff, especially if they found that there was laches or negligence on the part of the defendant in the prevention of such alleged fraud or in the discovery of such alleged trusts."

The Court declined so to charge, having already charged them that if they believed that the defendant had forbid the sale and claimed the land at the time plaintiff purchased, and before he bought, and that plaintiff knew of this before he bought, that it was sufficient to put him upon his guard and saved the plaintiff's rights. This was repeated to the jury, and it was added that, the defendant being an illiterate person and unable to read or write, negligence could not be

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imputed to her for signing a deed upon *the representations of others and in ignorance of its contents; and that if they believed the defendant's testimony, and that the deed was not read over to her, it would authorize a verdict for defendant. The plaintiff's counsel excepted to the refusal to charge as requested.

The jury found for the defendant.

The plaintiff appealed.

Allison & Connors, for appellant.

Moore, contra.

November 22, 1878. The opinion of the Court was delivered by

HASKELL, A. J. The only exception taken in this case is to the refusal by the Judge to charge the jury "that, even should they believe the testimony of the defendant, if the plaintiff, James B. Reeves, had no notice or knowledge of the alleged fraud or of the alleged trust in favor of the defendant before his purchase of the land at Sheriff's sale, then their verdict should be for plaintiff, especially if they found that there was laches or negligence on the part of the defendant in the prevention of such alleged fraud or in the discovery of such alleged trusts."

The defendant testified that she "forbid the sale at Sheriff's sale," and that "Reeves was present when she forbid the sale." That was actual notice. If the jury believed "the testimony of the defendant," the conclusion that Reeves did have notice is unavoidable. The charge requested was, in effect, "that, even should the plaintiff have had notice, if the plaintiff had no notice, &c." Such a charge would have been wholly incongruous, could only have misled the jury and was properly refused in toto by the Judge. It is useless to say that the latter portion of the charge requested may have been unobjectionable. It followed as an incident to the first, or was so intended, and must stand or fall with it. If the entire charge, as requested, is refused, it is the duty of the Attorney, not of the Judge, to sever the request if it contain distinct propositions and present them separately. There can then be no mistake as to what is asked or what is refused. It may be that the plaintiff did mean to take exception to the ruling of the Judge with regard "to the introduction of evidence tending to show fraud in the deed from Amanda Sims to Blackmon, there being no fraud alleged in the answer, but simply a general

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denial." The exception, if taken, is *not clearly expressed. The reply, however, is conclusive. The complaint sets forth no specific title to the land in dispute, and a general denial was the only defense possible. When the plaintiff proceeded in his case by setting up his title, the defendant had unquestionably the right to produce any and every kind of evidence in defense which she might have set up in the answer had the plaintiff alleged the facts in his complaint.

The judgment is affirmed.

Motion refused.

WILLARD, C. J., and McIVER, A. J., concurred.

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10 S. C. 311

HINSON v. CATOE.

(Columbia. April Term, 1878.)

[*New Trial* ⇐133.]

A motion for a new trial on the minutes must be heard at the term at which the trial was had; it cannot be heard at a term held two years afterwards.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 272; Dec. Dig. ⇐133.]

[*New Trial* ⇐101.]

Facts which were within the knowledge of a party at the time of the trial cannot be made the foundation of a motion for a new trial on the

ground of after-discovered evidence, though he was unable to prove them.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 206; Dec. Dig. ⟸101.]

Before Mackey, J., at Lancaster, October Term, 1875.

This was an action by Charles F. Hinson against James Catoe, on a promissory note, which was tried at the October Term, 1875, when a verdict was rendered for the defendant. The plaintiff then made a motion on the minutes of the Court for a new trial. This motion was not heard until August, 1877, when a special term of the Court was held, when it was heard upon an affidavit by the plaintiff, dated 17th August, 1877, which stated:

"That in the trial of the above case for the recovery of said note the defendant was allowed credits as discounts—one for ten dollars and another for seventy-five dollars—for which said amounts the plaintiff had given the defendant credit upon a note against him, sued on by the plaintiff, before B. R. Clyburn, Trial Justice, upon which judgment was obtained, execution issued, and the balance thereof collected.

"That at the time of the trial of the said cause the plaintiff could not avail himself

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of this testimony, for the record of the *Trial Justice's case of the plaintiff, Charles F. Hinson, against the defendant, James Catoe, tried before the said B. R. Clyburn, the said Trial Justice, which contained the last mentioned note upon which the said credits of ten and seventy-five dollars were given, the same being in the possession of the said Trial Justice, was then lost; and, though every search was made for the said record and note contained therein, the same could not at that time be found.

"That the plaintiff offered proof otherwise of said credits; but upon objection being made by the defendant that the said record and note offered the best testimony as to whether the said credits had been made, and that it ought to be produced, the Court properly sustained the objection and ruled out the secondary proof.

"That since the trial of the said action in this Court the testimony of the said credits has been discovered as having been made on the said note, by the finding of the said lost record with the note contained therein, and which is now in Court for its inspection, and proof of said credits of ten dollars and seventy-five dollars having been made by plaintiff upon the notes sued on before said Trial Justice, which were again claimed and allowed by the defendant as credits upon the notes sued on in this action.

"That deponent herewith submits that substantial justice has not been rendered him by the verdict of the jury in the said case, for and in that the defendant did recover judgment for a balance against the plaintiff by reason of there having been allowed to him by the said jury the credits given by the plaintiff on the other note herein mentioned, which, in addition to proper credits made on said note sued on in this Court by plaintiff, showed a balance in favor of defendant, and which balance claimed by him as a counter claim resulted in a verdict against plaintiff for the amount thereof, but which verdict would have been in favor of plaintiff if the said credits of ten and seventy-five dollars had been disallowed."

His Honor Judge Mackey made the following order granting a new trial:

"The jury having rendered a verdict in the above stated case at the October Term of the Court of Common Pleas for 1875, Lancaster County, in favor of defendant, and a motion for a new trial having been made at said term, the hearing of which motion was continued from term to term until a special term of this Court ordered by His Honor T. J. Mackey, the Judge of the Sixth Circuit,

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*to commence on the 14th day of August, instant, at which said term the motion for a new trial was heard, after the argument of counsel, and it appearing that newly-discovered evidence in favor of the plaintiff since the said trial of the cause had been found, on motion of W. L. DePass, counsel for the plaintiff, it is ordered that the verdict of the jury in the above stated cause, rendered in behalf of the defendant at the October Term, 1875, be set aside and a new trial be granted."

The defendant appealed on the following grounds:

1. Because the affidavit of the plaintiff upon which the application for the order was heard disclosed no cause sufficient in law to entitle him to a new trial.

2. Because the motion for a new trial was not heard and determined until after the expiration of the term at which the cause was tried.

3. Because the order was granted upon an affidavit, of which no copy had been previously served upon the defendant.

Moore, for appellant.

Del'ass, contra.

November 22, 1878. The opinion of the Court was delivered by

HASKELL, A. J. The order appealed from cannot come under the provisions of the Act of 1869, (Rev. Stat., p. 497,) for no judgment has been entered. Section 289 of the Code, Revised Statutes, p. 636, requires that a motion for a new trial, except where it is based upon a case and "exceptions," shall "be heard and decided at the same term." By the context it is made apparent that the "same term" means the term at which the trial was had.

The motion in this instance was made at

the same term on the minutes, but was heard and decided after the lapse of nearly two years, during which time, of course, several terms had occurred. The affidavit to support the motion bears date nearly two years after the trial and is of the date of the term at which the motion was heard and decided. To hear and decide at such term a motion made merely upon the minutes made by the Judge at the trial was clearly wrong. Moreover, the affidavit shows conclusively that the evidence therein set up was not

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"newly-discovered," as stated in the *Judge's order, but had been in the knowledge of the respondent at the time of the trial, and was then offered, but objection was made that the mode of proof by which he sought to introduce the evidence was secondary. The objection was sustained by the Court, and no appeal was taken. It is useless for the respondent to say that the papers which constituted the best evidence had been lost and now are found. On proof of the loss in the manner prescribed by the rules of evidence the secondary proof would have been admissible. The respondent admits that at the time of the trial he was acquainted with the facts which he sets up now as ground for new trial, but that he had failed in his efforts to prove them, by a mistaken view, on his part, of the law of evidence. That is no ground for a new trial.

The order granting a new trial is reversed.

Motion granted.

WILLARD, C. J., and McIVER, A. J., concurred.

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10 S. C. 314

MASON v. WINSMITH.

(Columbia. April Term, 1878.)

[*Descent and Distribution* ⟸133; *Executors and Administrators* ⟸423.]

A creditor of a decedent cannot maintain an action against one who is in possession of assets of the estate of such decedent where he has no lien upon such assets and no right to establish a lien in the action brought by him. His remedy is by action against the executor or administrator of the decedent.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. § 489; Dec. Dig. ⟸133; Executors and Administrators, Cent. Dig. § 1660; Dec. Dig. ⟸423.]

Before Mackey, J., at Spartanburg, October Term, 1877.

Action by Stephen D. Mason, administrator of James Mason, deceased, against John Winsmith.

The case was as follows:

The complaint alleged that the plaintiff was the administrator with the will annexed of James Mason, deceased; that on the 22d of January, 1864, Cassandra Barnett, since deceased, gave to the plaintiff, as administrator as aforesaid, her sealed note for $600; that after said note was given Cassandra Barnett died, leaving a last will and testament, of which she appointed her son, M. F. Barnett, the executor; that the said M. F. Barnett duly qualified as such executor; that the plaintiff sued the said M. F. Barnett,

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*executor as aforesaid, upon the said sealed note, and on the 9th day of May, 1870, recovered judgment thereon for $600, besides costs; that execution was duly issued on said judgment, and afterwards returned nulla bona by the Sheriff; that Cassandra Barnett was entitled at the time of her death to an undivided interest in the real estate of her deceased husband, Jorial Barnett; that proceedings were taken in the Circuit Court for partition of the real estate of the said Jorial Barnett, deceased, between his heirs-at-law and distributees, who were also heirs-at-law and distributees of Cassandra Barnett, then also deceased; that under said proceedings the said real estate was sold by the Sheriff, and on the 29th of July, 1875, a decree was made that the share of the said Cassandra Barnett in the proceeds of such sale be distributed equally amongst her heirs or their assignees; that the defendant was the assignee of two of said heirs; that he well knew of the indebtedness aforesaid of the said Cassandra Barnett to the plaintiff, but, nevertheless, did, on November 2d, 1875, receive from the Sheriff $360 of the proceeds of said sale under the said assignments to him by two of the distributees of the said Cassandra Barnett, deceased.

The complaint demanded judgment for the said sum of $360, besides interest and costs.

The defendant demurred to the complaint, and also put in an answer denying all the allegations thereof. The demurrer was on the ground that the complaint does not state facts sufficient to constitute a cause of action.

The case was first heard on the demurrer, which His Honor overruled; it was then heard on the issues raised by the answer and a verdict found for the plaintiff.

The defendant appealed upon the ground, inter alia, that His Honor erred in overruling the demurrer.

[For subsequent opinion, see 17 S. C. 585.]

Duncan & Cleveland, for appellant.

Evins & Bomar, Thomson, contra.

November 23, 1878. The opinion of the Court was delivered by

WILLARD, C. J. The plaintiff sues as administrator of a creditor of Cassandra Barnett and seeks to trace assets of the estate of Cassandra into the hands of the defendant, who, after the death of Cassandra, claiming to be the assignee of her distribu-

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tees, got into *possession of part of the assets of her estate. Plaintiff sets up a judgment recovered against M. F. Barnett, the execu-

tor of Cassandra, and an execution on such judgment returned nulla bona. The assets of Cassandra in question consisted of an undivided interest in the lands of which her husband died seized. These assets were not realized by Cassandra during her lifetime, but after her decease partition proceedings were instituted among the distributees of the estate of her husband, and the lands were sold for partition. The defendant, claiming to be the assignee of distributees of Cassandra obtained an order in the partition proceedings for the payment to him of the distributable share of his assignor, and an amount was paid to himself by the Sheriff in conformity with such order.

One of the questions presented by the appeal raised by the demurrer of the defendant to the complaint is the sufficiency of the cause of action set forth. It is necessary to consider whether the plaintiff has any title to follow the assets of Cassandra. He must make it to appear either that he has a lien on such assets or that he is entitled to establish such a lien in this action. That he has not a lien is apparent. He had no judgment at the death of Cassandra, and her estate passed into the hands of her executor without any charge in behalf of the plaintiff or his intestate that could prevent the disposition by her executor of the assets of her estate in the due and orderly course of administration. The law determined all priorities as it regarded the distribution of her estate. The judgment against her executor could not establish a priority of lien as affecting the assets in his hands: it bound the executor, but could not affect parties that had prior demands against such assets. Its effect upon the assets was to reach to such as were by law disposable to the class of creditors to which the plaintiff belonged viz., simple contract creditors. It is clear that under the judgment against the executor the plaintiff acquired the absolute right to go upon any and every part of the assets for the satisfaction of his judgment. As it regards the executor he was bound by such judgment to the extent of making him personally responsible to an amount equal to the judgment, on the ground that to that extent between the plaintiff in such judgment and the executor the existence of such available assets had been judicially established. The effect of this was to bind the executor personally in respect of assets but not to bind the actual assets so as to divert them from the due course of administration.

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*It must be concluded that no existing lien on the assets of Cassandra is shown to exist in favor of the plaintiff. The question then arises, can the plaintiff obtain such lien by a judgment in this action? The executor of Cassandra is not made a party. If any one is entitled to follow the assets of Cassandra into the hands of a distributee or of one claiming under a distributee, it is the executor of Cassandra. Certainly a creditor without a specific lien cannot exercise such right. As the executor is not a party, and the other creditors of Cassandra, if there are any, are not made parties, it is difficult to see how the plaintiff can establish a preference to be paid out of the assets. Yet unless such a preference is established the executor is entitled to hold the assets for distribution in the due and ordinary course, subject to the lien and priorities existing by law at the death of Cassandra. What might be the effect of joining the executor as it regards the other questions raised need not be considered, as no such fact exists. We must conclude that the plaintiff has no legal or equitable right to go against the assets of Cassandra in the hands of persons other than the executors.

McIVER, A. J., and HASKELL, A. J., concurred.

10 S. C. 317

DAVENPORT v. CALDWELL.

(Columbia. Nov. Term, 1877.)

[*Slaves* ⇐25.]

Where two slaves, persons of color, went through the form of marriage, lived together as husband and wife for a number of years, and died leaving issue before the general emancipation took place: *Held*, That, under the statutes passed under and since the Constitution of 1868 was adopted, said persons were to be considered in law as husband and wife—their children legitimate, and capable of inheriting from each other under the Statute of Distributions.

[Ed. Note.—Cited in State v. Whaley, 10 S. C. 501, 502; Herndon v. Moore, 18 S. C. 352; Dingle v. Mitchell, 20 S. C. 210, 211; Myers v. Ham, Id., 526; Clement v. Riley, 33 S. C. 80, 82, 11 S. E. 699; Callahan v. Callahan, 36 S. C. 463, 15 S. E. 727; Knox v. Moore, 41 S. C. 361, 19 S. E. 683; Roberson v. McCauley, 61 S. C. 421, 425, 39 S. E. 570; Lloyd v. Rawl, 63 S. C. 238, 239, 41 S. E. 312; Watson v. Ellerbe, 77 S. C. 234, 57 S. E. 855; Childs v. Childs, 93 S. C. 439, 77 S. E. 50.

For other cases, see Slaves, Cent. Dig. §§ 114, 115; Dec. Dig. ⇐25.]

[*Judgment* ⇐489.]

Where an inferior Court is without jurisdiction its proceedings are null and void, and may be so treated whenever they come before another Court for consideration.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 924, 925; Dec. Dig. ⇐489.]

[*Courts* ⇐198.]

The Court of Probate has no jurisdiction in cases for the partition of real estate.

[Ed. Note.—Cited in Herndon v. Moore, 18 S. C. 339, 343, 345, 346, 347, 348, 349, 354, 357; Schumpert v. Smith, Id., 359, 360; Thomas v. Poole, 19 S. C. 323, 334, 335; Tederall v. Bouknight, 25 S. C. 275, 280; Anderson v. Cave, 49 S. C. 505, 511, 27 S. E. 478.

For other cases, see Courts, Cent. Dig. § 471; Dec. Dig. ⇐198.]

[This case is also cited in Roberson v. McCauley, 61 S. C. 111, 39 S. E. 570, and distinguished therefrom.]

Before Northrop, J., at Abbeville, September Term, 1877.

This was a petition by Elihu Davenport and Katie, his wife, against Elizabeth Caldwell, for partition of real estate and account, originally brought in the Court of Probate for Abbeville County, and appealed to the Circuit Court of the same County.

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*The facts appear in the following statement prepared by counsel:

Many years ago a colored man named Joe, a slave of John Caldwell, of Newberry County, and a colored woman named Nancy, a slave of Edward Pitts, of Newberry County, lived together as man and wife, or were married according to the custom usual among persons in their station of life. They both remained in slavery until their deaths, which occurred, respectively, more than thirty years ago, and from their connection were born Willis Caldwell and Katie Davenport, who were both slaves until the general emancipation. Katie married Elihu Davenport, and they have both resided in Abbeville County for some years. On the 25th of February, 1875, Willis Caldwell, also a resident of Abbeville County, died intestate, leaving a small tract of one hundred acres of land and some personal property. He left surviving him his widow, Elizabeth Caldwell, whom he had married when they were both slaves and continued to live with as his wife until his death, and who took out letters of administration upon his personal estate on the 22d June, 1875; but he left no children or lineal descendants.

On the 17th of November, 1875, Elihu Davenport and Katie, his wife, brought suit against Elizabeth Caldwell, claiming that Katie is an heir-at-law and distributee of Willis Caldwell, deceased, and, as his sister, entitled to one-half of his estate, and praying that a partition might be had of his real estate, and that the defendant, as administratrix, might be compelled to account for his personal estate.

The answer denies that Katie Davenport is an heir-at-law or distributee of Willis Caldwell, and denies the right of the plaintiffs, or either of them, to demand of the defendant the account and partition prayed for.

The Judge of Probate made a decree in favor of the petitioner for partition of the real estate and an account of the personalty.

The defendant appealed to the Circuit Court upon the following grounds:

1. Because Willis Caldwell, the intestate, and Katie Davenport, the petitioner, having been born slaves, and having remained slaves until the general emancipation of slaves, the latter possesses no rights, absolute or relative, that have not been conferred upon her by law since emancipation.

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*2. Because the said Willis Caldwell and Katie Davenport having been born of a woman who lived in the state of concubinage at the time of their births, respectively, the said Katie Davenport is the illegitimate child of her mother, and is incapable of inheriting or of taking, under the Statute of Distributions, the property of the said intestate, Willis Caldwell.

3. Because Joe, the putative father of Willis Caldwell and Katie Davenport, having lived and died in slavery, never possessed the right or capacity so to recognize or acknowledge as his children the said Willis and Katie as to confer legitimacy upon them or upon either of them.

4. Because there is no proof that Joe, the putative father, ever, at any time during the lifetime of Nancy or afterwards, acknowledged or recognized the said Willis and Katie, or either of them, as his children.

5. Because the petitioner, Katie Davenport, is not a distributee of the intestate, Willis Caldwell, and the petition should have been dismissed.

6. Because the decree does not define or fix the share of the intestate's estate to which the petitioner is entitled and is void for uncertainty.

His Honor the Circuit Judge decreed as follows:

It is ordered and adjudged that the appeal be dismissed, and that the Clerk of this Court certify this judgment to the Probate Court for such further proceedings as may be deemed proper by the Judge thereof.

The defendant appealed on the following grounds:

1. Because Willis Caldwell, the intestate, and Katie Davenport, the petitioner, having been born slaves, and having remained slaves until the general emancipation of slaves, the latter possesses no rights, absolute or relative, that have not been conferred upon her by law since emancipation.

2. Because the said Willis Caldwell and Katie Davenport having been born of a woman who lived in the state of concubinage at the time of their births, respectively, the said Katie Davenport is the illegitimate child of her mother, and is incapable of inheriting or of taking, under the Statute of Distributions, the property of the said intestate, Willis Caldwell.

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*3. Because Joe, the putative father of Willis Caldwell and Katie Davenport, having lived and died in slavery, never possessed the right or capacity so to recognize or acknowledge as his children the said Willis and Katie as to confer legitimacy upon them or upon either of them.

4. Because there is no proof that Joe, the putative father, ever, at any time during the lifetime of Nancy or afterwards, acknowledged or recognized the said Willis and Katie, or either of them, as his children.

5. Because the Court of Probate cannot exercise jurisdiction of petitions for parti-

tion of real estate where any dispute exists in relation to the title thereof.

6. Because the Act of the Legislature conferring jurisdiction upon the Courts of Probate in cases of partition of real estate is unauthorized by the Constitution of South Carolina, and is, therefore, null and void.

7. Because the Act of 1872 "legalizing certain marriages," &c., is in conflict with Section 39 of Article I of the Constitution of South Carolina, and is, therefore, null and void.

8. Because the petitioner, Katie Davenport, is not a distributee of the intestate, Willis Caldwell, and the petition should have been dismissed.

9. Because the decree does not define or fix the share of the intestate's estate to which the petitioner is entitled and is void for uncertainty.

Burt, for appellant, filed a brief, containing the following points of law and authorities:

1. That, as slaves, Joe and Nancy were not husband and wife, and their relation was not marriage but concubinage.

2. That the respondent, Katie Davenport, and the intestate Willis Caldwell, were the natural children, if their children at all, of Joe and Nancy.

3. That, as emancipated slaves, the respondent and the intestate had no civil rights that were not conferred on them by emancipation or by statute.

4. That, as natural children, they had no capacity to inherit or take property or to transmit it from one to the other.

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*5. That the respondent, claiming an exemption from the disability of bastardy, must show that her disability has been removed.

6. That legitimacy can be conferred only by statute.

7. That the right of a putative father to recognize is a power, and there must be a grantee of the power and an act of recognition under it.

8. That the statute of 1872 relates to individuals only or a class of persons and is a private Act.

9. That it violates the Constitution of South Carolina, in that it is a discrimination in favor of colored persons.

10. That the Act conferring on the Probate Court jurisdiction in partition is unconstitutional.

11. That, if not unconstitutional, in this case the title to the land is in dispute, and the Probate Court has not jurisdiction.

Slaves in South Carolina had no civil rights—were incapable of making any contract—were mere personal chattels.—Act of 1740, Stat. at Large; Lenior v. Sylvester, 1 Bail., 642; Gregg v. Thomson, 2 Mill, 231; Gist v. Toohay, 2 Rich., 425. Consent of parties capable to contract, and not ceremony, necessary to valid marriage. Consent may be declared or presumed from reputation and cohabitation.—2 Kent Comm., 85, 87.

A slave cannot legally contract marriage. The union of slave and slave or slave and free negro is concubinage merely.—O'Neall's Negro Law, § 37, p. 23.

A bastard is a child born out of lawful wedlock and cannot inherit or transmit property.—1 Chit. Black., 379.

A bastard cannot claim under a devise to children generally though the implication be strong in his favor.—5 Ves., 530; 1 Ves. & Bea., 434.

In contemplation of law, children mean legitimate children.—7 Ves., 458; 1 Bouv. L. D., 244.

Katie Davenport, then, being a bastard and an emancipated slave, cannot inherit property or take under the Statute of Distributions unless the capacity to do so has been conferred by the Constitution or by statute. A bastard can be made legitimate only by Act of Parliament.—1 Chit. Black., 379.

The Constitution of 1865 merely forbids the existence of slavery—does no more.

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*Emancipation conferred only such civil rights as are not denied to colored persons. Legitimation of bastards did not ensue from emancipation.

The statute of 1865, Section 4, p. 31, is: "Every colored child heretofore born is declared to be the legitimate child of his mother, and also of his colored father, if he is recognized by such a father."

The Act of 1866 confers on colored persons all the rights of personal security, personal liberty and private property which white persons have, and prevents discrimination between the races, and repeals the Act of 1865. Both Acts are repealed by Revised Statutes.

The Constitution of 1868 does not confer legitimacy, but merely prohibits the denial by legislation of the rights of person and of property. Article 1, Section 12, gives nothing but mere equality of rights.

The Revised Statutes became law February 10, 1872, and the Act of 1872, p. 183, became a law March 12, 1872.

Chapter CXLVI, Section 3, p. 760, provides that "the repeal of the Acts and resolves, and parts of Acts and resolves, revised and re-enacted herein, or repugnant to the provisions hereof, shall not revive any law heretofore repealed or superseded."

Section 10 of the same Chapter provides "that all and every part of the common law of England, where the same is not altered by this Act, or inconsistent with the Constitution, customs and laws of this State, is hereby continued in full force and virtue in this State in the same manner as before the adoption of this Act."

As there is nothing in the Revised Statutes conferring legitimacy, the rule of the common law is made the law which applies to bas-

tards, and this was the law from February 10 to March 12, 1872.

The Act of March 12, 1872, is as follows:

"An Act Legalizing Certain Marriages, and for Other Purposes Therein Mentioned.

"Section 1. Be it enacted by the Senate and House of Representatives of the State of South Carolina, now met and sitting in General Assembly, and by the authority of the same. That all persons in the State of South Carolina who, previous to their actual emancipation, had undertaken and agreed to occupy the relation to each other of husband and wife, and are cohabiting as such, or in

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*any way recognizing the relation as still existing at the time of the passage of this Act, whether the rights of marriage have been celebrated or not, shall be deemed husband and wife, and be entitled to all the rights and privileges and be subject to all the duties and obligations of that relation in like manner as if they had been duly married according to law.

"Sec. 2. And all their children shall be deemed legitimate, whether born before or after the passage of this Act; and when the parties have ceased to cohabit before the passage of this Act, in consequence of the death of the woman, or from other cause, all of the children of the woman recognized by the man to be his shall be deemed legitimate: Provided, however, That no provision of this Act shall be deemed to extend to persons who have agreed to live in concubinage after their emancipation.

"Sec. 3. All Acts or parts of Acts inconsistent with this Act are hereby repealed.

"Approved March 12, 1872."

The Act of 1872 contemplates and describes persons in existence at the time of its passage and no others: "All persons in the State." &c.

There are four conditions of the legitimation of persons mentioned in the first Section: 1. That the man and woman had been emancipated. 2. That they had lived together as husband and wife. 3. That they were living as such at the passage of the Act, March 12, 1872. 4. That the man and woman both were living at that time.

Section 2 declares that the children shall be deemed legitimate. The words "and when the parties" mean the man and woman described in the first Section. No other persons are mentioned.

The existence of the man at the passage of the Act is plainly intended, as the death of the woman is mentioned.

The recognition of the children by the man plainly implies the existence of the man at the time of the passage of the Act.

The word "recognized" means acknowledged or recognized at the time of the passage of the Act or subsequently recognized. It does not mean past recognition.

To construe the words "recognized by the man" to mean antecedent and not present or future recognition would be to make the Act retroactive without that being the clear and necessary meaning of the words used. Such a construction is forbidden.

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*The rule is, that a retrospective meaning shall not be given to the words of a statute unless the intention of the Legislature is beyond doubt.—9 Bac. Abr. Stat., 235; Sedgw. Stat. and Cons., 187–190.

Statutes can never be applied retrospectively by mere construction.—Ibid.

That meaning is forbidden by the rule that "statutes are not presumed to make any alteration in the common law further or otherwise than the Act expressly declares."—9 Bac. Abr. Stat., 245; Sedgw. Stat. and Cons., 315.

Such a construction is forbidden by the further rule that a private statute must not bear a liberal construction.—9 Bac. Abr. Stat., 257.

There is still another rule which disallows the construction that antecedent recognition is the meaning of the Legislature: "If any part of a statute be obscure, it is proper to consider the other parts; the words and meaning of one part of a statute frequently lead to the sense of another."—Ibid. 239.

The Act of 1872, Section 2, does not declare the children of the deceased woman legitimate unless they are recognized by the man. The recognition of the man, then, is the condition of their legitimacy and confers it; it is a condition precedent. A condition precedent must be complied with, and if it be impossible no estate or right can vest.—2 Thom. Co. Litt., 18–22; 2 Black. Com., 154; 2 Freem., 186.

Recognition, then, is a condition, and, whether it be a condition precedent or a condition subsequent, it is a fact and must be proved; it cannot be presumed.

The respondent claims an exemption from a common disability of bastards; she claims that her disability has been removed, and she must show it beyond doubt.

No privilege is granted unless it be conveyed in plain and unambiguous words, testifying the intention of the Legislature in a manner too plain to be misunderstood.—21 Penn., 9; 25 id., 394; Sedgw. Stat. and Cons., 302.

The authority to legitimate the children of the woman by the recognition of the man is a grant of legislative power. The Act of 1872, page 163, gives to white fathers power to legitimate their colored children by will in certain cases. "There must be a grantee, donee, and that he be a person capable of the

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thing granted and *not disabled to receive it." and an acceptance of it.—Coke, 11–73; Plowd., 555; Shep. Touchst., 229.

Joe, the putative father, having been dead many years before emancipation, the grant as to him was void.

Recognition merely, or marriage of a putative father and mother, and subsequent recognition of children born before marriage, cannot confer legitimacy.

If, then, bastards can be made legitimate only by Act of the Legislature, and recognition be a condition, it follows that the recognition must be in pursuance of the power given, and necessarily subsequent to the Act.

By the civil law the marriage of the parents legitimates their children, and the rule has been adopted in many of the States by the Legislatures.

In North Carolina and Illinois marriage and recognition make them legitimate; but the recognition in the former State must be by petition of the father after the marriage and in the latter before an officer.—2 Bouv. L. D., 30.

The words "recognized by the man" in the ordinary or common meaning express present recognition, and to make them mean past recognition, other words, such as "have been," "at any time," must be added, and this the Court has no power to do.

"The best rule to arrive at the intention and meaning of the law is to abide by the words the law-maker has used."—9 Bac. Abr., rule 2, p. 238.

In Green v. Wood, (7 Q. B., 178–185, Sedgw., 245.) Lord Denman said: "We are bound to give to the words of the Legislature all possible meaning which is consistent with the clear language used; but if we find language used which is incapable of a meaning we must not supply one."

Lord Coleridge said: "The longer I sit here the more I feel the importance of seeking only the meaning of a statute according to a fair interpretation of its words and resting there."—Sedgw. Stat. and Const., 245.

Chief Justice Tyndall said: "It is the duty of all Courts to confine themselves to the words of the Legislature—nothing adding and nothing diminishing."—Sedgw. Stat. and Const., 246.

Whether the recognition of the man be past, present or future, it must be proved, and there was in this case no proof whatever of recognition by the man.

The Act of 1872 is unconstitutional.

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*We have seen that it legalizes the marriages of certain colored persons and confers legitimacy on certain colored children without conferring the same rights on white persons in the same circumstances.

Section 39 of Article I of the Constitution of 1868 is as follows: "No title of nobility or hereditary emolument shall ever be granted in this State. Distinction on account of race or color, in any case whatever, shall be prohibited, and all classes of citizens shall enjoy equally all common, public, legal and political privileges."

Probate Courts have not jurisdiction in partition.

The Constitution establishes Probate Courts and defines their jurisdiction in the following words: "A Court of Probate shall be established in each County, with jurisdiction in all matters testamentary and of administration, in business appertaining to minors and the allotment of dower, in cases of idiocy and lunacy and persons non compos mentis."

A statute creating a new jurisdiction must be construed strictly.—9 Bac. Abr., 245; Dwarris on Stat., 259.

Probate Courts have special or limited powers and are inferior Courts.

"Technically, an inferior Court is one of limited jurisdiction, and its jurisdiction must appear on the face of its proceedings, else they are void."—The State v. Fillebrowne, 2 S. C., 407.

"A Court of special or limited jurisdiction can claim nothing that is not expressly granted. It has no constructive powers."—McKensie v. Ramsay, 1 Bail., 457; Bloom v. Bostick, 1 Hill, (N. Y.,) 130.

In a dissenting opinion of Chief Justice Moses, in McNamee v. Waterbury, (4 S. C., 156,) he says: "To determine the extent of the jurisdiction of that Court [Probate] we must look to the Constitution—the Legislature is impotent to confer by Act any additional powers."—pp. 167–8.

"When the exercise of a power is claimed for a Court of limited jurisdiction, it must be shown to exist by express grant or necessarily consequent upon some power clearly given."—Ibid.

In Walker v. Veno, (6 S. C., 462,) the Court say: "It may be conceded, too, that when a new jurisdiction is conferred by statute on an inferior Court, its action under it will be void unless it be in conformity with the conditions prescribed for the exercise of such jurisdiction."

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*In Ex parte Carson, (5 S. C., 117,) this Court refused to issue a writ of certiorari because the power was not expressly granted by the Constitution.

In Waller v. Cresswell, (4 S. C. 353,) this Court ordered the constitutional power of the Probate Court to entertain a suit by an adult ward against his guardian to be argued, notwithstanding the Act of the Legislature.

Partition of real estate is not granted by the Constitution, and the power is not "consequent" upon any jurisdiction that is expressly given.

If the Legislature may not confer upon an inferior Court a power not granted by the Constitution, the Act in Revised Statutes, Section 40, p. 573, is unconstitutional, and the Probate Court has no jurisdiction in case of partition.

The Constitution of 1790 and that of 1865

vested the judicial power in such superior and inferior Courts as the Legislature might from time to time direct and establish.

The Constitution of 1868 creates the Courts and distributes the judicial power amongst them, delegating no power to the Legislature to increase or diminish their jurisdiction.

In Newell v. The People, (3 Seld., 97,) the Court of Appeals of New York say: "Whether we are considering an agreement between parties, a statute or a Constitution, the thing we are to seek is the thought it expresses. To ascertain this, the first resort is to the natural signification of the words employed in the order and grammatical arrangement in which the framers of the instrument have placed them—that which the words declare is the meaning of the instrument—and neither Courts nor Legislatures have any right to add to or to take away from that meaning." To the same effect is the Supreme Court of the United States.—2 Cranch, 358.

A Constitution is the permanent will of the people, is the supreme law, and paramount to the power of the Legislature.

"In this and all other countries where there is a written Constitution, designating the powers and duties of the Legislature as well as the other departments of the government, an Act of the Legislature may be void as against the Constitution."—1 Kent Com., 448; Story on Cons.

In Marbury v. Madison, (1 Cranch, 137,) the Supreme Court say: "If the Constitution does not control a legislative Act repugnant to it, then the Legislature may alter the Constitution by an ordinary Act."

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*If the Legislature may enlarge the jurisdiction of the Probate Court by adding a single power, it can abrogate the Constitution itself in any and all of its provisions.

Rules applicable to the construction of the Act of 1872 and the constitutional grant of jurisdiction to the Probate Court:

As to the consideration of hardship or policy in construction, in Smith v. Rues, (2 Sumn., 354–5,) Mr. Justice Story said: "It is not for Courts of Justice to provide for all the defects or mischiefs of imperfect legislation."

In Conflict of Laws, p. 17, he says; "Arguments drawn from impolicy or inconvenience ought to have but little weight. The only sound principle is to declare ita lex scripta est—to follow and obey."

To the same purport is the language of Mr. Justice Taunton, Dwarris, 597; the Supreme Court U. S., in McIver v. Ragan, 2 Wheat., 25; Lord Campbell, in 4 Ellis & Black., 670–9; Lord Abinger, in 4 Mees & Wels., 63.

In Portman v. United States, (4 Dallas, 30,) the Supreme Court U. S. say: "By the rules which are laid down in England for the construction of statutes, the British Judges have assumed a legislative power, and, on the pretense of judicial construction, have in fact made a great portion of the statute law of the kingdom."

In re Powers, (25 Vermont, 265,) Chief Justice Redfield says: "It is scarcely necessary, at this late day, to say that the judicial tribunals of the State have no concern with the policy of legislation."

The citations might be almost indefinitely multiplied.

If these rules have been solemnly announced by learned Judges in England and the United States for the Courts of general jurisdiction, are not they to be applied, in all their integrity, to inferior Courts?

The tendency of the judicial mind is to disavow any right to construe statutes according to considerations of policy or hardship and to recognize the duty of conforming to the will of the law-making body.—Sedgw. Stat. and Const., 337–80.

See also the case of Colston v. Quander, Virginia Law Journal, November, 1877, pp. 689 and 641.

There was no proof in this case of any marriage ceremony having been performed, nor, if any, of the consent of the master of either Joe or Nancy.

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*McGowan, contra:

It cannot be necessary to do more than state the propositions and cite the Constitution and laws upon the subject of this appeal. The deceased died intestate, and this is a simple application for partition and division under the Statute of Distributions. If these were white people there would not be a question.

1. "If the intestate shall leave no lineal descendant, but shall leave a widow, or brother, or sister, the estate shall be distributed in the following manner: The widow shall be entitled to one moiety and the other moiety shall be equally divided between brothers and sisters of whole blood," etc.—Rev. Stat., 438.

2. The statute makes no reference to color, and it is admitted that since emancipation former slaves, being persons, have all the rights of other citizens—to marry, to have heirs, to acquire property, to will it or transmit by descent under the statute.

3. But it is insisted that the disabilities of slavery still exist among persons now living as to every act that occurred during slavery; that none of the effects of emancipation are retrospective, but are only prospective; that Katie is not the sister of Willis, but Betsey is his widow and entitled to the whole of his estate. The marriage of Willis, as well as that of his father, Joe, was during slavery—the only difference being that Willis was alive in 1872 and Joe had died long before. That is the only difference.

To this we object, for the following among other reasons:

I. The Statute of Distributions [1872]

makes no distinction as to color or former condition.—Rev. Stat., 438.

II. Emancipation, being the removal of civil disabilities, has the effect of a declaratory law. The disabilities were removed as an incident and consequence of emancipation itself.

III. That the Constitution and laws upon the subject are expressly retrospective and meant to be so.—Constitution, Art. I, §§ 1, 12; Act 1865, 13 Stat., 31: Act 1866, 11 Stat., 393; Act 1872, 14 Stat. 184.

IV. The object of the Acts of 1865–66 is plain. The first says: "Every colored child heretofore born is declared to be the legitimate child of his mother and also of his colored father if he is acknowledged by such father."

"Cohabitation with reputation or recognition of the parties shall be evidence of marriage," etc. [1865.]

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*The Act of 1866 says: "That all persons hitherto known in law in this State as slaves, &c., shall have the right to make and enforce contracts, &c., to inherit, to purchase, &c., and to have full and equal benefit of the rights of personal security, personal liberty, &c., and all remedies and proceedings for the enforcement and protection of the same," &c.

Under these Acts there could be no doubt. These children of Nancy and Joe were "heretofore born." Nancy and Joe "cohabited as man and wife," and that is the statutory evidence of their marriage. "Nancy and Joe lived together as man and wife, or were married according to the forms usual among colored people at that time, &c., and from this connection were born Willis and Katie."

According to the statute of 1865 they were man and wife. They were in violation of no moral law. Their relation was not concubinage, and their children have been properly declared legitimate.

V. But it is said that Act was repealed by the statute of 1866, and that again was repealed by General Statutes, March 9, 1872, and that the Act of 1872, (March 12,) is the only law now upon the subject.

1. This Act is not well worded; but, construed in connection with the other Acts, "in pari materia," there can be no doubt of the intention.—Dwarris on Stat.; Bac. Abr. Stat., letter I.

2. It must be construed in the light of the Constitution of 1868, which had then been passed.

3. But even according to its terms it covers this case. "The children recognized by the man to be his shall be deemed to be legitimate." These children were recognized by Joe to be his.

a. Joe and Nancy were married and lived together as man and wife. That is the highest proof that he "recognized them."—See evidence.

b. The recognition is not required when the parties, as here, were married morally and in such way as the law recognizes as legal.

No one doubts the object of the Act to legitimize children born in slavery. One of the cardinal rules of construction is to interpret a law so as to repress the mischief and advance the remedy—"que hæret in litera, hæret in cortice."—Bac. Abr. Stat., letter I.

The Act of 1872 was passed in the light of the Constitution, which declares that "all men are born free and equal." This Act of 1872 bestows upon certain persons rights of which they had been deprived, the purpose of the Act being to make all equal. It is a

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*singular perversion of the spirit of the Constitution, which regards as forbidden by it that which was the very object of it.

The Act of 1872 refers to no class, but is general in its terms—"all persons," &c. If the mischief intended to be remedied is only found in a certain class, that does not make the law unconstitutional. That is "no distinction on account of race or color," but on account of their disabilities, to remove which is its beneficent object.

November 27, 1878. The opinion of the Court was delivered by

HASKELL, A. J. The questions arise out of a proceeding in the Court of Probate by Elihu Davenport and Katie, his wife, against Elizabeth Caldwell, the widow and administratrix of the goods and effects of one Willis Caldwell, who died intestate, possessed of land and personal property, but leaving no lineal descendant. Katie Davenport, claiming to be an heir-at-law and distributee of Willis Caldwell, and, as his sister, entitled to one-half of his estate, prays for partition of real estate and for an accounting, &c. The answer denies that Katie Davenport is heir-at-law or distributee of Willis Caldwell and denies the plaintiff's right to demand the account and partition prayed for. Willis Caldwell was a "person of color," as are also all the parties to this proceeding, and all formerly slaves. The important point of law decided in the Court below, and appealed from, is that the offspring of a female slave, and born in slavery, remaining slaves until the general emancipation, which took place in 1865, may, under the existing laws of this State, be the legitimate children of the parent—brothers and sisters to each other—and, as such, capable of inheriting under the Statute of Distributions. The decision sustained in the Court below, while it grants, in substance, the prayer of the petitioner, does not, perhaps, define her relationship to the deceased, whether it be of the whole blood or the half blood; whether they be the legitimate children of the mother only, or of the mother and the father. That is a question really involved in the case, and the Court deems it proper to consider the case as an

entirety, and, if possible, dispose of the whole question.

The facts upon which the decision rest are stated in the brief, as follows:

"Many years ago a colored man named Joe, a slave, * * * and a colored woman

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named Nancy, a slave, * * * lived *together as man and wife, or were married according to the custom usual among persons in their station of life. They both remained in slavery until their deaths, which occurred, respectively, more than thirty years ago, and from their connection were born Willis Caldwell and Katie Davenport, who were both slaves until the general emancipation."

The question is whether Katie is the sister of Willis in the legal sense of the word, and whether they are the legitimate children of the mother only, or of the mother and the father named?

The Act of 1865, (13 Stat., 269,) entitled "An Act to establish and regulate the domestic relations of persons of color," &c., contains important legislation upon the subject. So much of the Act as may be pertinent is as follows:

"I. The relation of husband and wife amongst persons of color is established.

"II. Those who now live as such are declared to be husband and wife.

"III. In case of one man having two or more reputed wives, or one woman two or more reputed husbands, the man shall, by the first day of April next, select one of his reputed wives, or the woman one of her reputed husbands, and the ceremony of marriage between this man or woman and the person so selected shall be performed.

"IV. Every colored child heretofore born is declared to be the legitimate child of his mother, and also of his colored father, if he is acknowledged by such a father.

"V. Persons of color desirous hereafter to become husband and wife should have the contract of marriage duly solemnized.

"VI. A clergyman, the District Judge, a Magistrate, or any judicial officer, may solemnize marriages.

"VII. Cohabitation, with reputation or recognition of the parties, shall be evidence of marriage in cases criminal and civil.

"XII. The relation of parent and child amongst persons of color is recognized, confers all the rights and remedies, civil and criminal, and imposes all the duties that are incident thereto by law, unless the same are modified by this Act or some legislation connected herewith.

"XIII. The father shall support and maintain his children under fifteen years of age, whether they be born of one of his reputed wives or of any other woman."

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*Several clauses are inserted here which may not be now of force, but they are here put in that each part of the Act may be more conveniently viewed in connection with its context and the weight of the latter be brought to the aid of construction. The term "persons of color," by the preliminary Act passed at the same session, (13 Vol., 245,) is used to designate "all free negroes, mulattoes and mestizoes, all freedmen and freedwomen, and all descendants through either sex of any of these persons." To all these people the first Section above relates. In striving to ascertain the meaning of the Act, words will be taken, as much as possible, in their usual signification, according to grammatical construction, and in such way, the other rules being observed, as will give the greatest force and effect to each and every portion of the Act.

By a resolution adopted by the State Convention assembled in 1865, (Journal of Convention, p. 166,) the Provisional Governor was authorized and directed to appoint two Commissioners "to prepare and report to the next Legislature what laws will be necessary and proper in consequence of the alterations made in the fundamental law, and especially to prepare and submit a code for the regulation of labor and the protection and government of the colored population of the State." In pursuance of this resolution a Commission of well-recognized learning and ability was duly appointed. At the first ensuing meeting of the General Assembly these Commissioners made their report, submitting several Bills, from one of which was framed the Act which we are now considering. The first Section of that Act is of equal brevity and importance, and each word must be regarded as having due and well-weighed significance. The "alteration in the fundamental law" which demanded this remedial Act was the general emancipation of slaves, (Const. 1865, Art. IX, Sec. 11,) whereby an element in the State which had in the main been property had suddenly become a free population. One of the first duties in the minds of these Commissioners and of the Legislature was the establishment of the domestic relations of this people. Of these the one of primary importance is marriage, of which it has well been said, "unlike other contracts, this is one instituted by God himself, and has its foundation in the law of nature. It is the parent, not the child, of civil society." The importance of this relation, both for its moral effect and as a matter of right and of public policy, was fully recognized, and to it is devoted the first Sec-

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tion of the Act. "The *relation of husband and wife amongst persons of color is established." It cannot be held that these words created the legal existence of the marriage relation amongst "persons of color," for such relation always had existed and been recognized among free or freed persons of color in this State.—Bowers v. Newman, 2 McM., 472; Porcher v. Hardcastle, Harper, 495.

"Whatever may be said about public policy, and whatever may be the future consequences, it is now (in 1841) a settled point that a free person of color, by the laws of this State, may take and hold, convey by deed, dispose of by will, or transmit to his heir-at-law, both real and personal estate."

The same is held in Porcher v. Hardcastle. But property cannot be transmitted to the "heir-at-law" except by the operation of the Statute of Distributions.—Wightman v. Valk, et al., Dud. Eq., 212.

And it is needless to argue or cite authority to sustain the proposition that the statute is based upon the legal presumption that legal marriage is the center from which the several lines derive their source. The right of legal marriage amongst free persons of color has never been disputed, and it is stated as law by Judge O'Neall, in his pamphlet styled "The Negro Law of South Carolina," p. 13, § 47, and he cites the cases of Bowers v. Newman and Porcher v. Hardcastle. The opinion in Blakely v. Tisdale (14 Rich. Eq., 90,) in no wise conflicts. The discussion there of the above cases has an entirely different bearing. If the Act of 1865 does not create the power of legal marriage amongst "persons of color," does it confer the right upon individuals (once constituting a class of those persons) who were not in the enjoyment of the right at the time the Act was passed? We have already noticed that the preliminary Act defines "persons of color" to comprehend alike those negroes, mulattoes and mestizoes who had been free and those who had been slaves up to the time of emancipation.

It may be argued that the purpose of the Act was to confer upon the latter class the same right enjoyed by the former. But the answer is that the latter class was already in the full enjoyment of all legal rights belonging to the former. The act or the fact of emancipation, recognized and confirmed by the State Convention in 1865, had made the slave a free negro or person of color. The free negroes or persons of color constituted a distinct class in this State; and when an individual, or a number collectively, was admitted to that class, the admission sub-

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jected the new party to the duties and *obligations, while it entitled him to a full enjoyment of the rights and privileges of the class. Thus, a law which would make all aliens denizens or naturalized citizens, would, without any other word, confer upon all aliens the rights of denizens or citizens, as the case might be.

This State had two classes of native population, commonly known as white persons and colored persons or persons of African blood or the mingled blood. The latter or colored class was subdivided into slave and free. It may be said that the slave was not a person but a chattel. While that is true in the sense of the property, it never was true in the sense in which the matter is now being considered. The slave has ever been, in this State, recognized as a human being and protected by the common law where the same was not altered by the statute or inconsistent with the Constitution, laws and customs of the State.

This proposition is consistent with all the law that is cited in State v. Fleming, (2 Strob., 464,) and is fully supported by the dissenting opinions of O'Neall and Richardson, JJ. In the more recent case of Blakely v. Tisdale it is thus stated by Wardlaw, A. J.: The status of the negro was that "of a native resident human being of a race deemed inferior; when a slave, subject to the absolute control of a master wherever the latter was not restrained by law, and, when emancipated from the dominion of a master, incapable of testifying, (except upon the trial of one of his own race before an inferior tribunal—State v. Scott, 1 Bail., 270; State v. Davis, 2 Bail., 558,) of becoming a citizen or of discharging any function which pertained to government, although protected in person, invested with full rights as to the acquisition and holding of property, real and personal, and entitled to sue and be sued in all Courts." Thus is shown the distinct legal division of the race into two classes of human beings, and that the transformation from the one to the other was effected by the fact of emancipation. Therefore when the Act was passed the whole colored race had been, prior to that time, free or emancipated by the State in convention. The right of marriage, and consequently the legality of the relation of husband and wife, eo instanti, had existed amongst them with all its legal privileges and obligations. It is clear, then, that the Act, by this Section, conferred upon none the right of marriage in futuro.

A third view of the Act is that, whether or not the legality of the relation of husband and wife or the right of marriage al-

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ready *existed amongst all persons of color, the use of the words "is established" indicates that such was not the view of the Legislature, and that the intention was to create in a prospective sense "new laws" consequent upon the "alterations in the fundamental law," and that this is indicated by the title, "to establish and regulate domestic relations," &c. Upon few words could there be more room for argument than upon the word "establish." It is selected (1 Story on Con., § 454, 3d. ed.,) to shew "that it is by no means a correct rule of interpretation to construe the same word in the same sense wherever it occurs in the same instrument. In common language, the same word has various meanings, and the peculiar sense in which it is used in any sentence is to be determined by the context. (Chief Justice Marshall in The Cherokee Nation v. The State of Georgia.)

A very easy example of this sort will be found in the use of the word 'establish,' which is found in various places in the Constitution." He then proceeds to give some meanings of the word in the several positions which it occupies, as, for example: To settle firmly; to fix unalterably; to make a form and not to fix or settle unalterably or forever; to create; to found and to regulate; to settle, recognize or support; to create; to ratify; and to confirm. We are forced, then, to look to the context and to the law as it was before the passage of the Act to enable us to determine the meaning of a word possessed of such diversity of signification. The relation of husband and wife is of necessity based upon marriage, and the words may, for some purposes, be regarded as synonymous. It being our conclusion that the right of marriage existed amongst persons of color prior to the passage of the Act of 1865, the next step is to consider who were married or who occupied to each other the relation of husband and wife amongst persons of color prior to the passage of the Act. To such persons the Act can have no application. "Marriage with us, so far as the law is concerned, has ever been regarded as a mere civil contract. Our law prescribes no ceremony. It requires nothing but the agreement of the parties, with an intention that that agreement 'shall, per se, constitute the marriage.' "—Per Johnston, Ch., in circuit decree in Fryer v. Fryer, Rich. Eq. Cas., 92.

"Under our laws, marriage is regarded as merely a civil contract, requiring no particular formality, which may be made by a private agreement between the parties."—Stringfellow v. Scott, Rich. Eq. Cas., 109, note.

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*This agreement, like every other contract, is a fact to be proven by evidence generally, by declarations of the parties, cohabitation and repute.—Fryer v. Fryer; Stringfellow v. Scott, supra; Jewell v. Magwood, Rich. Eq. Cas., 113; State v. Hilton, 3 Rich., 434 [45 Am. Dec. 783].

The answer, then, is that they were husband and wife at the time of the passage of the Act who had so agreed, or who lived together as such, for that is the very execution of the agreement subsequently to emancipation. We think, therefore, that if the law, as it then already was, be considered, it will be perceived that there could be but few cases to which the Act would apply if applicable only prospectively.

It may be thought, however, that the following Sections strengthen the view that the first Section was meant to create—the right of legal marriage amongst this people—for the second Section enacts that "those who now live as such are declared to be husband and wife;" that the first Section having created the legal right, the second at once applies it, and that the third Section, by indicating an exception, confirms this rule of construction. The reasons already indicated seem to prohibit this interpretation if there be any other more reasonable which the words and the context will justify. For such a construction would make the first and second Sections mere declarations of pre-existing law about which there was no room for doubt and would deprive these Sections of all remedial properties.

It may be said that the remedy is in the fourth Section, which legitimates "every colored child heretofore born." This Section is unquestionably retrospective and applies to the dead as well as the living. It will further be considered at another point; we would only say here that it would be extraordinary to legitimate an entire race, whether born in servitude or in freedom, and at the same time withhold from the parents the right of marriage and fix upon the race the brand of concubinage and upon the offspring the disgrace of bastardy. We think it will be made to appear that such was not the intention of the fourth Section and that it was meant to apply only to those cases which had not come within the provisions of the preceding Sections. Besides, we do not feel at all assured that the children of slaves who were morally married can be deemed bastards. Bastardy is "an unlawful state of birth which disables the bastard from succeeding to an inheritance." Legitimacy, as the word imports, will require that the child be born in a manner approved by law.—Schoulder on Dom. Relations, 304.

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*There was no law forbidding marriage among slaves, but the intention of slavery made the right of property in the master paramount, and natural marriage could not be allowed to interfere with that power, but was absolutely subject thereto, and could be annulled at will; but that did not make it necessarily, and ab initio, a nullity between the parties. Such a view of marriage amongst slaves could not affect the rights of third parties, for it was impossible for any such rights to exist, as slaves could not acquire or hold property in their own right. We are inclined to think that the fourth Section was not enacted upon the assumption that the entire race of slaves was illegitimate, or legitimated by the preceding Sections, where there had been a marriage agreement, but that the Section was meant to apply to cases not provided for by the previous Sections, and thus to effect the legitimation of the entire race which had not been free, nor legally, and but partially morally, responsible for the observance or non-observance of the form and moral law of marriage. That was the mischief which these Sections were meant to remedy. If it had been the intention of the Legislature to create the right of marriage amongst persons of color, the more correct grammatical order of the words in the first

Section would have been: "The relation of husband and wife is established amongst persons of color," instead of, as it is written, "The relation, &c., amongst persons of color is established." The latter, which is the Act, grammatically means that something is done to affect a relation which already exists amongst persons of color. Besides, the better language would have been "the relation, &c., shall exist or shall be permitted." To express, then, by additional words, the signification of the grammatical arrangement of the sentence, it may be written: "The relation of husband and wife (heretofore assumed) amongst 'free negroes, mulattoes and mestizoes, freedmen, freedwomen, and all descendants through either sex of any of these persons' is hereby established." It no doubt will be argued that the Act could not be retrospective and affect the marriages of slaves, because slaves are not included in the definition of "persons of color" in the preliminary Act. A brief investigation will show that while the term persons of color does include the several classes recited in the preliminary Act, it likewise includes persons who were formerly slaves, whether living at the time of emancipation or not; for, as an example, in the Section just recited, "all descendants through either sex of any of these persons"

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must of necessity *include those who are descended from slaves, members of the colored race, as well as those descended from free negroes, &c. The terms freedmen and freedwomen must be regarded as indicating the class which had been in slavery in contradistinction to previously "free negroes, mulattoes and mestizoes." Besides, the enactment that all such as are therein named "shall be known as persons of color" does not preclude the application of that title to the race of slaves, to which it had been applied from time immemorial. To recur—this is recognized in the Act of 1866, (page 366–29,) "to declare the rights of persons lately known as slaves and as free persons of color. The word 'establish,' as thus used, may be interpreted to signify 'recognized, acknowledged, ratified and confirmed.'" Such signification of the word is supported not only by judicial construction (Story on Con., § , supra,) but by common use and in the best authorities. A printed example cited occurs in two verses of the English translation of the Mosaic law concerning a married woman's vow.

"Every vow and every binding oath, to afflict the soul, her husband may establish it or her husband may make it void." But if her husband altogether "hold his peace at her from day to day, then he establish all her vows or all her bonds which are upon her; he confirmeth them, because he held his peace at her in the day that he heard them."—Numbers, Chap. XXX, verses 13 and 14. In the latter verse the words "establish" and "confirm" are used to translate one and the same word in the Greek and in the Hebrew.

By an identical interpretation of the word in this Act the "relation of husband and wife," which had been assumed, whether legally or not, amongst persons of color, is validated and confirmed.

In arriving at this conclusion, we are strengthened by the case of Jackson v. Lervey, 5 Cowen, 397. The Court in that case say: "Sound policy and public morals undoubtedly called the attention of the Legislature to this subject and gave rise to the Act of February 17, 1809. This Act was intended to be retrospective in its operation. By so considering it in the present case, I do not perceive any well-founded objection. It is not relied on here to divest any estate acquired under the law as it was supposed to exist before the passing of the Act. * * * The Act declares all marriages contracted or which may thereafter be contracted, wherein one of the parties was or might be slaves, shall be considered equally 'valid as though the parties thereunto were free,

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and the child or children *of such marriages shall be legitimate.' Why should it be restricted to cases where the parties were then living? One object was to render the children legitimate. What superior claims had the children of parents then living to the interference of the Legislature to those whose parents were dead when the statute was enacted? I perceive none. The words of the Act are sufficiently broad to include both, and ought so to be construed to effectuate the intent."

Words more broad than those in the Act of 1865 could not be found. There is nothing to limit the expression in the first Section to "relation of husband and wife" then existing, and everything to shew that the intent was to include the past. To construe it otherwise would make that important portion of the Act a meaningless, or at least needless, enunciation of acknowledged law. And certainly "statutes intending to effect an object of great public utility ought to receive the most liberal and benign interpretation, in accordance with the maxim 'ut res magis valeat quam pereat.'"—Potter's Dwarris, 203, note 20. It is impossible for such construction to impose hardship or effect mischief, and it affords a great public remedy. It cannot affect property where the rights had vested before the passing of the Act.—Blakely v. Tisdale, 14 Rich. Eq., 90. It could only affect those cases of escheat where one of the parties was free before emancipation and capable of holding property, but assumed marriage relation with a slave, in which case, under the law as it stood, the children could not inherit and there might not be any others to inherit the property. But in those cases (as in Jackson v. Lervey, supra,) "if, by the statute, the marriage is legalized, the effect of it is that

the State cannot resort to the doctrine of escheat. * * * They had the right of disclaiming a forfeiture for want of heirs, and in my view, they have done so."

Assuming such, then, to be the intent of the first Section of the Act it is proper to test such interpretation by taking up with it the succeeding Sections. It is well known that the marriage amongst slaves having had no binding legal effect, they were separated by their owners for good cause shown or by sale, especially in the distribution of estates, and that, being thus released or separated and removed from each other, the moral contract between them was regarded as released, and subsequent marriage of the parties to others was allowed and encouraged. In this way a man or woman may have had several wives

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or husbands all alive and *yet be free from moral blame, for they had a right to regard such separation of persons in their condition as equivalent to a divorce or release—a vinculo matrimonii. In such cases, who, under the first Section, would, amongst the living, be husband and wife, for they had all married? The second Section meets the exception and enacts "that those who now live as such are declared to be husband and wife." It may be said that this view is subject to the legal objection already stated that those living together since emancipation as husband and wife are husband and wife by force of the law as it stood prior to the Act of 1865, and that this makes the second Section meaningless or needless or puts it in conflict with the first. The answer to that is, that the Legislature has the same power to validate the separations as to validate the marriages, and that persons who come under the provisions of Section 2 are estopped from objecting to the validation of their own acts. Regarding themselves as released a vinculo, they married again, as was the custom of those days. If the first Section stood alone, the first marriage might have been held binding and the subsequent illegal. But the second Section validates the last marriage, and thereby validates the separations, and the two Sections operating together settle any doubt that might arise as to the existing relation between persons living at the time of the passing of the Act.

Section 3 applies a remedy for a species of polygamy which existed, fortunately to a limited extent, and, having no relation to the present question, does not require consideration.

Section 4 is, by the force of its words, beyond question retrospective, and by the term "colored child" includes those born during slavery. It would be unjust to the Legislature to entertain for a moment the idea that this Section only applied to those born since emancipation and to the children of those who were free prior to emancipation, and this is conclusive on the point that the term "persons of color" is not limited to the persons specifically mentioned in the preliminary Act. The fact that this Section is retrospective, as already intimated, removes every legal objection that could be advanced to the retrospective application of the first Section. If both Sections are retrospective, as we think, the fourth Section is a sweeping act meant to cover all not specifically provided for by the first Section, and thus to legitimate a race not responsible for its past but charged with its future course. It is meant to apply especially to those cases

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where there was not the *pretense of marriage, and the connection was in no sense that of husband and wife; and, further, it provides for all cases where the evidence of moral marriage may have been lost. If any other view of the two Sections be taken it would present an arbitrary and unjust enactment, giving to the husband "declared" by Section 2 the power to repudiate the children begotten by him of the woman whom he had regarded as his wife, but who, in that view of the Act, would not be his wife until the Act was passed. From such a construction no possible good could flow, and, perhaps, much mischief, and the purpose of the Act, unquestionably intended to be beneficent, would be disappointed.

The fifth Section is merely directory.

The seventh Section declares what shall be evidence of marriage. This Section can hardly be held to apply to future marriages, for, taken literally, such had always been the law in this State; and unless it is intended that this shall constitute sufficient evidence of the fact of marriage under the retrospective provisions of the preceding Acts, it is difficult to perceive its purpose, and this view will be strengthened when we look at the original Bill as presented by the Commission.

It is needless to dwell longer upon the other Sections; it would be merely to show that Sections 12 and 13 are retrospective, but it would be by the same mode of reasoning, and would make unnecessary repetition. While it is not the practice to resort to oral evidence to ascertain the intent of a statute, but resort must be had to the Act itself, in this case we may, with propriety, look to the resolution of the Convention and to the original Bill, as reported by the Commission, and perhaps derive light by comparing the Bill with the Act as adopted.

So much of the bill as relates to the subject is as follows:

"Section 1. The relation of husband and wife amongst persons of color is established.

"Sec. 2. Cohabitations and reputation, or recognition of the parties, shall be evidence of its existence in cases criminal and civil.

"Sec. 3. Those who now live as such are declared to be husband and wife.

"Sec. 4. In case of one man having two or

more reputed wives, or one woman two or more reputed husbands, the man shall immediately hereafter select one of his reputed wives and the woman one of her reputed husbands, and the ceremony of marriage between them respectively shall be performed.

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*"Sec. 5. All children heretofore born are declared to be legitimate."

Section 6 is immaterial.

"Sec. 7. Persons desirous hereafter to become husband and wife must have the contract of marriage duly solemnized."

Sections 12 and 13 are the same as in the Act.

It is but proper to say here that the conclusion as to the legal effect of the Act of 1865 had been reached before this original Bill was examined. So far as the Court could ascertain, the report of the Commission is not contained in the Journal or in the reports and resolutions of either branch of the General Assembly, nor could it be found in the public offices. It was handed to the Court on request by one of the Circuit Judges who was at that time Chairman of the Judiciary Committee of the Senate, and is in pamphlet form as originally printed. It is inserted in the opinion because the order in which its Sections occur, as also several words which we italicize, show, perhaps more forcibly than the Act itself, what was the original design, and we think that the Act has in the main not departed from it. The mode of proof is in direct sequence to the first Section, and the fact that this rule of evidence defines what is proof, and applies to the past and not to the future, is, we think, to be inferred from the fourth Section, which is mandatory and compels persons desirous hereafter to become husband and wife to observe the ceremony of due solemnization; and in Section 10 the due solemnization is provided for: "Ministers of the gospel, the District Judge, a Magistrate or any other judicial officer may solemnize marriages."

It is an established rule of construction that where the word "may" is thus used with regard to a public officer it is mandatory, and compels them to perform the duty indicated. It would be singular to command solemnization, and in the same Act weaken this very command by providing that evidence of obedience is unnecessary; and that would be unquestionably the effect if the second Section were held to be other than retrospective and relate to more than is contained in the first Section, to which it is so clearly annexed also by the language used.

It is needless further to discuss this Bill. We do not intend to go into the abstract and deeply interesting questions of law and of natural law, or of right and reason, which the case might suggest. In our judgment the problem has been solved by the statute

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which *we have been called upon to construe. The power of the Legislature to validate past natural marriages has not been questioned in this case, nor do we deem it questionable. Such legislation is not unconstitutional, for it does not per se affect contracts or vested rights and cannot interfere to the injury of others. Our conclusion is not in conflict with the point decided in Hall v. United States, (2 Otto, 27 [23 L. Ed. 597].) for the cases are different, and there was no statute to validate the contract. It was held in that case that a contract by a slave with his master was "an utter nullity," and the Court says: "It was an inflexible rule of the law of African slavery, wherever it existed, that the slave was incapable of entering into any contract, not excepting the contract of marriage." That is entirely true. "By the law of African slavery," with us, the slave was incapable of entering into the contract of marriage—in the accepted legal sense of the term—while he was a slave, but when he was emancipated (during the existence of slavery as an institution) he at once became capable to contract. The point is, that the incapacity to marry was not in re, but per lege. It may be said that there was no law forbidding marriage, but that the slave was, nevertheless, adjudged to be incapable and that the incapacity was, therefore, in the slave. It is true there was no statute, but slavery is in itself a law which establishes the dominion of the master and forbids whatever conflicts with the right of property which is in him, and by that law the marriage among slaves was deprived of all legal force. The slave, however, although property, was also a human being and a reasonable creature.—Blakely v. Tisdale, supra; State v. Posey, 4 Strob., 166. His capacity to form a natural marriage is thus admitted. His capacity to enter into a civil marriage upon the removal of the disability of slavery, or in his original condition as a free African, is admitted in Hardcastle v. Porcher, supra, and Bowers v. Newman, supra. The power of the State to remove disabilities which its own power had imposed, and of the Legislature to validate Acts which at the time, by reason of then existing laws, were null and void, is well recognized. Indeed, it is difficult to perceive real difference in principle, so far as the legislative power is concerned, between the Act of 1865 validating marriages entered into by slaves during slavery—slavery having, prior to the Act of 1865, been abolished by the Constitution of the State—between that Act and the Act of the Legislature in Connecticut validating marriages which by law were null

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and void ab *initio.—Cited in Cooley on Con. Lim., 372, and Sedgwick on Stat. and Con. Law, 666. In the opinion sustaining the Act,

Hosmer, J., says, in Goshen v. Stonington, 4 Conn., 224: "The man and the woman were unmarried, notwithstanding the formal ceremony which passed between them, and free, in point of law, to live in celibacy or contract marriage with any other person at pleasure. It is a strong exercise of power to compel two persons to marry without their consent and a palpable perversion of strict legal right. At the same time the retrospective law thus far operating on vested rights is admitted to be unquestionably valid, because manifestly just." It may be said that the difference is, that in the Connecticut and other similar cases the parties had a legal right to contract, but failed to execute the contract in the manner prescribed by law. Put it in the other form: The parties were able to contract, but were forbidden by law to contract unless they procured the aid and authority of a certain class of functionaries designated by the law. The contract could not be executed until this inhibition was removed, not by any voluntary act of the parties, but by the exercise of power on the part of the person authorized by law. If he had refused there could not be marriage. The slave was a person; the exercise of his power to marry was inhibited by the fact of slavery. This impediment could at one time be removed at the pleasure of the master—subsequently by the power of the State; and when thus freed—when the power had been exercised by the authority which could act that part—he could execute the contract; or if he had attempted the contract before his disability had been removed, his act might be validated by the Legislature. The Legislature, even while the person was a slave, could enable him to marry, (Maryland Act, 17; Jones v. Jones, 36 Maryland,) or could validate past marriages so far as it did not conflict with the rights of the master.

It is contended, however, that the Act of 1865, whatever might have been its intent or effect, was repealed by the Acts of 1866 (13 Stat., 366–29,) and of 1872. (Rev. Stat., pp. 768 and 842.) The Act of 1866 confers some rights upon persons of color, and repeals all Acts inconsistent therewith or contrary thereto, but it certainly does not attempt in any wise to contract their rights or to deprive them of any which had been conferred by the Act of 1865. There are parts of the Act of 1865 which are repealed by the Act of 1866, but not the first Section,

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nor the fourth nor the seventh. *As to the Act of 1872, (Rev. Stat., pp. 768 and 842,) the repeal thereby is qualified. Sec. 4, p. 766: "It shall not affect any act done or right accruing, accrued or established * * * before the repeal takes effect." By our view of the Act of 1865, the marriage between slaves and the legitimation of all children born of slaves are things clearly "established" by the Act, and constitute vested rights which cannot be taken away; but the special proviso in the repealing clause renders decision upon the constitutionality or the validity of an absolute repeal unnecessary.

It is hardly necessary, after what we have said, to do more than refer to the Act of March 12th, 1872, (Vol. —, p. 183,) were it not for some ambiguity in the language of the Act. The Act may have been passed under the impression that the provisions on the subject to which it relates in the Act of 1865 had been repealed; but, however that may be, there is no conflict between the Acts, and the repealing clause in the Act of 1872 cannot affect the Act of 1865. The first Section of the Act of 1872 is confined to such persons as, at the time of the passage of the Act, were cohabiting as husband and wife or recognizing the relation "as still existing at the time of the passage of this Act." Section 2 then begins: "And all of their children shall be deemed legitimate, whether born before or after the passage of this Act." So much of the second Section properly belongs to the first Section, and is in no wise connected with the succeeding portion of the sentence, which is as follows: "And when the parties have ceased to cohabit before the passage of this Act, in consequence of the death of the woman, or from other cause, all of the children of the woman, recognized by the man to be his, shall be deemed legitimate." The entire Act relates to "all persons in the State of South Carolina who previous to their actual emancipation had undertaken and agreed to occupy to each other the relation of husband and wife." The first Section disposes of those who "are cohabiting as such," (husband and wife,) "or in any way recognizing the relation as still existing at the time of the passage of this Act." And the first portion of the second Section disposes of "their children." The balance of the second Section applies to "the parties" who "have ceased to cohabit before the passage of this Act." It is obvious that "the parties" cannot refer to the preceding word "their," which relates to the class to which the first Section applies; but "the parties" represent the second division of those who "previous to their actual eman-

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cipation had *undertaken and agreed to occupy the relation to each other of husband and wife." The Act does not proceed to make this latter class husband and wife, but legitimates all the children of the woman recognized by the man to be his. Thus all cases are embraced in which the children of such a couple were ever recognized by the man, the only other condition essential being that the pair should once have undertaken the relation of husband and wife and then ceased to cohabit. It is true that the Act does specify one particular cause for

the cessation of cohabitation, viz., the death of the woman, but it adds "or from other cause." Thus the death of the man—or the death of both—effects the same end and the child is legitimated. The time of recognition by the man is not qualified, and is good if proved to have been made at any time during slavery as well as since. It is admitted in the case before us that the persons named as living in the relation of husband and wife were the parents of the petitioner and the deceased, and that would be deemed sufficient proof of recognition under the Act of 1872, which proceeds on that proof, and on proof of the death of the father and mother, to declare these two children legitimate and capable of inheriting from each other. It is concluded that the petitioner, Katie, and the deceased were brother and sister of the whole blood, being the legitimate children of Joe and Nancy, and that, as such relation, the petitioner is entitled under the Statute of Distributions.

The fifth and sixth grounds of appeal relate to the jurisdiction of the Court of Probate in cases of partition of real estate. If that Court has no jurisdiction in cases for the partition of real estate, then all its proceedings in relation thereto were null and void and should be so declared.

Where nothing appears on the face of the proceedings to show a want of jurisdiction, and the objection is not made in the Court below, it cannot be taken in the Court of Appeals.—Varney v. Vosch, 3 Hill, 237. But, as was held in Hill v. Robertson, (1 Strob., 1,) "the proceedings of a Court of limited jurisdiction in a case clearly without its jurisdiction are absolutely void, and may be so declared whenever the question is presented, whether directly or collaterally." Neither can failure to take objections at the proper time nor consent give jurisdiction. (Gallman v. Gallman, 5 Strob., 207,) except in cases where, under certain circumstances, the Court might take jurisdiction.—Miller v. Furse, Bail. Eq., 187. Where the case is

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such that under no circumstances *could it be brought within the jurisdiction, then objection may be made at any stage of the proceedings.

As was said by Moses, C. J., in Waller v. Cresswell, 4 S. C., 356: "We have no hesitation in saying that where there appears to be a clear want of jurisdiction, the Court is not prevented from so declaring because the exception is not made by the party against whom it is to operate." And again: "When a Court takes cognizance of cases in which the very nature of its organization prevents it from entertaining the issues made between the parties, and its means of administration prevent an enforcement of any judgment it may therein pronounce, the objection to its jurisdiction may be made at any time." The objection, therefore, in this case, although it should properly have been made in the Circuit Court, has not come too late, if, as contended, the Probate Court has no jurisdiction in a case for the partition of real estate, and the question must, therefore, be considered.

The Act of the Legislature (§ 41 Rev. Stat., 573,) does undertake to confer such jurisdiction, but the Court concurs in the views expressed by Moses, C. J., in his separate opinion in McNamee v. Waterbury, (4 S. C., 167–8,) that to determine the limits of the jurisdiction of the Court of Probate we must look to the Constitution, by which instrument jurisdiction is conferred. In this respect the Constitution of 1868 differs widely from that of 1790. By the latter the judicial power of the State was "vested in such superior and inferior Courts of law and equity as the Legislature shall from time to time direct and establish," and it was left to the Legislature to distribute the judicial powers amongst the several Courts so established; while by the former (the Constitution of 1868) the judicial power is vested in the several Courts named and in such municipal and other inferior Courts as the General Assembly may deem necessary, but the jurisdiction of each of those named, among them the Court of Probate, is defined and specified.

The jurisdiction thus defined and specified by the Constitution can be neither enlarged nor diminished by the legislative power of the State, which is itself the creature of the Constitution, and controlled by the provisions of that instrument, which constitutes the fundamental law.

Looking to the Constitution, then, for the limits of the jurisdiction of the Court of Probate, we find those limits defined in Section 20, Article IV, and, as there defined, cases for the partition of real estate are not embraced.

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*The Court of Probate is unquestionably a Court of inferior and limited jurisdiction. When the exercise of any power is claimed for a Court of that character, it must be shown to exist by express grant or to be necessarily consequent upon some power clearly given. The power here exercised by the Court of Probate is not expressly granted in the Constitution, nor is it necessarily consequent upon any power which is given. The conclusion follows that the power does not exist. It is possible that, had the decree of the Court of Probate been final in its nature, its adoption by the Circuit Court might have operated as a decree or judgment of that Court, which unquestionably has jurisdiction in partition of real estate. But such is not the case, and the decision of the Circuit Court, while it affirms the decision of the Probate Court, remands the case for further proceedings in that Court. The judgment of the Circuit Court, therefore, failed to cure the defect of lack

of jurisdiction, and neither judgment can stand.

It is unnecessary to consider the remaining grounds of appeal as they are in effect disposed of by the conclusion on the question of jurisdiction.

The judgment of the Circuit Court is reversed and the case remanded, with instructions that the proceedings in the Court of Probate be dismissed so far as they relate to partition of real estate.

WILLARD, C. J., concurred.

McIVER, A. J., dissenting. Being unable to assent to all of the conclusions reached by a majority of the Court, I desire to indicate, briefly, some of the grounds upon which I rest my dissent, without elaborating the argument in support of such grounds.

The question which lies at the foundation of the whole case is whether the connection which existed between Joe and Nancy was that of a lawful marriage, so that their issue, Katie and Willis, can be regarded as legitimate. It is to be observed that the question is not whether such connection was unlawful in the sense that it violated any law, by which the parties would be subjected to punishment, but whether such connection can be regarded as lawful in the sense that it gave rise to the relation of husband and wife, with the consequences flowing therefrom—the legitimation of their issue. These persons having been born slaves, and continued as such until their death, it is

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conceded, were incapable of forming *a lawful marriage connection in the sense above stated, and hence their issue must necessarily have been, at one time, illegitimate, for Blackstone tells us that a bastard is one born "out of lawful matrimony." This being the case, such issue must be regarded as still illegitimate unless they have been by proper authority declared legitimate. The burden of proof is upon the respondents to show this; and they have attempted to show it by the Act of 1865, (13 Stat., 31,) entitled "An Act to establish and regulate the domestic relations of persons of color," &c. The first question to be considered is: To what class of persons does this Act apply? Does it apply to the class to which Joe and Nancy belonged during their lifetime, they having died many years before the slaves in this State were emancipated, and, consequently, many years before the passage of the Act in question? The title informs us that, so far as the portion of it with which we are concerned, it applies alone to "persons of color," and the preceding Act, entitled "An Act preliminary to the legislation induced by the emancipation of slaves," (13 Stat., 10,) declares who shall be embraced within the words "persons of color," viz.: "All free negroes, mulattoes and mestizoes, all freedmen and freedwomen, and all descendants, through either sex, of any of these persons."

Now, Joe and Nancy, having died while still slaves, cannot by any possibility be brought within either of these classes, and cannot, therefore, be regarded as "persons of color" referred to in the Act of 1865, and hence the first Section of that Act cannot be applied to them, and the connection which existed between them cannot be regarded as constituting the relation of husband and wife. If they had lived until the slaves in this State were emancipated, then immediately they would, by virtue of that fact, have been placed in the class of "freedmen and freedwomen," and the Act would have applied to them, thereby legalizing their connection and giving rise to the relation of husband and wife between them. The Act cannot be construed as applying to slaves as such, but may be to persons who were once slaves, but who had subsequently, and prior to the passage of the Act, been placed in a different and higher class—that of freedmen; and as the persons in question never reached that class, the Act cannot apply to them. I must conclude, therefore, that Joe and Nancy could not be regarded as sustaining towards each other the relation of husband and wife, and that, therefore, their issue, Katie and Willis, were illegitimate and incapable of inheriting the one from the other.

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*It may be contended, however, that, even if this be so, the rights of legitimacy are, nevertheless, conferred upon Katie and Willis by the express terms of the fourth Section of the Act. That Section reads as follows: "Every colored child heretofore born is declared to be the legitimate child of his mother, and also of his colored father, if he is acknowledged by such father." If this language is to be construed as conferring the rights of legitimacy upon Katie and Willis, who were born of slave parents who never became freedmen, long before the emancipation of the slaves, then it necessarily follows that the same rights were conferred upon all the offspring of slaves in every preceding generation of persons of that class. This construction would not only be wholly unnecessary, but would lead to inextricable confusion. When we remember, as we have seen above, that the Act was not intended to apply to slaves, but only to "persons of color,"—by whom the Legislature has taken the pains to declare that they meant persons other than slaves—it is obvious that such a construction of the Act is inadmissible. It is true that the word "heretofore" in the Section does seem to demand that the Act should have, in violation of the general rules, a retrospective operation, but the inquiry still remains whether it may not be given such retrospective operation without extending it so far as to embrace

the children of slaves born in any preceding generation, especially when by so extending it persons of a class not intended to be embraced within the terms of the Act are included. This Act was passed on the 21st day of December, 1865, and as the slaves in this State had been emancipated in the previous Spring, (Pickett v. Wilkins, 13 Rich. Eq., 366,) there were doubtless quite a number of colored children born in this State between those two dates. Such children would be embraced within the terms "every colored child" used in the Act of 1865, as they would be descendants of freedmen and freedwomen, that is, descendants of some of those persons named in the "Act preliminary to the legislation induced by the emancipation of slaves," as coming within the terms "persons of color," to which class of persons the Act in question is confined. It may be, too, that by a liberal construction, which I am disposed to give the Act, that the terms "every colored child" would also embrace all the children of persons who, though once slaves, had become freedmen, whether born before or after the actual emancipation of the slaves, as they too would be the descendants of freedmen and freedwomen; but

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how those terms can be *held to embrace the children of those who never became freedmen, I am unable to understand. It is also to be observed that the language of the fourth Section of the Act under consideration is, "if he is acknowledged by such father," not if he has been or is acknowledged, and this is another indication to my mind that the Act only intended to deal with and provide for the then existing condition of things, and not to extend back through all preceding generations. It seems to me that so to extend the Act would lead to inextricable confusion.

Suppose, as not unfrequently happened during the existence of slavery, that Joe had at some time of his life, either prior or subsequent to his connection with Nancy, lived in the same way with some other woman by whom he had begotten two other children,—which set of children are to be regarded as legitimate? Why one set any more than the other? We know as matter of history that many of the slaves in this State were brought here from Virginia, and also that many slaves were carried from this State to the West. Now, suppose a case shall hereafter arise in which it is made to appear that the ancestor through whom the claimants before the Court trace their relationship had lived with some woman in Virginia, in the same way that Joe lived with Nancy, by whom he had a child whom he always acknowledged as such, and that when brought to this State his connection with such woman was broken up, and he formed another similar connection with some other woman in this State by whom he had another child who was also acknowledged by him as such, and then suppose he had been sold in the West by which his second connection was broken up, whereupon he found a third similar connection with still another woman in the West by whom he had still another child who was also acknowledged by him as such,—which of these children could we hold to be legitimate? Certainly not all of them without sanctioning polygamy, which, by our law, is a crime.

It seems to me also that there is great force in the argument that the Act of 1865, as well as that of 1872, referred to in the argument, are in conflict with Section 39 of Article I of the Constitution of 1868, and are, therefore, null and void. So much of that Section as relates to this matter reads as follows: "Distinction on account of race or color, in any case whatever, shall be prohibited, and all classes of citizens shall enjoy equally all common, public, legal and political privileges." Every one will admit

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that one of *the main objects of the present Constitution was to place the two races upon precisely the same footing, so far as the law could do so, both in respect to civil and political rights. One was to enjoy no privileges denied to the other, and to be subjected to no burdens to which the other was not liable. Hence, it would seem to follow that any legislation which should confer upon the members of the one race any privileges whatsoever which were not at the same time conferred upon the other would be in violation of this clause of the Constitution, just as much as any legislation which should impose upon the one race burdens from which the other was exempt. Such legislation as that under consideration must be regarded as an attempt to make a "distinction on account of race or color; one race by reason of its race or color is to enjoy certain privileges, while the other, only because it is not of the same race and color, is not to be entitled to such privileges. For it is very manifest that both the Act of 1865 and that of 1872 do undertake to confer certain rights and privileges upon the members of the colored race, while the same rights and privileges are not conferred upon the members of the white race. The rights of legitimacy are sought to be conferred upon a certain class of colored children, while the white children who have been born from the same kind of connection, under the same circumstances, have no such rights conferred upon them. If this is not a distinction on account of, that is by reason of, race and color, I confess that I am unable to understand the meaning of the terms.

The colored race, under the Constitution of this State, are entitled to the same, not greater, civil and political rights as the white race, and in these rights, no less and no more, should the Courts protect them. It will not

do to say that the right of legitimacy is a vested right, and, having been once conferred, could not afterwards be taken away. For while this argument may be sufficient to show that the Act of 1866, (13 Stat., 393,) which was doubtless designed to repeal the Act of 1865, could not have that effect so as to defeat or divest such vested right, it would not be sufficient to show that such a vested right would be beyond the reach of a constitutional provision unless it could be shown that such vested right vested upon or grew out of a contract, and could thereby be brought under the protection of that provision of the Constitution of the United States which forbids a State from making any law, either by legislative enactment or constitutional provi-

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sion, which shall impair the *obligation of a contract. Nor will it do to say, as was said in argument, that the Act of 1872 (15 Stat., 183,) applies to "all persons," and therefore there is no distinction on account of race or color. There might be great force in this argument if the words quoted described fully the persons to whom the Act refers, but such is not the fact. The persons to whom the Act refers are "all persons in the State of South Carolina who, previous to their actual emancipation, &c.," clearly confining the Act to persons who had once been slaves, and, as the colored race alone occupied that position, confining the Act to that race.

I concur entirely in the conclusion which the majority of the Court reached upon the question of jurisdiction, and deem it altogether unnecessary to say anything upon that question.

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SIMONS v. BRYCE.

(Columbia, April Term, 1878.)

[*Wills* ⇐614.]

A bequest as follows: "To my son C., (with the above requisitions and reservations), and to his children, the lawful heirs of his body, I give and bequeath all the rest and residue of my estate, real and personal, * * * to him and to his children forever; and I wish it fully understood * * * that, in the event of his dying leaving a wife, his widow shall not be entitled to any part or portion of my estate which I am now disposing of, but that it shall be the property of all his children, share and share alike, to be enjoyed and managed and controlled by him during his lifetime for his and their use and benefit * * *; and that in the event of his outliving his children and dying childless, without grandchildren, the lawful issue of his loins, then the estate which I now have shall go to the children of my brothers, P. and R., and their children:" *Held*, That the son, C., took in the personalty an estate for life, with remainder to his children or heirs of his body living at the time of his death, and for want of such issue, then to the children of P. and R.

[Ed. Note.—Cited in Fields v. Watson, 23 S. C. 47; Bethea v. Bethea, 48 S. C. 442, 26 S. E. 716; Robert v. Ellis, 59 S. C. 162, 37 S. E. 250; Mattison v. Mattison, 65 S. C. 349, 351, 43 S. E. 874.

For other cases, see Wills, Cent. Dig. § 1402; Dec. Dig. ⇐614.]

[*Executors and Administrators* ⇐115.]

An executrix, who is also a devisee of the testator and in possession of the lands devised to her, cannot execute a valid mortgage of her estate in such lands to secure the payment of her own debt, until the debts of the testator have been paid.

[Ed. Note.—Cited in Adger & Co. v. Pringle, 11 S. C. 548; Smith v. Grant, 15 S. C. 149; Roberts v. Smith, 21 S. C. 463.

For other cases, see Executors and Administrators, Cent. Dig. § 467; Dec. Dig. ⇐115.]

[*Wills* ⇐845.]

A mortgage given by a devisee in possession is not an alienation, within the meaning of the statute 3 and 4 W. & M., Ch. IV.

[Ed. Note.—Cited in Warren v. Raymond, 12 S. C. 9, 22, 24; Annely v. De Saussure, Id., 517; Smith v. Grant, 15 S. C. 150; Warren v. Raymond, 17 S. C. 190; Hendrix v. Seaborn, 25 S. C. 485, 60 Am. Rep. 520; Navassa Guano Co. v. Richardson, 26 S. C. 405, 406, 2 S. E. 307; Johnson v. Johnson, 27 S. C. 315, 3 S. E. 606, 13 Am. St. Rep. 636; Tant v. Guess, 37 S. C. 503, 16 S. E. 472; Arthur v. Screven, 39 S. C. 82, 17 S. E. 640; Stewart v. Blalock, 45 S. C. 68, 22 S. C. 774; Team v. Baum, 47 S. C. 415, 25 S. E. 275, 58 Am. St. Rep. 893; Barnwell v. Marion, 54 S. C. 232, 32 S. E. 313.

For other cases, see Wills, Cent. Dig. § 2158; Dec. Dig. ⇐845.]

[This case is also cited in Warren v. Raymond, 17 S. C. 200, without specific application, and in Robert v. Ellis, 59 S. C. 138, 37 S. E. 250, and distinguished therefrom, and in Logan v. Cassidy, 71 S. C. 188, 200, 50 S. E. 794, as to the construction of wills, and in Heath v. Haile, 45 S. C. 648, 24 S. E. 300, as to the rights of mortgagees.]

Before Carpenter, J., at Richland, May, 1877.

This was an action by Margaret C. Simons and others against Sarah M. Bryce and John C. Bryce, executors of Campbell R. Bryce, deceased, and George W. Williams and others.

The case will be understood from the decree of the Circuit Court and the opinion of this Court.

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*The decree of the Circuit Court is as follows:

CARPENTER, J. This action is brought by the children of Campbell R. Bryce, deceased, claiming to be the devisees and legatees, in remainder, under the will of John Bryce, the father of Campbell R., against the executors of the will of the said Campbell R. Bryce, and the judgment creditors of the said Sarah M. Bryce, and the Sheriff and Coroner of Richland County.

The objects of the action are—

First. An injunction to restrain the creditors of the said Sarah M. Bryce from selling lands devised by Campbell R. Bryce to Sarah M. Bryce, under a decree of foreclosure rendered against the said Sarah M. Bryce.

Second. For judgment against the execu-

tors of Campbell R. Bryce upon certain instruments of writing executed by the said Campbell R. Bryce and hereinafter set forth; and to subject the lands devised to the said Sarah M. Bryce by the said Campbell R. Bryce, and by her mortgaged to the defendants, to the payment of such judgment as they may recover against the said executors.

The answer of Jesse E. Dent, "The Mechanics' and Farmers' Building and Loan Association of Richland County, South Carolina," and George W. Williams embraces the following defenses:

1. That, under the will of John Bryce, Campbell R. Bryce took an estate in fee conditional in the lands devised, and consequently an absolute estate in the personalty.

2. That, even upon the assumption that Campbell R. Bryce took not a life estate, with remainder to his children, in the property devised and bequeathed to him by the said John Bryce, yet, the said Campbell R. Bryce having devised his lands to the defendant, Sarah M. Bryce, who entered upon and possessed herself of said lands, and afterwards, before suit brought against her by any creditors of Campbell R. Bryce, bona fide conveyed said lands, by way of mortgage, to the said defendants, the creditors of Campbell R. Bryce are, by the terms of Sections 5 and 7 of Chapter XIV, 3 and 4 William and Mary, (2 Stats., 534,) precluded from enforcing their claims against the said lands and are remitted to their personal action against the devisee.

3. That the plaintiffs are estopped by their release under seal, and by their knowledge of and implied assent to the terms of that release, from asserting any claim on account of the written instruments set forth in the complaint as a cause of action.

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*4. That the plaintiffs are barred by the Statutes of Limitations from enforcing the said claims against the executors of Campbell R. Bryce.

5. That, as between the parties to this action, the devise by Campbell R. Bryce to Sarah M. Bryce was the fulfillment of an obligation upon good consideration, created by the terms of the will of John Bryce.

6. That the plaintiffs are barred from enforcing their said claims as against the said defendants, who are "bona fide" creditors without notice, by reason of their knowledge and concealment of the fraud perpetrated by the defendant, Sarah M. Bryce, in mortgaging the said property without disclosing the existence of the said claims.

The facts involved in the case are as follows:

1. John Bryce, by his last will and testament, bearing date May 7, 1851, made, inter alia, the following devises and bequests, that is to say: "To my son, Campbell R. Bryce, (with the above requisitions and reservations,) and to his children, the lawful heirs of his body, I give and bequeath all the rest and residue of my estate, real and personal, of whatever kind I may die seized and possessed of, or that may at any time hereafter, either before or after my death, become mine, to him and to his children forever. And I wish it fully understood and declared, that, having already given him about sixty thousand dollars at various times, and he being worth a property of his own at this present time of fully that amount clear of debt, that, in the event of his dying leaving a wife, his widow shall not be entitled to any part or portion of my estate which I am now disposing of, but that it shall be the property of all his children, share and share alike, to be enjoyed and managed and controlled by him during his lifetime for his and their use and benefit. And this is not intended to apply to the present wife only, who is a most excellent lady and faithful and loving wife and mother, but also to any future wife. And I furthermore intend and desire, that, in the event of his outliving his children and dying childless, without grandchildren, the lawful issue of his loins, then the estate which I now have shall go to the children of my brothers, Peter and Robert Bryce." Lastly, "I do hereby appoint, nominate and constitute by beloved son, Campbell Robert Bryce, in whose principles and honor I have the highest confidence, sole executor of this my last will and testament; and I hereby clothe and endow him with full power and authority to take all my estate,

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real and *personal, wherever it may be, and of whatever it may consist, into his possession, and to pay off my debts at as early date as he conveniently may; to discharge and pay off, as I have herein rehearsed, all the bequests and legacies; and he, in the performance and discharge of this trust and duty, is at full liberty to sell and dispose of any portion of my estate, excepting such portions as I have disposed of by this instrument, without application to any Courts of law, or making returns or accounts to any Ordinary, Chancellor or Commissioner. All I require is, that this instrument may be placed on record, that all who have any rights under it may know what they are. I have no fears that my son will fail to carry out my intentions."

2. John Bryce died on the 24th day of November, 1855, at which time Campbell R. Bryce had children, but no grandchildren.

3. Campbell R. Bryce qualified as executor of his father's will and administered the estate.

4. In his account as executor, he charged himself on August 10th, 1859, with the sum of $2,000, and simultaneously executed a paper, of which the following is a copy:

"August 10th, 1859.

"$2,000. Due the estate of John Bryce two thousand dollars, for so much of its money this day taken in loan, for my personal use.

"Witness my hand and seal.

"Campbell R. Bryce, [L. S.]"

5. On the 4th day of April, 1863, he charged himself with $27,390.16, as the proceeds of the sale of certain shares of the capital stock of certain of the banks of the State, belonging to his testator's estate, and at the same time executed the two papers of which the following are copies:

"Columbia, S. C., April 4th, 1863.

"$13,695.08. On or before the first day of July next, I promise to pay to the estate of John Bryce thirteen thousand six hundred and ninety-five 08-100 dollars for value received.

"Witness my hand and seal.

"Campbell R. Bryce, [L. S.]"

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*"Columbia, S. C., April 4th, 1863.

"$13,695.08. On or before the first day of January next, I promise to pay to the estate of John Bryce thirteen thousand six hundred and ninety-five 08-100 dollars for value received.

"Witness my hand and seal.

"Campbell R. Bryce, [L. S.]"

The amounts of the two papers aggregating the precise sum on the same day charged in his account.

6. The said Campbell R. Bryce, on the day of , 1863, executed his last will and testament, wherein and whereby he devised and bequeathed as follows: "I devise and bequeath to my beloved wife, Sarah M. Bryce, absolutely and forever, all my estate, real and personal, which I owned before my father's death, or have since acquired, and which I did not derive under the devises and bequests of his will; that is to say, I devise and bequeath to her my dwelling house and lot in Columbia, containing two acres of land, together with my furniture, books, horses and carriage, silver plate, and all things at and belonging to said establishment; also my plantation situate about six miles below Columbia, on the Bluff road, containing one thousand three hundred and thirty-four acres, with all the fixtures and machinery thereon; all my stock, horses, mules, hogs, wagons and plantation implements and growing crops thereon; also the following negroes, with their issue; * * * also, I devise and bequeath to my beloved children, born or to be born, all my estate, real and personal, which I derived or which may come to me under the will of my beloved and honored father, to be equally divided between them; the issue of any child who may die before me to take the parent's share;" * * * and appointed his mother, Sarah F. Bryce, his wife, Sarah M. Bryce, and his son, John C. Bryce, executors, and died on the 14th day of August, 1867, leaving his will of force.

7. The will was admitted to probate on the day of , 1867, and the executors therein named all duly qualified therein, and assumed the administration of the estate, but that the said estate has not yet been fully administered.

8. Mrs. Sarah F. Bryce departed this life on the 21st day of May, 1870, leaving the said Sarah M. Bryce and John C. Bryce surviving executors.

9. At the time of the death of Campbell R. Bryce, all of his children had attained the age of twenty-one years, except Elizabeth

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*H., now the wife of the plaintiff, Carl McKinley, and Mary Y. Bryce, who attained that age, respectively, on the day of December, 1871, and on the day of November, 1874, and Nina R. Bryce and Florence M. Bryce, who are still infants, and are now of the ages of seventeen (17) and thirteen (13) years, respectively.

10. That on the day of , 1868, the following paper was executed by the parties whose signatures are thereto appended:

"South Carolina, }
Richland County. }

"Whereas the undersigned, the residuary legatees and devisees under the last will and testament of John Bryce, deceased, have learned that our mother, Sarah M. Bryce, found amongst the papers of our late father, Campbell R. Bryce, two certain papers, said to be in the handwriting of our said father, of which the following are copies:" [Here are inserted copies of the two notes set forth in the 5th finding of fact.] "And whereas it has been ascertained to our satisfaction that if said papers were intended by our father as acknowledgments of indebtedness, they were acknowledgments of indebtedness in Confederate currency only, at that time greatly depreciated and now utterly worthless; also, that such Confederate currency was the proceeds of sale of bank or other stock, which, had it been retained by our father, would soon be worthless, and perhaps worse than worthless, because of the supposed liability attending the ownership thereof; and whereas we are satisfied if said papers were really acknowledgments of money received by our father for the estate of his father, and if the same, or any part thereof, was used by our said father, the same, or the larger portion thereof, was used in the support, maintenance and education of ourselves and the other members of his family; and whereas if said papers do constitute valid claims against the estate of our father, and should now be enforced against it, such has been the loss and destruction of both estates, and so great have been the changes in the condition of both, that we are satisfied our mother, Mrs. Sarah M. Bryce, might, and probably would, be deprived of the maintenance and support which we are well assured both our father and grandfather intended she should have out of their estates:

"Now, therefore, know all men by these

presents, that we, the undersigned residuary devisees and legatees under the last will and

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*testament of the said John Bryce, for the consideration aforesaid, and for the further consideration of five dollars to us paid by our mother, Mrs. Sarah M. Bryce, at or before the sealing and signing of these presents, do hereby release, relinquish, assign and transfer unto the said Sarah M. Bryce all our right, claim, interest or demand, and all and every supposed right, claim, interest or demand, against or upon the estate of the said Campbell R. Bryce, under the said last will and testament of the said John Bryce, deceased, or in any other character or capacity whatever, on account of the said two papers above copied, or on account of any sum or sums of money of the receipts of which the said papers may have been acknowledgments. This release and relinquishment to embrace not only the principal sum supposed to be or actually represented by said papers, but also all accumulations of interest thereon. In this release or extinguishment of claim upon the estate of the said Campbell R. Bryce, each of the undersigned acts for him or herself alone, and as to his or her interest or share, or supposed interest or share, and for no other person or persons.

"In witness whereof we have hereunto set our hands and affixed our seals, this day of , 1868.

"Sarah Bryce, [Seal.]
"John C. Bryce, [Seal.]
"M. C. Simons, [Seal.]
"E. H. Bryce, [Seal.]
"M. Y. Bryce, [Seal.]
"W. A. Clarkson, [Seal.]
"Sally C. Clarkson. [Seal.]

"Signed and sealed and delivered in the presence of

"Geo. Howe,
"Sam'l Fair,
"J. J. Goodwin,
"C. T. Goodwin."

11. On the death of her husband, the defendant, Sarah M. Bryce, entered as devisee upon the lands and premises devised to her, and has ever since continued in the possession and enjoyment thereof, treating them as her own property.

12. The defendant, Sarah M. Bryce, retained the three papers above recited, and signed by her testator, Campbell R. Bryce, in her own actual possession until the year

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1870, when she deposited *them, in a mass of papers pertaining to her testator's estate, in the office of her attorney, Major C. D. Melton, since deceased, where they remained until some time in the early part of the year 1876, when, at her request, Mr. Clark, who had become the partner of Mr. Melton, searched for and found them among the papers of the estate. It does not appear that Mr. Melton, during his life, even knew of the existence of said papers; and it appears from the testimony of Mr. Clark that he had never seen or heard of them until he instituted the search for them as above stated.

13. That on the 18th day of October, 1876, Carl McKinley was duly appointed the general guardian of the infant plaintiffs, Nina R. and Florence M. Bryce, when the said papers were placed in his hands by the said Sarah M. Bryce, and by him delivered to Edward R. Arthur, Esq., attorney for the plaintiffs, for the purposes of this suit.

14. The existence of the three notes and the release above recited was always known to the several members of the family of Campbell R. Bryce, deceased, and at no time before the commencement of this action was any claim to the said notes set up, or any objection to the said release urged by any one of the parties.

15. That on the 27th day of March, 1874, the defendant, Sarah M. Bryce, executed and delivered to the defendant, Jesse E. Dent, a mortgage of the house and lot in the city of Columbia described in the pleadings, being a parcel of the land and premises devised to her by her deceased husband, Campbell R. Bryce, to secure the payment of a bond for two thousand dollars ($2,000) borrowed money; and on the 14th day of May, 1874, the said Sarah M. Bryce executed and delivered to "The Farmers' and Mechanics' Building and Loan Association of Richland County, South Carolina," a mortgage of the plantation described in the pleadings, also a parcel of the said devised lands and premises, to secure the payment of a bond for the sum of dollars, ($,) borrowed money; and also, on the 3d day of May, 1875, the said defendant, Sarah M. Bryce, executed and delivered to George W. Williams a second mortgage of the plantation above described, to secure the payment of a bond for the sum of dollars, ($,) borrowed money.

16. It appears that the negotiation of these several loans, and the execution of the several mortgages, was known generally in the family of the said Sarah M. Bryce. Sev-

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eral of her daughters ac*companied her in frequent visits to the office of Messrs. Melton & Clark, where the negotiation of the loan from Jesse E. Dent, and the security to be given to him, was the topic of conversation.

17. Judgments were recovered on the several bonds, and decrees of foreclosure rendered on the several mortgages, in the Court of Common Pleas for Richland County, at the May Term, 1876; and in pursuance of said judgments and decrees, the several mortgaged premises were advertised for sale on the sales day in December then next ensuing.

18. On the 28th day of November, 1876, after said advertisement and before the day of sale, the complaint in the present action was filed, and thereupon an order for temporary injunction was granted.

I find, as conclusions of law—

1. That Campbell R. Bryce took an estate in fee conditional in the lands devised to him by the will of John Bryce, and, of consequence, an absolute estate in the personalty bequeathed in the same language; and that the supposed evidences of indebtedness set forth in the complaint are absolutely null and void.

2. That the several mortgages executed by the said Sarah M. Bryce was such a bona fide alienation of the lands held by her as devisee under the will of the said Campbell R. Bryce, within the purview of the Statute of 3 and 4 W. and M., Ch. XIV, (2 Stats., 534,) as to render the same not liable to execution issued upon any judgment recovered against the said Sarah M. Bryce.

It is, therefore, ordered, adjudged and decreed that the injunction be dissolved, that the complaint be dismissed, and that the costs and disbursements of the defendants, Jesse E. Dent, "The Mechanics' and Farmers' Building and Loan Association of Richland County, South Carolina," and George W. Williams, be paid by the plaintiffs and defendant, Sarah M. Bryce.

The plaintiffs appealed on the following grounds:

I. That the mortgages referred to in the pleadings herein are not an "alienation," within the meaning of Act of 3 and 4 W. and M., Chapter XIV, (2 Stat. at Large, 534,) when it is respectfully submitted that this Act has no application to this case at all.

II. That His Honor erred in construing the will of John Bryce, deceased; especially so when it is held that C. R. Bryce took an absolute estate in all the personal property of said John Bryce.

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*Arthur & Arthur, Boone, for appellants.

Clark, Sloan, Fickling, contra.

November —, 1878. The opinion of the Court was delivered by

McIVER, A. J. The first question in this case arises upon the construction of a clause in the will of John Bryce, who died 24th November, 1855, which is in the following words: "To my son Campbell R. Bryce (with the above requisitions and reservations) and to his children, the lawful heirs of his body, I give and bequeath all the rest and residue of my estate, real and personal, of whatever kind I may die seized and possessed of, or that may at any time hereafter, either before or after my death, become mine, to him and to his children forever. And I wish it understood and declared that, having already given him about sixty thousand dollars at various times, and he being worth a property of his own at the present of fully that amount, clear of debt, that, in the event of his dying leaving a wife, his widow shall not be entitled to any part or portion of my estate which I am now disposing of, but that it shall be the property of all his children, share and share alike, to be enjoyed and managed and controlled by him during his lifetime for his and their use and benefit; and this is not intended to apply to the present wife only, who is a most excellent lady and faithful and loving wife and mother, but also to any future wife. And, furthermore, I intend and devise, that, in the event of his outliving his children and dying childless, without grandchildren, the lawful issue of his loins, then the estate which I now have shall go to the children of my brothers, Peter and Robert Bryce, and their children."

The controlling rule in the construction of a will is the intention of the testator. Hence, if we can discover from the language of the testator what his intention was, we must construe the will in accordance with such intention, provided the same is not in violation of law. It seems to us, from the language of this clause, that the primary object of the testator's bounty was his son, Campbell R. Bryce, and after him his children and grandchildren; and in the event there were none such at the death of his son, then the children of testator's two brothers, Peter and Robert. It is not so manifest, however, as to what was the nature of the estates which he intended these objects of his bounty to take. It is only necessary for us to determine in this case the nature of the

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son's estate. Reading the *whole clause together, with a view to give effect to every part of it, if possible, as required by one of the fundamental rules in the construction of wills, we cannot reach the conclusion that the testator intended that his son should take an absolute estate in fee simple, but, on the contrary, it appears to us that the intention was that the son should take a life estate, with remainder to his children and their children. If his purpose was to give the son an absolute estate, there was no necessity to insert the words "and to his children, the lawful heirs of his body;" and these words would, therefore, be given no force or effect whatsoever, and may as well have been omitted. To construe the will as giving an absolute estate to the son would be practically ignoring that portion of the will containing the words above quoted. Again, if he should be regarded as intending an absolute estate to the son what possible force and effect could be given to the words "that in the event of his dying leaving a wife, his widow shall not be entitled to any part or portion of my estate which I am now disposing of, but that it shall be the property of all his children, share and share alike, to be enjoyed

and managed and controlled by him, during his lifetime, for his and their use and benefit"? Now, these words would not only not be given any force or effect if the will should be construed as conferring an absolute estate upon the son, but such a construction would be a direct contradiction, and defeat the testator's express wish, in one respect at least; for it is perfectly manifest that his intention was to exclude the widow of his son, for reasons entirely consistent with respect for the lady, which he has taken particular pains to explain, from any participation in the bounty provided for his son, and this it would be impossible to do if the will is construed as conferring an absolute estate upon the son; for if the son took such an estate, then, necessarily, upon his death intestate his widow would inherit her portion under the Statute of Distributions, and if he left a will there would be nothing to prevent the son, if he held the absolute estate, from giving the whole or any part of it to her: so that, in either case, the intention of the testator would not be carried out, but, on the contrary, would be defeated and directly contradicted.

Again, the language of the testator, speaking of his son, "that, in the event of his outliving his children and dying childless, without grandchildren, the lawful issue of his loins, then the estate which I now have shall

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go to the children of my brothers, Peter *and Robert Bryce, and their children," is wholly inconsistent with the idea that the testator intended to give his son an absolute estate, and, on the contrary, indicates an intention that the estate of the son was to terminate with his life. We are, therefore, of opinion that the testator did not intend to give his son an absolute estate, but only a life estate, with remainder to his children or grandchildren, and, in the event of his dying without leaving issue, either of the first or second generation, then with remainder to the children of his brothers. It is not enough, however, to ascertain that such was the intention of the testator, but we must go on and inquire whether such intention can be carried into effect consistently with established principles of law. If the language be construed as amounting to a devise to the son and his children, and, in case he should die without either a child or grandchild, then over to the children of the brothers of testator, as we think it may well be, and if the term children be regarded as synonymous with "heirs of the body," which is the sense in which the testator seems to have used the word children, as is evidenced by the language "to his children, the lawful heirs of his body," and which is the sense most favorable to the view presented by the respondents, then, prior to the Act of 1853, (12 Stat., 298; Gen. Stat., Chap. 86, § 10, p. 443,) there might have been a question whether the limitation over was not void for remoteness, and whether the son did not take a fee conditional estate in the realty and an absolute estate in the personalty. But since that Act, which was passed prior to the death of the testator, no such question could arise. That Act declares "that whenever * * * in any will of a testator hereafter dying, an estate, either in real or personal property, shall be limited to take effect on the death of any person without heirs of the body or issue, or issue of the body, or other equivalent words, such words shall not be construed to mean an indefinite failure of issue, but a failure at the time of the death of such person." Hence, in construing a will which took effect after the passage of that Act, we are required to read a devise to one and the heirs of his body, or to one and his issue, and, in case of his death without heirs of his body or without issue, then over to some one else; as if the gift were to one and the heirs of his body, or to one and his issue, and, in case of his death without leaving heirs of his body or without leaving issue living at the time of his death, then over, in which case the limitation over would unquestionably be good. Reading, then, this

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will in that *way, we should have a devise to Campbell R. Bryce and the heirs of his body, and, in case he died without leaving such heirs living at the time of his death, then over to the children of testator's brothers. These are, in effect, the same words as those used in Bell's will, and, according to the case of Henry v. Archer, (Bail. Eq., 535,) the authority of which has never, so far as we are informed, been questioned, but which, on the contrary, has been so repeatedly recognized in a number of subsequent cases, (which are appended in a note to that case, as reported in the second edition of Bailey's Equity Reports,) that, as Dunkin, Ch., says in Hay v. Hay, (4 Rich. Eq., 387,) "it may now well be regarded as a rule of property." These words, when applied to personalty, create an estate for life in the first taker, with remainder to his issue as purchasers. In the case of Henry v. Archer, the bequest was to testator's daughter Elizabeth, "to her and the lawful issue of her body forever;" and after various other devises and bequests, the testator proceeds: "And it is my will and desire that if any of my sons or daughters should die without leaving lawful issue of their bodies alive, then their part of the estate to be equally divided amongst my then surviving children." The contest was between the children of Elizabeth, who was dead, and certain creditors of her husband, who claimed that Elizabeth took an absolute estate and that her husband's marital rights had attached, he having been in possession during the coverture, and the Court of Appeals in equity held, in conformity with a previous decision of the Court of Appeals in law, in the case of Henry v. Means, (2 Hill,

328.) that Elizabeth took only a life estate in the personalty, with remainder to her children, upon the principle that where there is an express gift to issue generally, a limitation over, in the event of the first taker dying without leaving issue living at his death, will confine the gift to such issue as are living at that time and entitle them to take as purchasers. The case under consideration comes within this principle, and we are unable to distinguish it from the case of Henry v. Archer. In our opinion, therefore, Campbell R. Bryce took, under the will of his father, an estate for life in the personalty, with a valid remainder to such of his children or heirs of his body as were living at the time of his death. This being the case, the memoranda of indebtedness, in the form of notes given by Campbell R. Bryce to the estate of John Bryce, so far as they represent personal property, constitute valid claims against his es-

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tate in behalf of his *children; but as he was entitled to a life estate therein, such amounts will not bear interest except from the time of his death. So far as the two larger notes, so called, are concerned, they are admitted to be representatives of personal property—the proceeds of the sales of bank stock; but as to the one for two thousand dollars, it does not distinctly appear what it represents, except that it was money of the estate of John Bryce; but whether money arising from the sales of real estate, which Campbell R. Bryce was authorized by his father's will to make, or from the sales of personal property, or from what source it was derived, does not appear, and may, therefore, be a matter for further inquiry in the Court below.

It appears, however, that some of the children of Campbell R. Bryce released their claims against the estate of their father on account of two of the so-called notes, and, as the bona fides of that release has not been questioned, it must operate as a discharge so far as the interests of those who were of age at the time are concerned. Two of the parties who signed this release were not of age at the time it was signed, but attained the age of twenty-one years some time before the commencement of this action; and as the Circuit Judge has found that "the existence of the three notes and the release above recited was always known to the several members of the family of Campbell R. Bryce, deceased, and at no time before the commencement of this action was any claim to the said notes set up, or any objection to the said release urged, by any one of the parties," it may be that these two children will be held to have ratified the release which they signed while minors after they had attained their majority. But as there is no decision upon this point by the Court and but little testimony, it will be necessary for that Court to make further inquiry as to this point. As to the two children who did not sign the release and who are not yet of age, it is manifest that their rights can in no wise be affected thereby.

The next inquiry is as to the effect of the several mortgages executed by Mrs. Sarah M. Bryce to some of the defendants. She was executrix as well as devisee under her husband's will, and the property mortgaged consisted of lands devised to her by him. The will of Campbell R. Bryce invests his executors, or a majority of such as may qualify, "with authority to sell or dispose of any portion of my estate, real and personal, they may deem expedient, at public or private sale, for change of investment, partition or any other purpose not inconsistent with my

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will." It seems that *all three of the executors named qualified, though one of them, Mrs. Sarah C. Bryce, died prior to the execution of the mortgages in question. These mortgages, however, do not purport to have been executed in pursuance of any power conferred by the will, even were it conceded that the terms of the will were sufficient to confer such a power; they were not given to secure debts due by Campbell R. Bryce, but, on the contrary, were given to secure the individual debts of Mrs. Sarah M. Bryce, and they were executed by her alone and not by the other surviving executor. It is clear, therefore, that these mortgages cannot be regarded as having been executed in pursuance of any power conferred upon his executors by the will of Campbell R. Bryce, but must be regarded as the individual act of Mrs. Bryce as devisee. Mrs. Bryce being both executrix and devisee, she cannot in the latter capacity claim any rights inconsistent with her duty in the former. Her first duty as executrix was to pay the debts of her testator so far as his property would extend, and until she had performed that duty it is difficult to understand how she could acquire any adverse rights to such property, which was in her hands, primarily, for the purpose of paying such debts. She must, therefore, be regarded as in possession as executrix until the debts are paid, and the lands devised to her must, while in her hands, remain liable for the payment of the debts due by her testator in preference to any debts due by her in her individual capacity.

This brings us to the question whether the mortgagees can claim the benefit of the Statute 3 and 4 W. and M., Chap. XIV, (2 Stat., 535; Gen. Stat., 92, § 5, p. 464); that is, whether a mortgage of real estate is an alienation within the meaning of that statute. It admits of no dispute that if the answer to this question depended alone upon the English cases it must be answered in the affirmative. These cases are the legitimate result of the nature of a mortgage at common law. A mortgage under that law is defined to be "the

conveyance of an estate, by way of pledge, for the security of debt, and to become void upon payment of it."—1 Hilliard on Mortgages, Chap. I, § 2, following 4 Kent Comm., 133. Or, "a mortgage is a pledge and more, for it is an absolute pledge, to become an absolute interest if not redeemed at a certain time," following the definition in 1 Powell on Mortgages, 3–4. Hence it naturally followed, from the inherent qualities of a mortgage, that, as Nott, J., says, in State v. Laval, (4

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McC., 339–40,) "a mortgage, *according to the English law, is a conveyance of land as a security for money to be paid in future, and defeasible upon the payment of the money within the time prescribed. If the money be not paid according to the contract the deed becomes absolute and the fee of the land is vested in the mortgagee." This being so, the necessary result would be that a mortgage must be regarded as an alienation. It is very apparent, however, that our Act of 1791 (5 Stat., 169,) introduced not only important but radical changes in the very nature of a mortgage; in fact, we may say, not only revolutionizing but absolutely reversing the nature of a mortgage. For, while at common law it operated as a conveyance of an estate, by that statute it is expressly declared that it shall not so operate, "even after the time allotted for the payment of the money secured by the mortgage is elapsed." And while, as we have seen, by that law "a mortgage is a pledge and more, for it is an absolute pledge, to become an absolute interest if not redeemed at a certain time," by that statute it is expressly declared that it ought to be considered "only as a pledge;" and while at common law the mortgagee, upon breach of the condition, could maintain an action to recover the possession of the mortgaged premises, by that statute it is expressly declared that a mortgagee shall not be entitled to maintain such action except "when the mortgagor shall be out of possession." In the face of these radical changes in the nature and effect of a mortgage, made by statute, it is difficult to understand how a Court can now attribute to a mortgage qualities of which it has been deprived by legislative enactment; for it is essential to the idea of a mortgage being an alienation that it should be the conveyance of an estate, and that the statute expressly declares it shall not be. The word is never used, so far as we are informed, either by text writers or in adjudicated cases in any other sense. The essential feature of it is that it involves the idea of a transfer of the title to an estate by the act of the parties as contradistinguished from the operation of the law. The legal definition of the term is, the act by which the title to an estate is voluntarily resigned by one person and accepted by another in the forms prescribed by law.—2 Bouv., § 1992. It is true that we do find the expression "alienation by way of mortgage" both in the text books and reported cases, but it is applied to mortgages as they were at common law, and not to mortgages as changed by the Act of 1791; or, if so applied, incorrectly applied,—resulting, probably, from a habit which grew

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up *under the common law, just as we will presently find with regard to the words "equity of redemption." It is argued, however, that by the terms of the Act of 1791 the changes thereby introduced do not apply "when the mortgagor shall be out of possession," and therefore in such cases a mortgage still retains all of its common law incidents or qualities, amongst which is, that it is a conveyance of an estate, and, therefore, should be regarded as an alienation. A sufficient answer to this is, that we are not now dealing with such a case, and that it will be time enough to consider such a case when it arises. In the case in hand the mortgagor is still in possession, and therefore it does not come under the proviso to the second Section of the Act of 1791. It may be insisted, though, that as in the one case a mortgage must still be regarded as an alienation, that it ought also to be so considered in the other, probably, for the purpose of preserving the symmetry of the law. This is undoubtedly a good purpose; but however good it may be, we are unable to see by what authority a Court can abrogate a statute, or any part of it, even for the purpose of subserving so desirable an end. It is perfectly manifest that the Act of 1791, as it has been construed by our Courts with respect to the effect of that proviso, has established not only marked differences, but absolute contradictions, in the two cases: for where a mortgagor remained in possession, the mortgagee might, under certain specified circumstances, have applied to the Court of law for a sale, while in the other case, where the mortgagor was not in possession, he was not allowed, under any circumstances, to resort to what is called in one of the cases "the easier and cheaper mode" afforded by the Court of law, but was forced to take proceedings in the Court of Equity, which are denominated as "tedious and expensive." In the former case he could not maintain an action for possession of the mortgaged premises, while in the latter he could. In the one case the mortgage was to be regarded as only a pledge, while in the other it was a pledge and something more. And, finally, in the former case the mortgagor was still the owner of the land, even after breach of the condition, while in the latter he was not. We do not, therefore, see the force of the argument that, notwithstanding all these radical changes, we should still attribute to a mortgage in the one case a feature of which it was deprived by these alterations, simply because in the other case, to which these alterations do not apply, the

mortgage might still retain all of its common law features. Whether the true con-

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struc*tion has been placed upon the proviso to the second Section of the Act of 1791 we do not propose to inquire, inasmuch as it cannot affect the case under consideration, especially as that construction has been so long settled and has been followed in so many cases as to demand, probably, that it should not be disturbed, even though originally it may have been wrong. But we are not disposed to extend the effects of that construction beyond what the cases on the subject absolutely require.

Again, it may be argued that the provisions of the Act of 1791 are but the declaration of the construction which had always been placed upon the nature and effect of a mortgage by the Court of Equity, and that the legal estate was always regarded by that Court as remaining in the mortgagor. This is a common remark, and is to be met with in many of the cases; but, like most common remarks, it is true only in a modified sense. It is not true that the Court of Equity always regarded the mortgagor as the legal owner of the mortgaged land, for, if so, whence the necessity of a reconveyance when the mortgagor applied to that Court to redeem after condition broken? If the legal title was regarded by the Court of Equity as still in the mortgagor, as it is still declared to be by the Act of 1791, after condition broken, the reconveyance of the mortgagee would be worse than a nullity—it would be an absurdity. A person who had no title would be conveying to one who already had the title. Certainly a Court of equity would not decree that one should convey what he never had to another who already had the thing to be conveyed. And yet, as Wardlaw, J., says, in Mitchell v. Bogan, (11 Rich., 697,) "the right to redeem, if opposed, always required the aid of a Court of equity for its enforcement, and was not complete in fruition until there had been a reconveyance from the owner of the legal estate"—the mortgagee. Even where the mortgage debt had been paid or extinguished, there must have been a reconveyance. As Lord Hardwicke said in Harrison v. Owen, (1 Atk., 520,) "if a mortgagee cancels a mortgage and it is found so in his possession, it is as much a release as canceling a bond, but it does not convey or revest the estate in the mortgagor, for that must be done by some deed." This shows that the Court of Equity did not regard the mortgagor as the owner of the legal estate. It would probably be more correct to say that the Court of Equity always regarded the mortgagee as the owner of the legal estate, which, however, was im-

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*pressed with a trust to reconvey upon payment or tender of the mortgage debt; and this is a very different thing from the light in which the relations of the parties—mortgagor and mortgagee—are to be regarded under the provisions of the Act of 1791. In the one case, the mortgagor, upon payment or tender of the debt, might be forced to go into the Court of Equity to get back that—the legal title to the land—which he had alienated; while in the other, having never parted with such legal title, he is under no necessity to apply to any Court to get that which he already had, having never alienated it.

Again, it may be urged that the provisions of the Act of 1797, (5 Stat., 311,) which was passed, as its title declares, "to explain and amend" the Act of 1791, show that the Legislature did not intend to effect the radical changes in the nature of a mortgage which we have indicated above as the necessary result of the Act of 1791 in those cases to which it applies. The Act of 1797 provides that, whereas, under the Act of 1791, "doubts have arisen whether a mortgagee, taking a release of the equity of redemption from his mortgagor, can be considered as legally and fully seized of the premises mortgaged, inasmuch as that Act discloses that the premises mortgaged are still to be the estate of the mortgagor, and only a pledge in the hands of the mortgagee, who is not thereby vested with any legal estate, and, therefore, cannot be benefited by such release:

"Be it, therefore, enacted, * * * That all releases of the equity of redemption made since the passing of the said Act, or hereafter to be made, shall have the same force and effect in law as if the said Act had not been passed."

From this it may be argued that the design of the Act of 1791, as thus explained and amended, was not to change the previously existing law in respect to who should hold the legal estate,—whether mortgagor or mortgagee,—inasmuch as the Act of 1797 provided that a mere release of the equity of redemption should be sufficient to perfect the title in the mortgagee, and that this necessarily involved the idea that, notwithstanding the express declaration of the Act of 1791 to the contrary, the mortgage did convey the legal estate to the mortgagee, which was a perfect title, subject only to the trust, which equity impressed upon it in favor of the mortgagor, to reconvey upon payment of the mortgage debt; and, therefore, when that equity was gone, by the release of what

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was called the *equity of redemption, the title of the mortgagee was absolutely perfected. This argument, though plausible and ingenious, is answered conclusively by the remark that it results necessarily in the repeal or abrogation of that portion of the Act of 1791 which expressly declares that, even after condition broken, "the mortgagor

shall be deemed the owner of the land:" and as there are no repealing words in the Act of 1797, and no such effect has been attributed to it in any case that we are aware of, but, on the contrary, the full force of the Act of 1791 has been repeatedly recognized by our Courts, we must necessarily seek for some other construction of the Act of 1797. The most obvious one is that it was not designed to repeal any portion of the Act of 1791, but simply to give additional force and effect to a release of the equity of redemption—make it operate as a conveyance. Indeed, since the passage of the Act of 1791, the term "equity of redemption" is, as Nott, J., says in State v. Laval, (4 McC., 340,) "clearly a misnomer," as is fully shown by Wardlaw, J., in Mitchell v. Bogan, (11 Rich., 704). In speaking of the Act of 1791, he says: "There can be under the Act no redemption before sale for satisfaction, for no estate to be redeemed has passed from the mortgagor or those who hold under him until a sale which bars their title. What is generally called the equity of redemption is a legal right in the owner of the land to disencumber it. * * * There can be no simple foreclosure: for if all right to disencumber was taken away and nothing more done, there would still be no estate in the mortgagee. The release of the equity of redemption is a conveyance of the land to him who has the encumbrance."

Again, it is obvious that the words "equity of redemption" do not mean what the words would naturally import, for it is beyond dispute that the interest which is commonly called the equity of redemption is liable to levy and sale under an execution; and it is equally clear that if it were, what the words import, a mere equity, it would not be liable to levy and sale under an execution. It is plain, therefore, that what is miscalled the equity of redemption is, in fact, the legal estate in the land, subject to the encumbrance created by the mortgage, and that the release of the equity of redemption must be regarded, as Judge Wardlaw says, as the conveyance of the land to him who holds the encumbrance.

We do not think that this question is concluded by the decision in Haynsworth v. Bischoff, 6 S. C., 159. The point decided

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there *is, that a mortgagee may claim the protection afforded to purchasers for valuable consideration without notice, upon the equitable principles regulating the doctrine. The case does not decide that a mortgage is an alienation in the proper sense of that term. As the present Chief Justice well says in that case: "The equitable doctrine as to purchasers springs out of the peculiar nature of equity as the administration of a settled rule of conscience. When it is sought to affect a party or subject his rights or estate to some equity or state of equities existing primarily between other parties, on the ground that he has acquired some property or right from one bound by such equity, and in whose hands the property or right previous to its transfer was specifically bound by such equity, it is necessary to show that the act of acquiring such property or right ought not in conscience to stand. If the dealing has been fair and the purchaser has been at cost to acquire the property or right, not intending or knowing of any injury to result therefrom to a third person, it is clear that a Court that proceeds on the ground of conscience cannot interfere with rights thus obtained."

But in this case the mortgagees do not and could not invoke any such equitable doctrine, but rely upon the express provisions of a special statute, and by that statute must they stand or fall. The claim which they resist does not rest upon a mere equity, as in Haynsworth v. Bischoff, but is a plain legal right—lands in the possession of an heir or devisee being liable at law for the debts of the ancestor or testator. Therefore the question here is not whether the mortgagees can claim the protection afforded purchasers for valuable consideration without notice, upon the equitable principles regulating that doctrine, but the only question is, whether a mortgage of real estate can be regarded as an alienation within the meaning of that term as used in the Statute of William and Mary.

It is argued, however, that the words used in that statute are "sold, aliened or made over," and not merely the word aliened, and that this shows a purpose to include something more than mere alienation, in the strict sense of that term, as those words will include any disposition of the property whereby the rights of third persons are affected. This argument is not sustained by the facts, for in that part of the statute which saves the rights of purchasers—the only part with which we are concerned—the only word used is the word aliened. In the previous part of the Section fixing the liability of the heir or devisee, as the case may

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be, the three terms, *sold, aliened and made over, are used, but not in that part which saves the rights of purchasers. Hence, if there is any force in this argument at all, it is rather against than in favor of the view contended for by the respondents. For if it be argued that the Legislature, by using the three terms, designed to cover other cases than those strictly within the meaning of the term aliened, then the fact that the additional terms were dropped when they came to provide for the rights of purchasers would seem to indicate that they intended to save the rights of purchasers only in the

case of alienation, in the strict sense of that term.

Finally, it is argued that as a mortgage was undoubtedly an alienation at the time of the adoption of the Statute of W. and M., (1712) that statute ought now, notwithstanding the subsequent changes in the nature of a mortgage, still to be construed as embracing a mortgage. There might be some force in this argument but for the fact that this statute has been re-enacted in the general statutes, and the same terms, so far as the question under consideration is concerned, are retained, although the phraseology in other respects is changed, as we know has been the case throughout the general statutes, in order to make them conform to existing laws. For example, in this very statute, from that part of it which makes the heir answerable, the words "in an action or actions of debt" are omitted, because the Code of Procedure had abolished all distinctions in the forms of actions.

It follows, therefore, from these views that the children of Campbell R. Bryce, who have not debarred themselves by the release above mentioned, have a right to subject the lands of their father in the possession of his devisee to the payment of any claims which they may be able to establish against him, notwithstanding the fact that the devisee has mortgaged the same to secure the payment of debts contracted by her. The question of the Statute of Limitations was not passed upon by the Circuit Court, and therefore is not properly before us.

The judgment of the Circuit Court is reversed and the case remanded to that Court for such further proceedings as may be necessary and proper.

WILLARD, C. J., and HASKELL, A. J., concurred.

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*FABER v. POLICE.

(Columbia. Nov. Term, 1877.)

[*Wills* ⟸634.]

A devise to trustees for the use of A "during his life, and after his death in trust for his lawful issue living at the time of his death; and if he should die leaving no issue," (there being none) then over to his residuary devisees and legatees, gives to the remaindermen not a vested but a contingent remainder.

[Ed. Note.—Cited in Waring v. Cheraw & D. R. Co., 16 S. C. 424; Moseley v. Hankinson, 22 S. C. 328; Farr v. Gilbreath, 23 S. C. 512; Roundtree v. Roundtree, 26 S. C. 470, 2 S. E. 474; Robinson v. Ostendorff, 38 S. C. 74, 75, 16 S. E. 371; People's Loan & Exchange Bank v. Garlington, 54 S. C. 421, 32 S. E. 513, 71 Am. St. Rep. 800; Boykin v. Springs, 66 S. C. 370, 44 S. E. 934; Woodley v. Calhoun, 69 S. C. 288, 48 S. E. 272; Charleston & W. C. Ry. Co. v. Reynolds, 69 S. C. 503, 513, 48 S. E. 476; Steele v. Poe, 79 S. C. 411, 60 S. E. 951.

For other cases, see Wills, Cent. Dig. § 1497; Dec. Dig. ⟸634.]

[*Remainders* ⟸10.]

A contingent remainder held under a devise may be defeated by a feoffment with livery of seizin from the tenant for life, and a release from the heir of the testator gives the purchaser good title.

[Ed. Note.—Cited in Snelling v. Lamar, 32 S. C. 77, 10 S. E. 825, 17 Am. St. Rep. 835; McCreary v. Coggeshall, 74 S. C. 49, 53 S. E. 978, 7 L. R. A. (N. S.) 433.

For other cases, see Remainders, Cent. Dig. § 7; Dec. Dig. ⟸10.]

[*Trusts* ⟸131.]

A devise to trustees, their heirs and assigns, "in trust for the use of A during his life," with contingent remainders over, vests, under the Statute of Uses, the legal estate in A.

[Ed. Note.—Cited in Howard v. Henderson, 18 S. C. 192; Ayer v. Ritter, 29 S. C. 138, 7 S. E. 53; Snelling v. Lamar, 32 S. C. 76, 10 S. E. 825, 17 Am. St. Rep. 835; Benbow v. Levi, 50 S. C. 128, 27 S. E. 655; Harkey v. Neville, 70 S. C. 135, 49 S. E. 218; McCreary v. Coggeshall, 74 S. C. 48, 53 S. E. 978, 7 L. R. A. (N. S.) 433; Young v. McNeill, 78 S. C. 143, 151, 59 S. E. 986; Pope v. Patterson, 78 S. C. 343, 58 S. E. 945.

For other cases, see Trusts, Cent. Dig. § 175½; Dec. Dig. ⟸131.]

[This case is also cited in Pope v. Patterson, 78 S. C. 341, 58 S. E. 945, as to the construction of wills, and in McElwee v. Wheeler, 10 S. C. 403; Leroy v. City Council of Charleston, 20 S. C. 76; Woodley v. Calhoun, 69 S. C. 289, 48 S. E. 272; Roberts v. Herron, 78 S. C. 118, 58 S. E. 968; Young v. McNeill, 78 S. C. 150, 59 S. E. 986; Walker v. Alverson, 87 S. C. 59, 66, 68 S. E. 966, 30 L. R. A. (N. S.) 115, as to the distinction between vested and contingent remainders.]

Before Reed, J., at Charleston, June, 1877.

This was an action by John L. Faber against J. G. Police to recover damages for the breach of a contract for the sale of a lot of land in the city of Charleston.

The case was referred to Samuel Lord, Jr., Esq., to take testimony and report the facts, together with his opinion on the title tendered by the plaintiff to the defendant.

The following is the report of the Referee:

This action was brought to recover damages sustained by the plaintiff in consequence of the refusal of the defendant to comply with the contract made by him on the 19th day of July, 1875, for the purchase of the lot of land on the East side of King street, in the city of Charleston, more particularly described in the complaint.

The answer admits the making of the contract, as alleged in the complaint, and the tender of a deed of conveyance to the defendant on the 27th July, 1875. The only defense set up is, that the plaintiff had not an estate in fee simple in the premises.

The question thus presented arises under the will of Christian Henry Faber, who was seized of the lot in question at the time of his death, and who, by his last will, admitted to probate in 1828, devised it to his three nephews, Henry Frederick Faber, Joseph W. Faber and John C. Faber, their heirs and assigns, in trust for the use of his son John

Lewis Faber during his life, and after his death in trust for his lawful issue then living; and if he should die without leaving issue at the time of his death, then to his residuary legatees, Henry F. Faber, Joseph W. Faber, John C. Faber, Maria Christiana Faber, Catherine E. Bennett, Christina Faber and Catherine Faber.

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*The testator died leaving his will in full force, and leaving his widow Anna Margaret Faber and his son John Lewis Faber, and leaving no other issue.

Henry F. Faber, one of the trustees, died about the year 1839.

On the 30th June, 1843, Joseph W. Faber, John C. Faber, Maria Christiana Faber and Catherine E. Bennett, two of whom (Joseph W. and John C. Faber) were surviving trustees under the will, in consideration of regard and affection and of one dollar paid them by John Lewis Faber, the life tenant, released to him and his heirs and assigns all their interest in the lot in question as residuary devisees of Christian Henry Faber.

On the 1st July, 1843, John Lewis Faber, being then of full age and in possession of the premises, conveyed them, by deed of feoffment and delivery of seizin, to Lawrence H. Folker in fee, who, on the 2d July, 1843, reconveyed the same to him and his heirs.

On the 8th day of the same month of July Mrs. Ann Margaret Faber by deed released all her right in the premises to John Lewis Faber. John Lewis Faber, at the time of the execution of this deed, was unmarried. He afterwards married, and has now three children living, the eldest of whom is nineteen and the youngest seventeen years of age. Of the remaindermen, to take in default of issue, living at his death, all have released their interest in the property except Christina and Catherine Faber.

On the 6th February, 1851, John Lewis Faber, in consideration of $6,000, conveyed the premises to his mother, Ann Margaret Faber, who died intestate in 1858, leaving the said John Lewis Faber as sole heir. No letters of administration upon her estate have been taken out.

The objections urged by the defendant to the plaintiff's title were: First, that by the deed of feoffment with livery of seizin, made by John Lewis Faber to L. H. Folker, the contingent remainders created by the will of Christian Henry Faber were not destroyed; and, second, that until administration upon the estate of Ann Margaret Faber has been had the plaintiff cannot convey the premises.

I find, as conclusions of law:

1. That under the will of Christian Henry Faber the legal estate to this lot vested, by the Statute of Uses, in the cestuis que use, the testator not having imposed on the trustees any duties which in any way interfered with the existence of legal estates in the different *beneficiaries named in the will.—Ramsay v. Marsh, 2 McC., 252; Webster v. Cooper, 14 How., (U. S. S. C.,) 488.

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2. That the limitations by the will of Christian Henry Faber to the issue of John Lewis Faber constituted contingent remainders. They are to the issue who shall be living at his death; and until that event happens it must remain perfectly uncertain who will be the persons to take. This is the definition of one species of contingent remainders.

3. That by the deed of feoffment to L. H. Folker, the contingent remainders to the issue of John Lewis Faber and to the residuary devisees were effectually barred and destroyed by the reconveyance to John Lewis Faber. He took a fee simple, subject only to the right of his mother, Ann Margaret Faber, as one of the heirs-at-law of her husband. By her release to him his title became absolute and unquestionable to hold the premises.—Redfern v. Middleton, Rice, 459.

4. That John Lewis Faber having, upon the death of his mother, taken possession of the property and since that time held it as heir, a purchaser from him would take it discharged from the debts of his mother, although no letters of administration have been taken out upon her estate.

5. That the conveyance tendered by the plaintiff to the defendant would have conveyed to him an absolute estate in the premises.

6. That the plaintiff is entitled to recover from the defendant the sum of twenty-five dollars for his refusal to comply with his contract.

The defendant excepted to the report on the following grounds:

1. That said Referee erred in holding that, under the will of Christian Henry Faber, the legal estate to the land vested by the Statute of Uses in the cestuis que use.

2. That said Referee erred in holding that the limitations by the will of Christian Henry Faber to the issue of John Lewis Faber constituted contingent remainders.

3. That said Referee erred in holding that by the deed of feoffment to L. H. Folker the remainders to the issue of John Lewis Faber and to the residuary devisees were barred and destroyed, and that John Lewis Faber subsequently acquired a valid title to said land.

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*4. That said Referee erred in holding that the conveyance tendered by the plaintiff to the defendant would have conveyed to him an absolute estate in the premises.

5. That said Referee erred in holding that the plaintiff is entitled to recover from the defendant the sum of twenty-five dollars for his refusal to comply with his contract.

His Honor the Circuit Judge overruled the exceptions and confirmed the report of the Referee.

The defendant appealed on the following grounds:

1. Because under the will of Christian Henry Faber the legal estate in the land did not vest by the Statute of Uses in the cestuis que use.

2. Because the limitations under said will to the issue of John Lewis Faber and to the residuary devisees and legatees of the testator did not constitute contingent remainders.

3. Because the deed of feoffment with livery of seizin to L. H. Folker did not bar and destroy the remainders to the issue of John Lewis Faber and to the residuary devisees under said will.

4. Because His Honor erred in overruling the exceptions to the Referee's report filed herein by the defendant.

5. Because the title tendered by the plaintiff would not convey a fee simple estate.

Ficken, for appellant:

The estate limited to the residuary devisees and legatees of testator in the event of the death of the life tenant without issue constituted vested remainders, and, consequently, could not be destroyed by the deed of feoffment with livery of seizin executed by the life tenant.

"The struggle with the Courts has been for that construction which tends to support the remainder by giving it a vested character."—4 Kent, 204; Croxall v. Shererd, 5 Wall., 268; Seabrook v. Gregg, 2 S. C., 78.

"The law favors vested estates, and no remainder will be construed to be contingent which may, consistently with the intention, be deemed vested."—4 Kent, 203.

"A remainder limited upon an estate tail is held to be vested, though it must be uncertain whether it will ever take place."—Ibid. 204.

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*"The present capacity of taking effect in possession if the possession were to become vacant, and not the certainty that the possession will become vacant before the estate limited in remainder determines, universally distinguishes a vested remainder from one that is contingent."—2 Blackstone's Com., 168; 2 Cruise's Digest, 270.

"It is the uncertainty of the right of enjoyment and not the uncertainty of its actual enjoyment which renders a remainder contingent."—Williamson v. Field, 2 Sandf. Ch., 533.

"A limitation after a power of appointment as to the use of A for life, remainder to such use as A shall appoint, and in default of appointment remainder to B, is a vested remainder, though liable to be divested by the execution of the power."—4 Kent, 204.

"A devise to A in fee if or when he attains the age of twenty-one years becomes a vested remainder, provided the will contains an intermediate disposition of the estate or of the rents and profits during the minority of A, or if it directed the estate to go over in the event of A dying under age."—Doe v. Underdown, Willes, 293; Boraston's case, 3 Co., 19; Goodtitle v. Whitby, 1 Burr., 228; Doe v. Lea, 3 T. R., 41; Bromfield v. Crowder, 4 Bos. & P., 313; Doe v. Moore, 14 East, 601; 4 Kent, 206.

"Though it may be uncertain whether a remainder will ever take effect in possession, it will nevertheless be a vested remainder if the interest be fixed. * * * It is the present capacity of taking effect in possession, if the possession were to become vacant, and not the certainty that the possession will become vacant before the estate limited in remainder determines, that distinguishes a vested from a contingent remainder."—4 Kent, 203.

"In a case of a devise to A and the heirs of his body, and in default thereof to B, or in the case of a devise to B and after his death without male issue to C, and after his death without male issue to D, and if D die without male issue, none of these prior devisees being living, to E in fee, here the remainder to B in the one case and to E in the other is vested."—Badger v. Lloyd, 1 Salk., 232; 1 Ld. Raym., 523 S. C.; Ives v. Legge, 3 T. R., 488, note.

"A remainder is vested in interest where the person is in being and ascertained who will, if he lives, have an absolute and immediate right to the possession of the land upon the ceasing or failure of all the precedent estates, provided the estate limited to

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him by *the remainder shall so long continue."—Hawley v. James, 5 Paige, 466; 2 Minor's Institutes, 337; Smith on Real and Personal Property, 228.

The deed of feoffment with livery of seizin did not operate to destroy the remainders to the issue of life tenant, because the legal estate was vested in the trustees and they were charged with the duty of preserving said remainders.

"To preserve the contingent remainders from the operation of the feoffment, recourse has been had to the creation of trustees to preserve the contingent remainders during the life of the tenant for life, notwithstanding any determination of the particular estate prematurely by forfeiture or otherwise. * * *

"The legal estate limited to trustees during the tenant's life is a vested remainder in trust, existing between the beneficial freehold and the contingent remainder, and the limitation in trust is not executed by the Statute of Uses, and the legal estate in such cases remains in the trustees. The tenant for life has a legal estate and the remainder of the same character and for the same period is vested in the trustees; and if the particular estate determines otherwise than

by the death of the tenant, the estate of the trustees, eo instanti, takes effect, and, as particular estate in possession, it supports the remainder depending on the contingency."—4 Kent, 256; 1 Preston on Est., 241; Chapman v. Blissell, Talb. Cases, 145; Redfern v. Middleton, Rice, 466; 2 Black. Com., 170; Vanderheyden v. Crandall, 2 Denio, 17; Habergham v. Vincent, 2 Ves., Jr., 233.

In equity the tenant for life of a trust cannot, even by a fine, destroy the contingent remainder dependent thereon, and it will only operate on the estate he can lawfully grant. A Court of equity does not countenance the destruction of contingent remainders.—4 Kent, 255.

Where the intention is manifest, as in the case under consideration, it is not necessary that the trust to preserve contingent remainders should be expressed in so many words. There is no authority requiring it to be so expressed. The legal estate being in trustees and no express trust declared, the manifest intention defines the trust.

In this State, before the adoption of the Constitution of 1868, a trust to A for a married woman was not executed by the statute, although no special duty was assigned

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A. Why was this so? *Because the law discovered the trust and defined the duty of trustee where no duty was declared. That duty was to hold during coverture of the married woman. So in the case before us, although the trust is not in direct words to preserve contingent remainders, yet there is a trust. The law detects the expectancy of issue and defines the duty of the trustees to be the preservation for such issue of the contingent remainders.

"The rule is, that trustees take that quantity of interest only which the purposes of the trust require and the instrument creating it permits. The legal estate is in them so long as the execution of the trust requires it, and no longer, and then it vests in the person beneficially entitled."—Wagstaff v. Smith, 9 Ves., 520; Doe v. Scott, 4 Bing., 505; Doe v. Willan, 2 B. & Ald., 84; Doe v. Nichols, 1 B. & C., 336; Doe v. Edlin, 4 Ad. & El., 582; Doe v. Simpson, 5 East, 162; Doe v. Needs, 2 M. & W., 129.

"The intention is to prevail. If technical terms are employed to express and denote this, they must have their legal significance, unless on the face of the instrument it is apparent that an intention was purposed different from that which their use would so intimate."—Seabrook v. Gregg, 2 S. C.; Brownsword v. Edwards, 2 Ves., Sr., 249.

"Trusts are governed by the intention of the party."—Viner's Abridg., 493.

"In the construction of a trust the intent of the party is to govern, and Courts of equity have always in cases of trusts taken the same rules of expounding trusts and of pursuing the intention of the parties therein as in cases of wills, and that even in point of limitations of estates, where the letter is to be as strictly pursued as in any case."—Sheldon v. Dormer, 2 Vern. Ch., 310.

"Where the legal estate is vested in trustees, that will be sufficient to support the limitations of contingent remainders, and there will be no necessity for any other particular estate of freehold; nor need the remainders vest at the time when the preceding trust limitations expire."—2 Black. Com., 168.

"There is one case which forms an exception to the rule that a preceding particular estate of freehold is requisite to support contingent limitations, and that is where the legal estate is vested in trustees. The estate will continue in that instance, notwithstanding the failure of an intermediate life estate, until the persons who were to take the contingent remainders should come in esse."—4 Kent, 247.

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*It is said to be a rule in equity, that if one comes into possession of trust property with notice of the trust he shall be considered as a trustee and with respect to that property bound to the execution of the trust.—2 Mad. Ch., 125; Chaplin v. Givens, Rice Eq., 154.

If executrix, tenant for life, purchase land and have the titles made to the estate of the testator, this will be prima facie a declaration of trust by the executrix in favor of the heirs.—Garrett v. Garrett, 1 Strob. Eq., 100.

If land or personalty be devised or settled to or upon a married woman for her separate use without the precaution of vesting it in trustees, the intention will be effected in equity, and the rights of the wife will be protected by the conversion of her husband into a trustee for her.—Franklin v. Creyon, Harper Eq., 205; Joyce v. Gunnels, 2 Rich. Eq., 268.

Lesesne & Lesesne, contra:

1. That under the will of Christian Henry Faber the legal estate to this lot vested, by the Statute of Uses, in the cestuis que use, the testator not having imposed on the trustees any duties which interfered with the vesting of the legal estates in the beneficiaries named in the will.

The Statute of 27 Henry VIII, Chap. X, commonly known as the Statute of Uses, made of force in this State, (Gen. Stat., Chap. XCIII, § 2, p. 465.) enacts as follows:

"Where any person or persons shall be seized of and in any lands, tenements, rents, reversions, remainders or other hereditaments, to the use, confidence or trust of any other person or persons, or of any body politic, by reason of any bargain, sale, feoffment, covenant, contract, agreement, will or otherwise, the person, persons or body politic that have, or shall have, any such use, con-

fidence or trust in fee simple, fee tail, for term of life or for years, or otherwise, or any use, confidence or trust in remainder or reversion, shall be deemed and adjudged in lawful seizure, estate and possession of and in the same lands, tenements, rents, reversions, remainders and hereditaments, with their appurtenances, to all intents, constructions and purposes in law, of and in such like estate as they had or shall have in use, trust or confidence of or in the same."

In the case of Ramsay v. Marsh, (2 McC., 152,) the statute is construed, and a devise identical with the one in question held to vest the legal estate in the cestui que use.

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*The same construction is also given in the case of Webster v. Cooper, 14 How., (U. S. S. C.,) 488.

2. That the limitations by the will of Christian Henry Faber to the issue of John Lewis Faber constituted contingent remainders. They are to the issue who shall be living at his death, and until that event happens it must remain perfectly uncertain who will be the persons to take. This is the definition of one species of contingent remainders.

2 Black. Comm., 169, gives this definition: "Contingent or executory remainders (whereby no present interest passes) are where the estate in remainder is limited to take effect either to a dubious and uncertain person or upon a dubious and uncertain event, so that the particular estate may chance to be determined and the remainder never take effect."

Fearne, p. 1, Sec. 1, at p. 1, gives four classes of contingent remainders, and at p. 9, (4th American, from 10th Eng. ed.,) Sec. 11, 4: "Where a remainder is limited to a person not ascertained, or not in being at the time when such limitation is made." "So if an estate be limited to two for life, remainder to the survivor of them in fee, the remainder is contingent, for it is uncertain who will be the survivor."

4 Kent, (margin,) 206, after definition, adds: "It is not the uncertainty of enjoyment in future, but the uncertainty of the right to that enjoyment, which makes the difference between a vested and contingent interest." And on page 203: "It is the present capacity of taking effect in possession, if the possession were to become vacant, and not the certainty that the possession will become vacant before the estate limited in remainder determines, that distinguished a vested from a contingent remainder." And in note c, p. 208, gives the definition of the New York revised statutes: "A remainder, says the statute, is contingent whilst the person to whom or the event upon which it is limited to take effect remains uncertain." And in same note: "Lord Ch. J. Willes, in the opinion which he gave before the House of Lords, on behalf of all the Judges, in the case of Parkhurst v. Smith, (Willes, 327,) declared that there were but two sorts of contingent remainders: (1.) Where the person to whom the remainder was limited was not in esse. (2.) Where the commencement of the remainder depended on some matter collateral to the determination of the particular estate."

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*3. That by the deed of feoffment to L. H. Folker the contingent remainders to the issue of John Lewis Faber and to the residuary devisees were effectually barred and destroyed, and by the reconveyance to John Lewis Faber he took a fee simple, subject only to the right of his mother, Ann Margaret Faber, as one of the heirs-at-law of her husband. By her release to him his right became absolute and unquestionable to hold the premises.—Redfern v. Middleton, Rice, 459.

To adopt a different construction would be to overturn one of the common assurances of title in this State and to unsettle the title to much of the property therein. In the language of Mr. Petigru, who examined and approved the title to this very lot: "This whole matter was solemnly settled in the case of Dehon v. Redfern, (Rice, 459,) and cannot be drawn in question."

The principle established by this case has not been questioned by our Courts to the present time. In Seabrook v. Gregg (2 S. C., 68,) the decision is rested solely on the ground that the remainders are vested and not contingent, and by no word is the authority of Redfern v. Dehon, questioned. Indeed, it follows from the reasoning employed in that case that had the remainders been held to be contingent they would have been necessarily barred by the feoffment of the life tenant.

At the death of the testator, and also at the time of the feoffment to Folker, there were no issue of John Lewis Faber in being in whom the remainders could vest, nor could any estate commence in the persons who were to take in default of issue, for by the terms of the devise their interest depended on the contingency of John Lewis's death without issue. When the life estate was destroyed there was no one in esse in whom the estate could vest in remainder, and the fee, of necessity, reverted to the heirs of the grantor.

November 22, 1878. The opinion of the Court was delivered by

McIVER, A. J. C. H. Faber, by his last will and testament, devised the land in question to certain trustees in trust for the use of his son, John Lewis Faber, for his life, and from and immediately after the death of his son in trust for the lawful issue of said son living at the time of his death; and in case of his death without leaving issue living at the time of his death, then to his residuary legatees and devisees.

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*The testator died leaving his widow and his son John Lewis Faber as his only heirs-at-law. On the 1st of July, 1843, John Lewis Faber, being then of age and in possession of the premises, conveyed the same by deed of feoffment and livery of seizin to one Folker, who on the next day reconveyed the same to the said John Lewis Faber in fee simple, and a few days thereafter the widow of the testator released all her right in the premises to John Lewis Faber. At the time of the execution of this deed John Lewis Faber had never been married, but he subsequently married and now has three children, all of whom are minors. On the 6th of February, 1851, John Lewis Faber conveyed the premises to his mother, who died intestate some time in the year 1858, leaving as her sole heir-at-law her son, the said John Lewis Faber. No letters of administration upon her estate have ever been taken out. On the 19th of July, 1875, the defendant, J. G. Police, contracted to purchase from the plaintiff, John Lewis Faber, the said premises, but afterwards declined to accept the title upon the ground that Faber could not convey a fee simple interest. This action was then brought to recover damages for the breach of such contract, the real object being to obtain the decision of the Court as to the validity of the title.

The appellant contends: 1st. That the estate limited to the issue of John Lewis Faber is vested and not a contingent remainder, and therefore the remainder was not barred by the deed of feoffment and livery of seizin. Questions of this kind are involved in no little difficulty and uncertainty, owing mainly, as we think, to the efforts which the Courts have made to construe limitations so as to constitute vested instead of contingent remainders, the rule being, as stated by Kent, (4 Com., 203,) that "the law favors vested estates and no remainder will be construed to be contingent which may, consistently with the intention, be deemed vested." This rule, by its very terms, admits, as it should do, the paramount importance of the intention of the testator, which must necessarily override every other rule and be the governing principle, otherwise the Court instead of the testator would make the will. Hence, when the testator's intention can be discovered it must necessarily be carried out, unless it is inconsistent with the law of the land. In looking for this intention we must be guided by the words which the testator has used, reading them in the light of established principles of law. Looking, then,

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at the clause of the *will under consideration in this light, we think it clear that the remainders created are contingent and not vested remainders. It is very clear from the language used, that the testator did not intend that the issue should take the estate in remainder absolutely and at all events, but only on a contingency—that of their surviving their father; and it is equally clear that he did not intend that the residuary legatees and devisees should take the estate in remainder absolutely and at all events, but only on a contingency—that of the son dying without leaving issue living at the time of his death. There is no language in the will which would convey the idea that the testator intended that either class of remaindermen should be invested with an absolute right with only the enjoyment in possession postponed to a future period, but their right as well as their enjoyment in possession is not only postponed to a future period but is made to depend upon an uncertain event. This manifest intention of the testator is not only not inconsistent with any of the rules of law, but, on the contrary, as we shall see, is in strict conformity with such rules. According to the elementary writers a vested remainder is one which is limited to an ascertained person in being, whose right to the estate is fixed and certain, and does not depend upon the happening of any future event, but whose enjoyment in possession is postponed to some future time. A contingent remainder, on the other hand, is one which is limited to a person not in being or not ascertained; or, if limited to an ascertained person, it is so limited that his right to the estate depends upon some contingency in the future. So that the most marked distinction between the two kinds of remainders is that in the one case the right to the estate is fixed and certain, though the right to the possession is deferred to some future period; while in the other the right to the estate as well as the right to the possession of such estate is not only deferred to a future period but is dependent upon the happening of some future contingency. As it has been well expressed, "it is not the uncertainty of the estate in the future but the uncertainty of the right to such enjoyment which marks the difference between a contingent and a vested remainder."

Keeping in mind these principles, which are so well established as to need no citations of authority to support them, and remembering that the estate in remainder, whether vested or contingent, must necessarily have been created at the same time that the particular estate upon which it rests passed out of the testator, we will find no

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*difficulty in determining the nature of the estate in remainder created by the will under consideration. These estates, as well the particular estate for the life of John Lewis Faber as the estate in remainder to his issue, and in default of such issue to the residuary legatees and devisees, passed out of the testator at the time of his death,—the time when his will, the instrument by which the estates were created, speaks. Then it was

that these estates were created, and to that point of time must we look to determine their character. It is very clear that at that time it was wholly uncertain who would be the persons to take at the termination of the particular estate. The life tenant then had no issue, and it was of course, uncertain whether he would ever have any; and as to the issue which he has subsequently had, it is yet uncertain whether any of them will be living at his death, and the same uncertainty exists as to whether the residuary legatees and devisees will ever have the right to take. It is manifest, therefore, that at the time these estates were created, as well as now, it is altogether uncertain, not merely who will, at the termination of the life estate, be entitled to enjoy in possession the remainder, but who has now the right to the future enjoyment of such estate. The present issue cannot say that they have any such fixed and certain right, because their right depends upon a future contingency,—that of the life tenant dying leaving lawful issue,—and they may all die before the life tenant. Nor can the residuary legatees claim any such right, for their right also depends upon a future contingency,—the death of the life tenant without leaving lawful issue,—and they cannot claim that they have now a fixed and certain right to the possession when such possession shall become vacant by the death of the life tenant. One of the tests laid down in the books by which we may ascertain whether a remainder is vested or contingent is to inquire whether the person claiming such remainder, being sui juris, could, by uniting with the owner of the particular estate, convey a fee simple title. If he could, such a remainder must be regarded as vested; otherwise it is contingent. For if the owner of the right to the immediate possession unites with the owner of the right to the future possession when such immediate possession shall become vacant in conveying the property, then the whole estate, present as well as future, is well conveyed. But if the owner of the right to the future possession is not ascertained, or if his right depends upon the happening of a future event, such right to the future possession could not

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be well *conveyed, and the grantee would ne essarily take an imperfect title.

Subjecting this case to this test, it must be apparent that the remainders are not vested, for neither class of remaindermen could, by uniting with the life tenant, convey a good title. The issue of the son could not, because if the life tenant should survive such issue their conveyance would not carry the title in remainder: and the residuary legatees and devisees could not, because if the life tenant should die leaving any issue their conveyance would not carry the title in remainder, and, therefore, the property would not be well conveyed. As Harper, Ch., says in Dehon v. Redfern, (Dud. Eq., 118,) in speaking of remainders like those under consideration: They were to the children who should be living at the death of the daughters respectively, or to the children of those who had died leaving children. Until the death of the daughters it must remain perfectly uncertain who will be the persons to take, and this is the definition of one species of contingent remainders." So here the remainder is to the issue of John Lewis Faber "living at the time of his death;" and in default of such issue, to the residuary legatees and devisees. Until the death of John Lewis Faber it must remain perfectly uncertain who will be the persons to take, and hence the remainders are contingent. If so, then, it necessarily follows, upon the authority of Redfern v. Middleton, (Rice, 459,) in which the Court of Errors adopted the reasoning of Chancellor Harper in his circuit decree in Dehon v. Redfern, (Dud. Eq., 115,) that the contingent remainders to the issue of John Lewis Faber, and in default of such issue to the residuary legatees and devisees, were barred by the deed of feoffment and livery of seizin to Folker, and by his reconveyance to John Lewis Faber and the release of Mrs. Ann Margaret Faber of all her interest the absolute title was perfected in the said John Lewis Faber.

But, second, it is argued by the appellant that, even if the remainders be construed to be contingent and not vested, yet the deed of feoffment and livery of seizin could not bar such remainders, because the legal estate was vested in the trustees. This proposition might be admitted if it were true that the legal estate was in the trustees. It becomes necessary, therefore, to consider that question. The rule undoubtedly is, that where there is a conveyance to one for the use of another, and the trustee is charged with no duty which renders it necessary that the legal estate should remain in him to enable him

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prop*erly to perform such duty, the Statute of Uses executes the use and carries the legal title to the cestui que use.—Ramsay v. Marsh, 2 McC., 252 [13 Am. Dec. 717]; Jenney v. Laurens, 1 Speers, 356; McNish v. Guerard, 4 Strob. Eq., 66. By the terms of the will under consideration it does not appear that the trustees are charged with any duty whatsoever. The language is "in trust to and for the use, benefit and behoof of my son John Lewis Faber, for and during the term of his natural life and no longer; and from and immediately after the death of my said son, then in trust to and for the lawful issue of my said son living at the time of his death; * * * and should my said son die without leaving lawfully-begotten issue living at the time of his death, then and in that case I give, devise and bequeath all and singular

the lots of land, &c., * * * unto my residuary devisees and legatees, their heirs and assigns forever, to be equally divided between them share and share alike." There is no provision that the trustees shall receive the rents and incomes of the property and pay them over to the son or to his issue after his death, nor is there any provision that the trustees shall have the estate for the sole and separate use of any of the issue who might happen to be married women; in fact, no duty whatsoever is imposed upon the trustees.

It is argued, however, that though the will does not in terms create a trust to preserve the contingent remainders, yet that such a trust may be implied. We know of no authority for such a position, and none has been cited. We are at a loss to conceive by what right a Court could undertake to add to the words of a will, by which additional trusts to those which the testator has seen fit to declare should be raised. It is very true that in some cases where no trusts whatever are declared a Court of equity will imply a trust from the conduct and relations of the parties, as where one purchases lands with the money of another and takes title in his own name, or where one comes into the possession of trust property with notice of the trust, or where, prior to the Constitution of 1868, property was given for the sole and separate use of a married woman. But where the owner of property in disposing of it either by deed or will declares the trusts upon which he desires it to be held, we are unable to see by what authority a Court could undertake to add to the trust so declared. We think, therefore, upon principle, as well as upon express authority, especially the case of Ramsay v. Marsh, supra, where

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the trusts declared were very much *the same as in the case now under consideration, that the legal title to the premises in question was, by the operation of the Statute of Uses, vested in the cestui que use. The other exception taken to the judgment below, that, until administration upon the estate of Mrs. Faber, the plaintiff could not convey the premises, was not insisted upon in the argument here, and, therefore, we infer that it was abandoned. But if we are wrong in this inference we may say that we do not think this exception would avail the appellant. Mrs. Faber died in 1858, and up to this time no claims have been set up against her estate, so far as we are informed by the record. But, certainly, if appellant had accepted the title when tendered, and debts against the estate of Mrs. Faber should afterwards have been set up, he would have been protected in his title by the Statute of 3 and 4 William and Mary, Chap. XIV, 2 Stat., 535. This, therefore, constituted no valid objection to the title.

The judgment of the Circuit Court is affirmed.

HASKELL, A. J., concurred.

WILLARD, C. J. I regret that we are compelled to give efficacy to an act of wrong on the part of the life tenant in destroying the remainders and to that extent defeating the intention of the testator. This effect, originally dependent upon purely technical grounds, has become embodied in the laws of our State, and we have no power to deny its force. I am satisfied that at the time of the alienation the remainders were contingent, issue not having been born. As it regards the question whether the limitation to issue living at the death of the first taker gave a remainder that could not vest upon the birth of issue, I do not deem it necessary at the present time to pass upon it. Such a view is not necessarily precluded by Seabrook v. Gregg, but still I think that counsel should be heard on that case before that conclusion is reached.

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*McELWEE v. WHEELER.

(Columbia. April Term, 1878.)

[*Wills* ⇐634.]

Testator devised land to A., his unmarried daughter, for life, with remainder "to any child or children she may have living at the time of her death;" but if she should die not leaving any children or child alive at her death, then over "to any brothers and sisters and the children of any deceased brother or sister residing in this State at the time of her death, equally, or share and share alike;" such child or children to take only the share which "their deceased father or mother would have taken if living." A. never had issue, but had brothers and sisters who were living in this State at the death of the testator and at her death: *Held*, That the limitation over to the brothers and sisters of A. was a contingent remainder.

[Ed. Note.—Cited in Dickson v. Dickson, 23 S. C. 224; Roundtree v. Roundtree, 26 S. C. 470, 2 S. E. 474; Robinson v. Ostendorff, 38 S. C. 74, 16 S. E. 371; McCreary v. Coggeshall, 74 S. C. 47, 53 S. E. 978, 7 L. R. A. (N. S.) 433.

For other cases, see Wills, Cent. Dig. § 1497; Dec. Dig. ⇐634.]

[*Remainders* ⇐10.]

A contingent remainder, to take effect upon the death of a married woman who holds the particular estate for life, may be defeated by a feoffment with livery of seizin by husband and wife.

[Ed. Note.—Cited in Snelling v. Lamar, 32 S. C. 77, 10 S. E. 825, 17 Am. St. Rep. 835; McCreary v. Coggeshall, 74 S. C. 49, 53 S. E. 978, 7 L. R. A. (N. S.) 433.

For other cases, see Remainders, Cent. Dig. § 7; Dec. Dig. ⇐10.]

Before Kershaw, J., at York, ———, 1877.

This was an action by Jonathan N. McElwee and others against Burritt T. Wheeler and others to recover the possession of a tract of land.

The case is stated in the opinion of the Circuit Court, which is as follows:

Kershaw, J. The plaintiffs claim a certain tract of land described in the complaint, under a devise made by William McElwee, late of York County, deceased, which is in these words:

"To Agnes McElwee, to her own use and possession during her natural lifetime, and after death to any child or children she may have living at the time of her death; but if she should die not leaving any children or child alive at her death, then and in that case the said tract of land * * * shall revert and go back absolutely and unconditionally to any brothers and sisters and the children of any deceased brother or sister residing in this State at the time of her death, equally, or share and share alike; but the child or children of any deceased brother or sister shall only take a share equal to the share their deceased father or mother would have taken if living."

Agnes was unmarried at the time of testator's death, but subsequently intermarried with James McElwee, and died without ever having had a child. During her lifetime she joined her husband in making a deed of feoffment with livery of seizin to one Samuel A. McElwee, conveying the land in dispute in fee, and renounced her inheritance thereon in the form required in case of a release under the Act of 1795, (5 Stat., 257,)

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in the presence of a Magis*trate, which renunciation, with the deed of feoffment, was duly recorded.

Samuel A. McElwee then reconveyed the land to the said James McElwee, the husband of Agnes, and he subsequently to the defendant Wheeler. The other defendants, with the plaintiffs, constitute the second class of remaindermen under the devise.

These facts present two questions of law for determination.

1. What was the nature of the interest created in the second class of remaindermen under the devise?

2. Has that interest been destroyed by the deed of feoffment?

1. The devise was to Agnes for life, with remainder to her children surviving, if any should be at the time of her death, with remainder over.

The remainder to the children was contingent upon her marriage and the birth of issue at the time of her death.

It was also a remainder to her children living at the time of her death in fee under the Act of 1824, which declares that any gift of land by devise shall be considered as a gift in fee simple, unless such a construction be inconsistent with the will of the testator, express or implied. The limitation over to the brothers and sisters must, therefore, be a contingent remainder, because when there is a contingent limitation in fee absolute no estate limited afterwards can be vested. "Where the mesne estates limited are for life, or in tail, the last remainder may, if it be to a person in esse, vest, but no remainder after a limitation in fee can be vested."—Fearne Con. Rem., 6th ed., 225.

This second limitation is a substitute for or alternative of the other, to take place if the former should fail of effect. The one is not expectant upon or to take effect after the other, but is contemporary, "commencing from the same period, not indeed together, but the one to take effect in lieu of the other, if that failed."—Id., 373. "A devise to B for life, he being unmarried, remainder to his children, but if he dies without leaving children, remainder over, both remainders are contingent."—4 Kent, 295, note b, 5th ed.; see authorities there cited. This sort of alternative limitation is termed "a contingency with a double aspect," sometimes "limitations on a double contingency," and sometimes "concurrent or contemporary limitations." I shall not prolong this decision by discussing the propositions embraced, but content myself with references to the authorities I have consulted, which sustain the

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conclusions at which *I have arrived.—Redfern v. Middleton and Dehon v. Middleton, Rice, 459-64; 2 Jarman on Wills, (Perkins' ed.,) 229, margin p. 315; Dale v. Barber, 2 Barb., 485; Doe v. Burnsall, 6 D. & E., 30; Ives v. Legge, 3 D. & E., 488, in note; Doe v. Perrin, 3 D. & E., 488, 494, opinion by Butler, J.; 2 Washburn Real Prop., 250.

2. If contingent, the remainder over to these plaintiffs was barred by the feoffment, if there was a valid feoffment by the life tenant.—Dehon v. Middleton, ubi supra. It has been supposed that the deed of feoffment here would not have that effect, because of the disabilities of the life tenant, Agnes McElwee, resulting from coverture at the time of the feoffment and the absence of an acknowledgment in due form of law.

If she had made the acknowledgment in the manner prescribed by A. A. 1731, as amended by A. A. 1767, the deed, in the language of these Acts, would have been "deemed as effectual and valid in the law, to all intents and purposes whatsoever, as any fine passed in due form of law in His Majesty's Court of Pleas at Westminster."

Having determined that she was not seized of an estate of inheritance, but of a life estate merely, and the acknowledgment not having been made in accordance with the Acts above mentioned, was entirely nugatory, and the deed of feoffment inoperative, so far as her rights were concerned.—Hays v. Hays, 5 Rich., 38; Brown v. Spand, 2 M. Con., 12.

Upon the principles laid down in these cases, and which are in accordance with the decisions elsewhere, it is doubtful if a

married woman could convey her inheritance under the Act of 1795 (5 Stat., 257,) by any other form of conveyance than that prescribed by the Act. It only enabled her to do so by joining her husband in a release "to the purport of the one therein before prescribed." A deed of feoffment with livery of seizin is of an entirely different character. The difficulty of plaintiffs lies beyond this.

By the common law the alienation of the husband who was seized in right of his wife worked a discontinuance of the wife's estate, and thus destroyed the estate in remainder by the determination of the particular estate before the happening of the contingent event upon which it was to vest.—2 Comm., 171; 3 id., 172.

To remedy this, the Statute 32 Henry VIII, Chap. XXVIII, provided that no act of the husband alone should work a discontinuance of or prejudice the inheritance of the wife,

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but that after his death *she or her heirs might enter on the lands in question.—3 Comm., 172. And the rights of all others which appertained after her death were in like manner preserved, with an exception of fines levied by the husband and wife, whereunto the wife was party or privy. And although the statute mentions feoffment made by the husband only, yet it was held that the statute applied when the wife joined in the feoffment, because that was a void act, so far as concerned her rights.—Roper, Husband and Wife, 1-60.

Unfortunately for these plaintiffs this statute is not of force in this State, and the feoffment of the husband had the same effect as at common law, and destroyed the particular estate upon which depended the contingent remainder. It was suggested that the limitation might be construed an executory devise which could not be barred by the feoffment; but having shown that it was a contingent remainder, it cannot be an executory devise.—Purefoy v. Rogers, 2 Sanders, 388.

Though this may be regarded as a deliberate and tortious defeat of the will of the testator, in obedience to technical rules and distinctions which are binding on the Courts until altered by the Legislature, it must be upheld, however wrongful, or, in the language of Chancellor Kent, however "flagrantly unjust and repugnant to every settled principle of equity as now understood."—4 Kent, 252, note.

It is, therefore, adjudged that the complaint be dismissed; that the defendants have judgment for their costs and disbursements.

The plaintiff appealed on the following grounds:

1. For that His Honor held that the remainder after the death of Agnes was a contingent remainder.

2. For that His Honor held that the remainder created by the will could be barred by a deed of feoffment and livery of seizin so as to defeat the estate of those in whom the land was to vest, according to the terms of the will, in the event of Agnes dying without leaving issue living at the time of her death.

3. For that His Honor held that the limitation in the will of William McElwee, deceased, in favor of the plaintiffs and certain of the defendants as to the premises in issue conferred such an estate as could be defeated by the act of the life tenant, Agnes McElwee.

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*4. For that His Honor held that the limitation in the will of William McElwee, deceased, in favor of the plaintiffs and certain of the defendants as to the premises in issue conferred such an estate as could be defeated by the act of the life tenant, Agnes McElwee, and her husband.

5. For that His Honor held that the limitation in the will of William McElwee, deceased, in favor of the plaintiffs and certain of the defendants as to the premises in issue conferred such an estate as could be defeated by the act of the husband of Agnes McElwee.

6. For that His Honor held that there was an effectual relinquishment by deed and release by the life tenant sufficient to bar the estate of the plaintiffs and certain of the defendants.

Rion, with whom was Hart & Hart, for appellants:

1. Since the Act of 1795, (5 Stat., 255,) the power of a married woman in parting with an interest in land is limited by the provisions of said Act and the Acts of 1731 and 1767.—Hays v. Hays, 5 Rich., 38, 39, citing Brown v. Spann, 2 Mills, 12.

Agnes's release of her inheritance was a nullity, as she did not have a fee in the land, (Hays v. Hays, 5 Rich., 38,) and she did not acknowledge a conveyance "before any of the Judges."—Ibid, 38, 39.

2. The remainder vested, and, therefore, not contingent. Remainders are not contingent because there may be a contingency as to whether the beneficiary may ever come into enjoyment of the provision made for him, but when there is a contingency as to whether the remainder shall ever be vested. Hence, whenever there is in esse a person who could immediately take if the prior estate should then end, the remainder, eo instanti, becomes vested. There would have been less confusion of ideas upon this subject had the division of remainders into vested and non-vested obtained instead of contingent and vested.—2 Wend. Black., 170, 171, and notes; 1 Fearne on Remainders, 216.

In our case there were brothers of testator living in the State at the time of his

death, who continued so to reside up to and at the time of the death of Agnes without children. Hence, if at any moment after testator's death Agnes had died, the remaindermen mentioned in the will were in esse and

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qualified to take, and, there*fore, the remainder was at all times vested.—2 Wend. Black., 169; 4 Kent Com., 202–3 and 206; 1 Fearne on Remainders, 225, 226.

3. Even if the remainder should be a contingent remainder, then it can be supported as an executory devise, and, as such, not barred.—1 Fearne on Remainders, 395, 396, 517.

4. This case is concluded by the decisions of this Court in Bedon v. Bedon, 2 Bail., 250; Hay v. Hay, 4 Rich. Eq., 382; Seabrook v. Gregg, 2 S. C., 71, 73, and post.

The decision of the Court in Dehon v. Redfern, (Dud. Eq., 115,) not contra; and see foot of page 120.

Wilson & Wilson, contra:

I. In this State a deed of feoffment with livery of seizin by the life tenant of the legal estate will bar all contingent remainders. The validity of such deeds has been recognized by our Courts and by Acts of the Legislature.—Redfern v. Exr. of Middleton, Rice 459; Act of 1785, 1 Brev. Dig., p. 172, Tit. 51; Act of 1631, p. 170, id., and Act of 1795, id., p. 176. Such deeds are not against public policy, as they serve to defeat and prevent perpetuities, which, in the language of Lord Coke, are "inconsistent with the welfare of the State, and, therefore, contrary to the policy of the law."—2 Fearne on Rem., 392.

II. Plaintiff's interest under the will of William McElwee a contingent remainder, and barred by the deed of feoffment and livery of seizin from Agnes McElwee and her husband, James McElwee, to S. A. McElwee. "Contingent or executory remainders, whereby no present interest passes, are where the estate in remainder is limited to take effect either to a dubious and uncertain person, or upon a dubious and uncertain event, so that the particular estate may chance to be determined and the remainder never take effect."—1 Black., 2 book, 135.

"A contingent remainder is a remainder limited so as to depend on an event or condition which may never happen or be performed, or which may not happen or be performed till after the determination of the preceding estate."—1 Fearne on Rem., 3.

In 1 N. Y. Rev. Stat., 723, Section 13, the definition is brief and precise, viz.: "A remainder is contingent whilst the person to whom or the event upon which it is limited to take effect remains uncertain." If at the death of Agnes she left children, then the plaintiffs could not take. But this event was uncertain.

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*At the time of the death of Agnes the plaintiffs might have all been dead, or, if alive, not residents of the State. Both events were uncertain, and the remainder, therefore, contingent.

It was also uncertain who of the remaindermen would be alive at the death of Agnes, and, if alive, then resident in the State; therefore the persons to whom limited were dubious.

"It is not the uncertainty of enjoyment in future, but the uncertainty of the right to that enjoyment, which marks the difference between a vested and contingent interest."—4 Kent, 198. Here the right to enjoy was uncertain, not fixed, because it could not be known until the decease of Agnes whether plaintiffs would have any interest. If at her death Agnes left children, or at that date the plaintiffs were non-residents, in either event they had no claim. If the devise had been to Agnes for life, and at her death to plaintiffs, they would take a vested remainder, for, though it would be uncertain whether they would survive Agnes, their right would not be uncertain but fixed. But, under the will, plaintiffs had no fixed right to enjoy, and, therefore, there could be no present capacity to take possession. In vested remainders there is a certainty upon the part of the remainderman, during the existence of the first estate, that at its termination he will take—that no object or right can arise or intervene between him and the estate. There is a certainty now of no uncertainty then. The capacity to take now exists as it will then if alive, because the right is fixed—it depends upon no contingency.

III. "No remainder after a limitation in fee can be vested."—1 Fearne on Rem., 224. Here there is a limitation in fee to the children of Agnes living at the time of her death. It is the clear intent of the testator. Therefore, the limitation over, after this estate, to the plaintiffs, is necessarily a contingent remainder. "A devise to B for life, he being unmarried, remainder to his children; but if he dies without leaving children, remainder over, both remainders are contingent."—4 Kent, 295. Further, if Agnes left no children at her death, and no brothers or sisters, nephews or nieces, then resident in this State, the remainders could not take effect. This clearly distinguishes the character of the remainders as contingent and not vested.—1 Fearne on Rem., 216; 2 Ves., Jr., 357; 1 Black., 135, note 10. In the words of Blackstone, "the particular estate may chance to be determined and the remainder never take effect."

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* "It is not the uncertainty of ever taking effect in possession that makes a remainder contingent, for to that every remainder for life or entail expectant upon an estate for life is and must be liable, as the remainderman may die, or die without issue before the death of the tenant for life. The present ca-

pacity of taking effect in possession, if the possession were to become vacant, and not the certainty that the possession will become vacant before the estate limited in remainder determines, universally distinguishes a vested remainder from one that is contingent."—2 Cruise Dig., 270. During the life of Agnes there was no "present capacity" to take in the plaintiffs. Their capacity depended upon events in future, and not to be known until the death of Agnes.

IV. "When a limitation over can be supported as a contingent remainder, it will never be construed as an executory devise." Lord Mansfield said: "It was perfectly clear and settled that when an estate can take effect as a remainder it shall never be construed an an executory devise."—1 Fearne on Rem., 394.

In this case there is not a fee mounted upon a fee, but a contingent remainder. The limitation is to Agnes for life, remainder to her children if alive, and in default of children, to the plaintiffs. The remainder to the plaintiffs is good as being collateral to the contingent fee in the issue. It is a contingent remainder with a double aspect. But if the remainder over to the plaintiffs had been merely in the event of the children of Agnes dying before twenty-one, then it would have been good only as an executory devise, for it would have rested on the rescinding of a prior vested fee.—4 Kent, 192. "In an executory devise no estate vests at the death of the devisor, but only on some future contingency."—1 Black., 139. It requires no precedent estate to support it. Upon the death of the testator a life estate vested in Agnes. It was simply a devise to Agnes for life, with a contingent remainder over. While an executory devise, in many of its features, resembles a contingent remainder, if all the essentials of the latter are present the Courts will never construe the will as an executory devise.

V. The contingent remainders could only have been supported so as to prevent bar by feoffment by the intervention of a trustee.—2 Black., 172; Rice, 466; 2 Washburn on Real Property, 548. There was only a possibility of reverter to the heirs-at-law of the testator in case there had not been a deed of feoffment or all the remainders had failed. As soon as the feoffment was executed all

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*remainders and contingencies were barred and a fee simple title to the land vested in S. A. McElwee, who conveyed to James McElwee, and he to the respondent, B. T. Wheeler.—4 Kent, 253.

This case is similar to Gilman v. Elvey, 4 East, 315. The devise to the children of Agnes and to the plaintiffs were contingent remainders in fee, but they were concurrent contingent remainders, of which one only could take effect. If Agnes left children surviving her, they took, and plaintiffs could not take. They were not, therefore, alternative limitations. The feoffment was not prevented either by fee being in the heirs of the testator or by alternative limitation.—4 Kent, 223, 234, 239.

VI. The Statute of 32 Henry VIII applies where the estate of the wife is a fee, and on the death of the husband gives her or her heirs the right of entry. But this statute has not been made of force in this State; if it were it could not avail the appellants. Agnes took under the will an estate for life only. This, at common law, the husband could dispose of and convey absolutely. At her death the life estate would terminate.

"Estates for life being freehold estates could only commence in livery of seizin, and can only be avoided by entry."—Waller v. Hill, 2 Saund., 180. There was no entry in the lifetime of Agnes, and no right of entry in the plaintiffs.

"If wife have an estate for her life the husband becomes seized of such an estate in right of his wife."—2 Kent, 113; McQueen on Husband and Wife, p. 33, Section 3, Law Lib., vol. 28. The alienation by the husband, James McElwee, destroyed the estate in remainder, by the determination of the particular estate before the happening of the contingent event upon which it was to vest.—See authorities cited in circuit decree. Also, "a feoffment by the husband and wife is a discontinuance, for, though the wife joins, it is the act of the husband alone."—Coke on Littleton, 326; Bingham on Law of Coverture, 221.

"At common law any alienation made by the husband of his wife's land, whether by feoffment, fine or recovery, was a discontinuance."—Bingham on Coverture, p. 219, Chap. III. As analogous, sale of an estate for life by Court of equity held sufficient "to make the title good against all contingent interests and remainders, though the life tenant the only party before the Court."—4 Rich. Eq., 476, 493; Williman v. Holmes, 2 Rich. Eq., 321; Vanlieu v. Parr, Bofil v. Bofil, 3 Rich. Eq., 1.

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*The manner of the execution of the wife's release is not, therefore, important, as feoffment by the husband barred the contingent remainder.

VII. In the case of Hays v. Hays and Evans (5 Rich., 38,) the contest was between a widow as plaintiff and a purchaser under Sheriff's title as defendant. The release had been wrung from the wife by the cruelty of a drunken husband, and O'Neall, J., in delivering the opinion, says: "Such a release so obtained never, with my consent, shall bar the rights of the wife." Under the pressure of this praiseworthy object, he held that a life estate is not the subject of release under Section 3 of the Act of 1795. The Judges did not all concur, and he adds (on page 39): "But as we have not all satisfactorily

attained this conclusion, it is necessary to look beyond it, namely, to the point that the release was not voluntary. The words of the Section are: 'Every married woman of the age of twenty-one years who may be entitled to any real estate as her inheritance and may be desirous of joining her husband in conveying away the fee simple of the same.' Is it not a reasonable construction that the statute meant any estate the wife may have inherited? Is it reasonable to suppose that the Legislature intended to provide that the weaker safeguard should be limited to the conveyance of the larger estate? That if a wife wished to convey any estate less than an estate of inheritance, she must acknowledge the instrument before a Judge, but that as to an estate in fee simple, acknowledgment before a Magistrate would be sufficient? The right to convey the greater estate, under the Act of 1795, certainly implied the right to convey the less. The Act was, perhaps, intended as a substitute for the Acts of 1731 and 1767, enacted in the colonial period."

IX. But the present case is a very different one from that of Hays v. Hays and Evans. Here there is a deed of feoffment, with livery of seizin, in which wife and husband unite. In addition to the life estate under the will, the wife had, by operation of law, the right and power to bar the contingent remainder and convey a fee simple. The two constituted an estate "not less than an estate of inheritance." The words used in the Act of 1795, Section 3, are: "Joining her husband in conveying away the fee simple of the same to another person." She was permitted by the Act to thus convey a "fee simple." This she and her husband did, as the deed shows and recites—"a good title in

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fee simple to the premises." *Such a case does not come in conflict with the decision in Hays v. Hays and Evans. The point urged by O'Neall, J., in that case, was that for a wife's release before a Magistrate to be valid the conveyance must be of a fee simple. Here there was a conveyance of a fee simple title and the act of the wife was voluntary and in due form.

November 22, 1878. The opinion of the Court was delivered by

McIVER, A. J. The land in controversy in this case was devised "to Agnes McElwee, to her own use and possession during her natural lifetime, and at her death to any child or children she may have living at the time of her death: but if she should die not leaving any children or child alive at the time of her death, then, and in that case, the said tract of land and the before named negroes, with their future increase, together with the other property herein bequeathed to my daughter Agnes, shall revert and go back absolutely and unconditionally to any brothers and sisters and the children of any deceased brother or sister residing in this state at the time of her death, &c." At the time of testator's death, which occurred on the 15th November, 1854, Agnes was unmarried, but she subsequently intermarried with one James McElwee and died on 20th September, 1875, without ever having had a child. Subsequent to her marriage she joined her husband in making a deed of feoffment and livery of seizin to one Samuel A. McElwee, conveying the land in dispute in fee, which deed bears date the 29th September, 1857. Samuel A. McElwee then conveyed the land to James McElwee, and he to the defendant, Wheeler. The plaintiffs and all of the defendants, except Wheeler, are the brothers and sisters of Agnes, and children of deceased brothers and sisters who were residing in the State at the time of the devise and death of the testator, and continued so to reside in the State until after the death of Agnes. The questions presented are: 1st. Whether the limitation to the brothers and sisters constituted a vested or a contingent remainder. 2d. If contingent, was the deed of feoffment and livery of seizin sufficient to bar such remainder? The Circuit Judge held that it was a contingent remainder and that it was barred by the deed of feoffment.

We think that the conclusions reached by the Circuit Judge are correct, and are so fully sustained by his reasoning and the authorities which he has cited that it is scarce-

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ly necessary for us to add *anything to what he has said, especially as we have quite recently had occasion to consider and determine a question somewhat similar to the first in the case of Faber v. Police [10 S. C. 376], in which the opinion has just been filed. It was urged in the argument that "the present capacity of taking effect in possession, if the possession were to become vacant, and not the certainty that the possession will become vacant before the estate limited in remainder determines, universally distinguishes a vested remainder from one that is contingent."—Fearne on Rem., *216. And, therefore, whenever there is in esse a person who could immediately take, if the prior estate should then end, the remainder, eo instanti, becomes vested; and as in this case there were brothers and sisters of Agnes residing in the State continuously from the time of the death of the testator up to the time of the death of Agnes, if at any moment after testator's death Agnes had died the remaindermen mentioned in the will were in esse and qualified to take, Agnes never having had a child, and, therefore, the remainder was at all times vested. This argument, though plausible, cannot stand the test of examination. It is very certain that the limitation to the brothers and sisters depended, by the express terms of the devise, upon the happening of two events, both of which were uncertain at the time the devise took effect,

and continued to be uncertain until the death of Agnes: First, the contingency that Agnes should die "not leaving any children or child alive at her death; and, second, the contingency that one or more of the brothers and sisters should be residents of this State at the time of the death of Agnes. Hence, it would be more correct to say that there was no moment during the existence of the precedent life estate when these remaindermen could claim that they had a present fixed right to take possession when the possession should become vacant by the termination of the precedent particular estate, because until that estate terminated their right remained uncertain and wholly dependent upon the happening of the two contingencies above mentioned. Suppose Agnes had died in giving birth to a child which survived her, their right to take would have been, not defeated, because that would imply perhaps that the right had once existed, but their chance of having such right, which before had rested in contingency, would then have been wholly lost. It seems to us, therefore, very clear that their interest was wholly contingent—not merely that their right to enjoy the estate in possession, but that their right to future possession, was wholly contingent.

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*The argument of the appellants is based upon a misconception of the proposition laid down by Fearne, which we have quoted above, as is apparent from the illustration which he employs to elucidate such proposition. For, after laying down that proposition, he proceeds to say: "For instance, if there be a lease for life to A, remainder to B for life, here the remainder to B, although it may possibly never take effect in possession because B may die before A, yet, *from the very instant of its limitation*, it is capable of taking effect in possession if the possession were to fall by the death of A: it is, therefore, vested in interest, though perhaps the interest so vested may determine by B's death before the possession he waits for may become vacant."

The italics are ours, and the difference between the case stated by Fearne as an illustration of the rule relied upon by the appellant and that now under consideration is that in the former the remainderman, from the very instant the limitation was made, had the right to the possession upon the falling in of the precedent estate, which right did not depend upon any contingency but only upon the death of A,—an event certain to happen,—while in the latter the right remained contingent, being dependent upon the happening of two uncertain events during the whole of the existence of the precedent estate, and it could not be known certainly that such right would ever be entitled to become vested until the determination of the particular estate. Again, Fearne, on page *217, says that "whenever the remainder is limited to a person not in esse, or not ascertained, or whenever it is limited so as to require the concurrence of some dubious, uncertain event, independent of the determination of the preceding estate and duration of the estate limited in remainder, to give it a capacity of taking effect, then the remainder is contingent. Now, in this case, the remainder is limited to persons some of whom may not have been in esse—the children of deceased brothers and sisters—because after the death of the testator some one or more of the brothers or sisters might have died leaving children born subsequent to the death of the testator who were residing in this State at the time of the death of Agnes. If so, it is difficult to see how they could be excluded. How the fact may be in reference to this matter does not appear, as the "case" only discloses the names of such children of deceased brothers and sisters as were living in this State at the time of the death of the testator who continued to live here until

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the death of *Agnes; but whether there were any such children born subsequent to the death of the testator living in this State at the time of the death of Agnes we are not informed. Be that as it may, the limitation certainly was to a class of persons "not ascertained," for it was not merely to the brothers and sisters but to such of them as should be living in the State at the time of the death of Agnes. Who they would be could not, of course, be "ascertained" until her death.—See Luddington v. Kine, 1 Ld. Raym., 203, and Gilman v. Elvey, 4 East, where similar limitations were held to create contingent and not vested remainders.

As to the second question, we are content to rest that upon the reasoning employed and the authorities cited by the Circuit Judge. For even assuming that a married woman could not convey her life estate without making the acknowledgment in the manner prescribed by the Act of 1731, as amended by the Act of 1767, yet the deed of feoffment, in that case, would be regarded as the deed of the husband alone; and by the common law, which in this respect had not at the time this deed was made been altered or modified in this State, the conveyance of the husband alone operated as a discontinuance of the wife's life estate, and thus destroyed the estate in remainder by the determination of the particular estate before the happening of the contingency upon which alone the remainder could vest.—2 Kent Comm., 133, 5th ed.; 1 Wash. on Real Prop., 578.

The judgment of the Circuit Court is affirmed.

WILLARD, C. J., and HASKELL, A. J., concurred.

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*HAND v. RAILROAD COMPANY.

(Columbia. April Term, 1878.)

[*Receivers* ⊂⊃113.]

In an action to wind up the affairs of an insolvent railroad corporation, in which different classes of creditors, embracing, it may be, many individuals, have been made parties by publication, an order directing the Receiver to change the location of a part of the road and build a bridge with the income of the corporation should not be made upon the recommendation of a Receiver and the report of an engineer, but only upon the report of the Master showing that necessity for the change exists.

[Ed. Note.—For other cases, see Receivers, Dec. Dig. ⊂⊃113.]

[*Receivers* ⊂⊃93.]

[The ground for holding property of an insolvent railroad corporation by a receiver being solely the preservation of the property and its application to the demand of creditors, the court will not engage in any speculative projects with the property, or weigh the merits of projected improvements, unless necessary.]

[Ed. Note.—For other cases, see Receivers, Cent. Dig. § 171; Dec. Dig. ⊂⊃93.]

[This case is also cited in Clyburn v. Reynolds, 31 S. C. 115, 9 S. E. 973, as an example of the setting aside of judgment as to persons interested, but not made parties to the action.]

Before Reed, J., at Charleston, July, 1877.

This case will be found reported in 5 S. C., 182; 6 S. C., 307, and 8 S. C., 207, and by reference to those reports the nature and object of the action will be understood.

It now comes before the Court on the report of the Receiver, C. T. Mitchell, Esq., and the Engineer, C. S. Gadsden, Esq.

The report of the Receiver is as follows:

I respectfully submit for the consideration of the Court a report of C. S. Gadsden, Esq., the Engineer and Superintendent of the Savannah and Charleston Railroad, showing the necessity for an immediate change of the track of the road so as to form a connection with the Northeastern Railroad and thereby enter the city, and recommending the building of a new track from near the John's Island Station to the Ashley River, at Bee's Ferry, and crossing that river by a bridge at that point.

I entirely concur in the views of Mr. Gadsden and recommend their adoption by the Court.

I have caused the solicitors representing the various liens upon the road to be consulted, and am informed that they concur in the opinion that there is a great and immediate necessity for the change.

From the proposed bridge over the Ashley River the Ashley River Railroad Company is ready to construct a road to the Northeastern Railroad, and these two corporations offer to make a fair and equitable arrangement for the use of their tracks into the city, and thus complete a continuous railroad connection and route from New York to Florida by way of Charleston. Unless this is done it seems inevitable that the through mail system will be taken away from us and a general decadence rapidly go on. All that is necessary, I believe, to effect a complete con-

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nection, and to give to *the Savannah and Charleston Railroad the long-deferred benefit of entering the city by rail in time for the opening of the Autumn business, is the authority of the Court to construct the work; the cost to be charged upon and paid from the income of the road. And I respectfully recommend that this be done.

The report of the Engineer is as follows:

Mr. Charles T. Mitchell,

Receiver Savannah and Charleston Railroad.

Sir: In reply to your inquiry as to the proposed change of route of the Savannah and Charleston Railroad from a point near the John's Island Ferry Station (nine miles from the city) to the crossing in the Ashley River at or near Bee's Ferry, and the construction of a bridge at that point, I respectfully report the experiences at the present terminus in "St. Andrew's" and the substantial reasons for a change of route.

The early history of the road shows that the first choice of the engineer was a location practically that now contemplated, and the selection of the present site opposite the city, on the West bank of the Ashley River, was made only after much discussion and serious opposition.

It was soon discovered that the choice of the St. Andrew's terminus in preference to an entrance into the city via the Bee's Ferry route was a grave mistake—a mistake which, more than any other cause, has involved the enterprise in financial ruin.

Experience has shown that the water carriage necessary to the transfer across the Ashley River is very expensive and unsatisfactory. The delays, inconvenience and exposure incident to passenger traffic at that point prejudice the through travel against the route and cause the travelers, especially invalids and families, to seek more agreeable lines of communication. The repeated handling of freight, inseparable from the system, is a source of much complaint, and the expense considerable. The handling and receipt of both passengers and freight on the Western side of the city involves a transfer across the entire width of Charleston, which is found practically to equal an additional rail transportation of twenty-five miles on passenger and one hundred miles on certain classes of freight traffic.

The superior advantages of a location in the city induced an examination into the practicability of a bridge across the Ashley

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*River at the West end of Calhoun street. The proximity of the present terminus to the city seemed to point to this means of escape from the errors committed by the early

management, and this project has been thoroughly canvassed.

The very great cost of a suitable structure, the exposed position of a bridge spanning the river at this locality and the difficulty of traversing with trains the entire width of the city, even were the bridge built, have prevented any serious attempt in this direction.

The history of the temporary bridge built during the war seemed to impress the more forcibly the folly of using other than permanent foundations.

The many estimates made from time to time by the bridge building firms of the country for a suitable bridge range from a quarter to a half million dollars.

Thus the experience of the seventeen years of the life of this enterprise, while proving the folly of the choice of the St. Andrew's terminus and the necessity of a depot in the city of Charleston, proved also that a bridge at or near the present terminus was an undertaking beyond the possibilities of the present and unlikely to secure the advantages sought. The judgment of those who in the beginning pointed out the route by Bee's Ferry and an entrance into the city by that means has been endorsed by all those who have participated in the management of this property as well as by the test of time.

The construction of nine and one-half (9½) miles of road between the John's Island Ferry Station, on the Savannah and Charleston Railroad, to the six-mile post on the road North of the city of Charleston secures a connection with the system of railroads North and West and an entrance into the city at a comparatively moderate outlay.

The Ashley River at Bee's Ferry is but four hundred and fifty (450) feet wide at low water, and a timber bridge, readily and cheaply constructed, will be all that is necessary.

In these days of close connections, rapid mail transportations and low freight charges, the advantages of this route must be evident on the most casual examination.

The continuity of rail for the interchange of passenger and freight traffic is a necessity of the times. The Charleston break of continuity is the only one now existing in the Atlantic Coast Line system from New York to Florida.

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*A charter for an independent company proposing to build this connection was granted by the South Carolina Legislature, and this road would long since have been built but for the disturbed financial condition of the affairs of the Savannah and Charleston Railroad Company.

The object of the present move is to transfer the nine mile section from John's Island Ferry Station of the St. Andrew's terminus to the new route. In other words, to build along the Bee's Ferry route, to and across the Ashley River, under the charter of the Savannah and Charleston Railroad, using, as far as they will go, the proceeds of the sale of the old materials abandoned on the old road. By this scheme, upon the completion of the Bee's Ferry line, the length of the road will be 97¼ miles, in place of 101, as formerly, or 92 miles should this branch line be built under the independent charter.

The cost of construction from John's Island Ferry Station to the North bank of the Ashley River will be as follows:

* * * * * *

[The aggregate amount of the estimate annexed to the above report was $32,846.20.]

His Honor made the following order:

On hearing the report of Charles T. Mitchell, Receiver, covering report to him of C. S. Gadsden, Engineer and Superintendent, and it appearing that an early connection enabling the Savannah and Charleston Railroad to deliver and receive its freight and passengers within the city, and to continue the transportation of the mails as at present, is essential to the value of the property and in aid of the security of the lien holders, it is, therefore, on motion of Mr. Campbell, and with the consent of other solicitors in the several causes, ordered as follows:

1. That the Receiver, Charles T. Mitchell, be authorized to make suitable, fair and satisfactory agreements with the Ashley River and Northeastern Railroad Companies, or any other responsible corporation or parties, by which the trains of the Savannah and Charleston Railroad Company may enter the city to receive and discharge freight and passengers and closely connect with the great mail route to and from Washington and New York.

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*2. That thereupon the said railroad shall be, and hereby is, authorized to construct, or cause to be constructed, a new track from the John's Island Station to Bee's Ferry, and to build a suitable bridge over the Ashley River at that point, as recommended in and by the report of Mr. Gadsden, Engineer and Superintendent, and at a cost not exceeding the estimate appended thereto.

3. That the cost of said track and bridge be paid out of the surplus income of the road, after paying current expenses, repairs and other charges already upon it, and the same, when built and paid for at the cost of construction, shall be subject to and covered by the present existing liens, according to their legal priority, as shall any agreement made with the Ashley River Company or persons for the use of their property. And until the work hereby ordered shall be paid for, in the manner provided aforesaid, they shall be, and stand as and for, a security for such persons as shall furnish material, or construct them, or shall advance or loan money to pay for such material and construction.

4. That the Receiver have leave to apply for any further orders necessary at any time

to enable him to carry into full effect the purposes of this order.

To the above order was appended the written consent of a number of firms of solicitors representing different parties to the action.

James Conner, a holder of six per cent. bonds of the Charleston and Savannah Railroad Company guaranteed by the State of South Carolina and secured by the statutory mortgage to the State, who became a party to these proceedings and proved his claim under the order of the said Court, dated , appealed, on behalf of himself and such other lien creditors as will unite in prosecuting this appeal, from the order of His Honor Judge Reed made in the above entitled cause on the 11th day of July, 1877, on the following grounds:

1. That the order was granted on the application of the Receiver alone, and upon ex parte statements furnished by the employees of the Receiver.

2. That the Court had no jurisdiction or authority to expend the income or assets of the corporation in the construction of a new road and bridge, and could grant no such authority to the Receiver, and that the order of Court granting such authority is illegal and void.

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*3. That the surplus income of the corporation can be applied only to the payment of the lien creditors of the corporation, and the application of it to any other purpose is illegal and void.

4. That the Court had no authority to change the route of the Savannah and Charleston Railroad Company and to construct a new one. If such power still exists, it is vested by Act of the Legislature in the stockholders or Directors of the corporation and not in the Court.

5. That the construction of the new route destroys the value of the old, and to that extent impairs the security created for the protection of the six per cent. bonds of the Charleston and Savannah Railroad Company.

6. That whether the proposed change of route will impair the value of the property in the custody of the Court or enure to the benefit of the lien creditors are questions which the Court had no jurisdiction over and could neither hear nor decide. That the only power or duty of the Court is to administer the property until it can be sold for the payment of the lien, and that, in assuming to decide upon the propriety of the proposed change and authorizing it, the Court exceeded its powers in the premises and its order is illegal and void.

7. That the order appropriates the surplus income to the construction of the new track and bridge and gives to the parties a lien over said track or bridge.

[For subsequent opinions, see 12 S. C. 314; 17 S. C. 219.]

Conner, for appellant.

Memminger, Campbell, contra.

November 25, 1878. The opinion of the Court was delivered by

WILLARD, C. J. The Savannah and Charleston Railroad Company has been sued by D. Hand, a bond creditor, upon the allegation of insolvency, with the usual demand for a Receiver and for the collection and distribution of its assets in payment of its debts. C. T. Mitchell was thereupon appointed such Receiver and assumed the management and control of the franchises and property of the company under orders of the Circuit Court for the First Circuit. The road was, at the time of the commencement of this suit, operated as a passenger and freight road between the cities of Charleston and Savannah. The Receiver continued to

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operate the *road. At the time the Receivership was created the Charleston terminus was separated from the terminus of the Northeastern Railroad, with which road the company's traffic to the Northward was principally connected. The Receiver applied to the Court for authority to change a portion of the line of the road, commencing Southerly of the existing terminus, by building from that point a new line to the Ashley River, North of the city of Charleston, and thence, over a bridge to be constructed for that purpose, across the Ashley River, alleging that from that point to the Northeastern Railroad a company duly authorized for that purpose was prepared to extend a line of road and that suitable arrangements for transmitting trains over such road and connecting with the Northeastern Railroad could be made with both companies. A stipulation, purporting to be signed by the solicitors of all the parties in interest, was presented to the Circuit Court, consenting to an order for that purpose. It appears, however, that the appellant, a party in interest, did not consent, but opposed the granting of such order on various grounds. Upon such application the order was made from which the present appeal has been taken. The propriety of this order can only be considered as it regards parties who did not assent to it. Under this order the work has been completed, and it is understood that parties who have made advances towards the construction, claim, under the terms of the order, a first lien on that part of the line thus constructed, including the bridge across the Ashley River. It appears, also, that a portion of the original line, as it went into the hands of the Receiver, has been abandoned and is worthless in consequence of the opening of the new line.

Before considering the questions presented by the appeal, we cannot pass without notice the evidence furnished by this case of the

disregard of the customary precautions proper to prevent injustice where Courts are dealing with the interests of parties represented before the Court as a class or classes. In such cases there is ordinarily no such strict representation that the Court can safely act on stipulations purporting to be with the consent of parties without inquiry, and therefore the practice prevails, and should be adhered to, of referring matters of that description to a Master or Referee for a hearing and report on such matters as may be deemed requisite to inform the Court as to the propriety of the order. Had that course been pursued in the present case, it is probable that we should be able to form a better judgment of the nature and effect of the

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*order in question than can possibly be formed from the meager statement of the facts and proceedings in the case brought before us in this appeal. It cannot be doubted that the Court might, under proper circumstances, order a change to be made in the state of the property in its hands for distribution among creditors with a view to increase the value of the fund, but it is clear that the pursuit of speculative advantages would not present a proper case for its exercise. To preserve the property from all causes tending to its depreciation, to render it reasonably productive during the period it remains in the hands of the Court, are objects proper for the attention of the Court, and its hands should not be too rigidly tied in the pursuit of these objects. On the other hand, for the Court to undertake to weigh the merits of projected improvements, and to assume in behalf of the parties in interest that class of experimental risks that appertain to the development of material industries, is both inconsistent with the nature of a Court and the objects with which it holds assets for the satisfaction of creditors. A Court is compelled to inform itself through allegations and proofs—a channel unsuitable for drawing correct judgments as to the relative advantages of projected lines of railroad. Sometimes it is true that Courts are called upon to devise schemes that involve more or less of the exercise of business prudence and foresight, but such cases are of rare occurrence, and the necessity of the case is the ground upon which the Court departs from its customary functions. On the other hand, the sole ground for holding property in cases of this class is the preservation of the property and its application to the demands of creditors. It should be the interest of all parties that distribution should be speedily made; but if the Court can assume to carry out projects that look to the ultimate successful establishment of a railroad, it may become the interests of some of the parties to work out their plans through the instrumentality of the Court, firmly holding the property against the immediate demands of creditors, while if the hands of the Court were removed such projects would be likely to be interrupted through causes arising from its indebtedness. Such temptations for indefinitely continuing the control of the Courts over insolvent institutions should be removed as far as possible, not only for the sake of preserving purity in the administration of justice, but for the sake of the parties entitled to distribution,—as experience shows that funds in the hands of a Court for distribution cannot by any act be made to grow while in that custody.

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*We are led by these considerations to conclude that before the order in question was made, as affecting the interests of parties not assenting to it, it should have been shown that some necessity existed for the change projected in the location of the line of the railroad, such necessity having relation to the production of the property or business of the railroad. No such case is presented. The advantages presented to the Court as likely to arise from the change are of such a nature as to call for the exercise of business sagacity and foresight, rather than prudence, for the formation of a judgment in regard to them. This, in our judgment, is reason sufficient for the refusal of the order when objected to. The order, as it regards the appellant, must be set aside.

McIVER, A. J., and HASKELL, A. J., concurred.

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WILLIAMS v. KIBLER.

(Columbia. Nov. Term, 1877.)

[*Wills* ⇨623.]

Testator devised to each of his three grandsons a tract of land, "to him during his natural life, and then to his children forever;" but if "either of my said grandsons should die without leaving a child or children capable of inheriting the share of the property I have given to him, then and in that case it is my will that the share so given to him shall go to and be divided between the survivors; or if two of them should die without either of them leaving children capable of inheriting their or either of their shares, then it shall go to the survivor during his life, and then to his children forever." The will also contained a residuary clause by which the testator devised "all of his other property, of every kind and description whatsoever, to his said three grandsons, to be equally divided between them." Each of the three grandsons died without children: *Held*, That each of the three grandsons took an estate for life in the land devised to him, with remainder to his children and with cross remainders between him and the other devisees in case he died without children, —the survivor taking all the lands upon the death of two of the devisees, neither of them leaving children; and that upon the death of the survivor, leaving no children, the residuary clause took effect and vested the estate in al-

the lands, from the death of the testator, in the three grandsons absolutely and in fee.

[Ed. Note.—Cited in Robert v. Ellis, 59 S. C. 161, 37 S. E. 250; McCreary v. Coggeshall, 74 S. C. 48, 53 S. E. 978, 7 L. R. A. (N. S.) 433; Still v. Creech, 95 S. C. 370, 78 S. E. 1039.

For other cases, see Wills, Cent. Dig. § 1445; Dec. Dig. ⟸623.]

[*Wills* ⟸587.]

A residuary clause of all the testator's "property, of every kind and description whatsoever," carries all his interests in real estate otherwise undisposed of by the will, whether such interests be vested, or future, contingent or reversionary.

[Ed. Note.—Cited in Bell v. Towell, 18 S. C. 100; Lopez v. Lopez, 23 S. C. 269; Gambrell v. Gambrell, 82 S. C. 212, 64 S. E. 1135.

For other cases, see Wills, Cent. Dig. § 1289; Dec. Dig. ⟸587.]

[*Wills* ⟸497.]

[Cited in Williams v. Gause, 83 S. C. 267, 65 S. E. 241, to the point that the word "children" differs in its technical sense from the word "issue."]

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1080–1086; Dec. Dig. ⟸497.]

[This case is also cited in Kibler v. McIlwain, 16 S. C. 553, as to facts and in Lopez v. Lopez, 23 S. C. 266, as to the construction of wills.]

Before Mackey, J., at Lancaster, October Term, 1876.

This was an action by Mary J. Williams and Nancy Williams against Andrew J. Kibler, James S. McCardle and James H. Williams for the partition of certain lands of

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which William G. Stew*art, deceased, was in possession at the time of his death, and of a considerable portion of which the defendant, Andrew J. Kibler, held a mortgage given to him by the said William G. Stewart.

The case is stated in the decree of His Honor the Circuit Judge, which is as follows:

"This cause was heard before me at October Term, 1876. The plaintiffs claim that the real estate left by Isaac Stewart, deceased, consisting of lands lying in Lancaster County, shall be partitioned and divided amongst the children of Molcy J. McCardle, deceased, as the sole surviving heirs of the said Isaac Stewart, deceased. Isaac Stewart died in 1836, leaving of force his last will and codicil thereto, of which copies will be herewith filed. The solution of the questions raised depends upon the construction of the will. The will bears date December 10th, 1833. The codicil, which is simply a republication of the will, was executed December 7th, 1835, after the death of the testator's wife.

"At testator's death, his only heirs-at-law were his four grandchildren, namely, William G., Isaac N., Andrew J. and Molcy J. Stewart. Molcy J., who afterwards became the wife of John McCardle, whom she survived, is now also dead, and her children are now claiming the said real estate as reversioners.

"All of the testator's grandsons are now dead, William G. Stewart being the sole survivor of the three. Molcy J. McCardle survived two of the brothers, but died before William G. William G. died in possession of the whole of the said real estate. The property and estate left by him will prove insufficient for the payment of all his debts. His creditors, of whom Andrew J. Kibler is the principal and largest, claim that, under the terms of the testator's will, the said real estate was held by him at the time of his death absolutely in fee simple, and that the same now constitutes an asset for the payment of the debts against his estate.

"On hearing the pleadings, evidence and argument of counsel, it is the judgment of the Court that the children of the said Molcy J. McCardle, deceased, are entitled to the land described in the complaint, as heirs-at-law of the said Isaac Stewart, deceased, and it is so ordered and adjudged."

The following is a copy of the will of Isaac Stewart:

"To all whom it may concern: Be it known that I, Isaac Stewart, of the District of Lancaster and State of South Carolina, being

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*of sound and disposing mind and memory, do make and ordain this my last will and testament as follows, to wit:

"After the expenses of the decent interment of my body, and the payment of all my just debts, I give and bequeath to my beloved wife, Mary, (if she survive me,) during her natural life, all my lands and negroes, stock of cattle, horses, hogs, sheep, wagons, carts, plantation tools and all my other property of any and every description whatsoever; also, any money I may have by me at my death.

"I give to my grandson William George Stewart the plantation or tract of land whereon I now live, containing two hundred acres, more or less, after the death of my wife, if she should survive me, during his natural life, and then to his children forever.

"I give to my grandson Isaac Newton Stewart all that tract or plantation of land called the McIlwain tract, containing one hundred and twenty-three acres, more or less, after the death of my wife, if she should survive me, to him during his natural life, and then to his children forever.

"I give to my grandson Andrew Jackson Stewart all that plantation or tract of land called the Bolton tract, containing one hundred acres, more or less, after the death of my wife, if she should survive me, to him during his natural life, and then to his children forever.

"I give to my granddaughter, Molcy Jane

Stewart, the sum of one hundred dollars, to be paid to her when she marries or comes to the age of twenty-one years.

"I also give to my said grandsons, to wit, William George, Isaac Newton and Andrew Jackson, to them and for their use, during their natural lives, my negroes, to wit, Comfort, Mose, Jim, Rum, Dorcas, Rachel and Ailsey, and their increase, to be equally divided between them at my death; or if my wife should survive, then to be equally divided between them at her death: and should it so happen that an equal division cannot be made of the said negroes and their increase between my said grandsons, then and in that case it shall be the duty of the parties interested therein to divide the said negroes and their increase equally as they can, and after such division, if they cannot agree upon the sum of money to be paid from one to the other to make the lots equal, it shall be left to three men, to be chosen by the parties interested therein, who may fix the sum of money to be paid by either of

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those who may *have the more valuable lot and thereby make the division equal. And it is my will that my said grandsons take nothing more than a life estate in the said negroes and their increase, and that the lots which may fall to them or either of them shall be for their use during their or either of their lives and to their or either of their children forever.

"I also give all my other property, of every kind and description whatsoever, to my said three grandsons, to be equally divided between them at my death, or, if my wife should survive me, at her decease.

"And it is further my will that if it should so happen that either of my said grandsons should die without leaving a child or children capable of inheriting the share of my property I have given to him, as above recited, then and in that case it is my will that the share so given to him shall go to and be divided between the survivors; or if two of them should die without either of them leaving children capable of inheriting their or either of their shares, then it shall belong to the survivor during his life, and then to his children forever.

"I also nominate and appoint my beloved wife, Mary, to execute this my last will and testament."

The codicil is as follows:

"December 7th, 1835.—I republish this to be my last will and testament, confirming every part and clause of the same."

From the foregoing decree Andrew J. Kibler appealed on the following grounds:

I. Because William G. Stewart, at the instant of his death, was seized ex vi termini in fee simple of the lands mentioned in the decree.

II. Because, if, under the terms of the will, no reversionary interest was left in the testator, William G. Stewart, as survivor of the three brothers, was seized in fee simple at the instant of his death of at least nineteen-thirty-sixths of said lands.

III. Because, even if title to the land on the death of William G. Stewart, reverted to the heirs-at-law of the testator, the estate of the said William G. Stewart, as heir of

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the testator and of his two *predeceased brothers, became entitled to five-twelfths thereof absolutely.

Moore, for appellant:

William G. Stewart, as survivor, took all the estate in the lands devised to the three brothers.—Swinton v. Legare, 2 McC., 449; Yates v. Mitchel, 1 Rich. Eq., 265; DeTreville v. Ellis, 1 Bail. Eq., 40.

1. If, as survivor, he took only a life estate in remainder, then at his death the lands reverted to the heirs-at-law of the testator.

2. If there was such reversion, he, (or his representatives,) as such heir of the testator and as heir of his two predeceased brothers, took in fee simple five-twelfths of all the lands devised.—Wilson v. Keer, 2 Hill, 550; Young v. Dinkins, Rich. Eq. Cas., 23.

But the reversionary estate in the lands was caught up by and disposed of in the residuary clause, in which the testator gives and bequeaths all of his "other property, of every kind and description whatsoever," to his said three grandsons, "to be equally divided between them."

1. The words employed in this clause (the remainders to the children of the grandsons having failed) were sufficient to carry to the grandsons the reversion left in the testator.

In Wall v. Langdale (14 East) the words of the will were: "I give and bequeath the residue of my property, goods and chattels." Lord Ellenborough held that the real estate passed under the former words. The comprehensive import of the word "property," when unrestricted by qualifying expressions in the will, is also shown in various other English decisions cited by Jarman on Wills. —See pp. 190, 579, Perk. ed.; see also Doughtery v. Doughtery, 2 Strob Eq., 63.

2. By this residuary clause the three grandsons, in addition to estates for life in the several parcels, took the reversion in the whole of said lands as joint tenants in fee simple, defeasible upon contingencies which have never occurred. This construction, it is submitted, is fully sustained by the decision of the Appeal Court in the case of Hopkins v. Mazyck, Rich. Eq. Cas., 263. Stephen Mazyck (pp. 273–4) devised certain real estate to his three sons, Benjamin, Paul and Alexander, for and during their several and respective natural lives, with remainders to their chil-

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dren respect*ively. All of them died, leaving no children. By the 13th clause of his will the testator devised the rest and residue of

his said real estate to the same three sons. It was held, on the principle laid down in Roberts on Wills, 439,—"a residuary clause will extend to every latent reversion which the testator might have in him, unless it is expressly excluded by devise to some other person,"—that each of said sons took an estate in fee simple, such estate never having been defeated by the contingent remainders taking effect.

3. Had the provisions of the will of Isaac Stewart ended here, it would have followed that each of his grandsons would have taken an estate for life in the portion of land specifically devised to him and the reversion of the whole of the lands in fee simple as joint tenant with his two brothers.

4. In this aspect, the "jus accrescendi," which was formerly the distinguishing feature of joint tenancies, would not have prevailed; and upon the death of the survivor, William G. Stewart, the whole of the lands would have been devisable amongst the heirs of the three brothers—to the heirs of each the one-third thereof, according to their respective rights, at the death of each brother respectively. Hence the estate of William G. Stewart, the survivor, would have consisted only of five-ninths of the whole lands, to wit, of one-third as devisee and one-twelfth and five-thirty-sixths thereof as heir-at-law of his two predeceased brothers.

William G. Stewart, as survivor of the three brothers, took in the whole of the lands devised an estate in fee simple, defeasible upon his death leaving children.

One of the first canons of construction is that the intention of the testator, (to be ascertained from a consideration of all parts of the will,) where it does not contravene the policy of the law, nor is defeated by some obstinate technical rule, must prevail. Applying this principle to the facts in this case, we find:

1. That the testator intended to dispose of his whole estate and of every interest held by him therein.

2. That in and by the residuary clause he used expressions, according to the authorities above quoted, adequate to effect this purpose.

3. That his three grandsons were the principal objects of his bounty.

4. That he clearly intended (any two of them dying leaving no children) that the survivors should succeed to the shares of his estate devised to the three.

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*5. William G. Stewart had succeeded to these shares. The residuary clause, which operated to vest in the three brothers (in addition to estates for life with limitations to the survivors or survivor) the entire reversion, must, therefore, have enlarged his estate in the lands into a fee simple, defeasible upon his dying leaving a child or children capable of inheriting the lands.

6. Had the residuary clause been omitted, according to the decisions in the case of Addison v. Addison, (9 Rich. Eq., 58.) William G. would have taken in the lands devised to the three brothers a fee conditional, and upon his death without heirs of his body the lands would have reverted to the right heirs of the testator. He was, therefore, the only remaining object upon which the residuary clause could operate, and the reversion superimposed upon the fee conditional must, as in the case of Hopkins v. Mazyck, before cited, have enlarged his estate into a fee simple defeasible.

8. If he took in the lands a fee defeasible, then the fee must continue in him until the happening of the contingency upon which it is to be defeated; and if, as is said in the case of Carr v. Porter, (1 McC., 60.) "the contingency never happens, and can never happen, then the title can never be defeated," it follows that the estate of William G. Stewart in the lands devised to the three brothers ripened, at the instant of his death, into a fee simple absolute.

9. This result, too, it is submitted, is in exact accord with the plain intention of the testator as manifested by the general tenor of his will.

I. If either of the three foregoing propositions can be maintained the decree of the Circuit Court is erroneous.

II. If proposition 3 can be maintained the complaint should be dismissed.

Wylie & Hough, Allison & Connors, contra:

1. Did the brothers, Isaac N., Andrew J. and William G. Stewart, under the will take estates for life with cross remainders for life, remainders in fee to children or children of survivor? If so, the remainder in fee upon the testator's death, without either of the life tenants having children, descended to Isaac N., Andrew J., William G. and their sister Molcy, in equal portions, subject to be divested upon either or any of the grandsons afterwards having children. Upon the death of Isaac without children his one-fourth

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*vested equally in Margaret, his mother, his two surviving brothers and his sister Molcy; and upon the death of A. J. Stewart his interest became divisible between his mother and surviving brother and sister, which would leave in the mother two-twelfths and in Wm. G. and Molcy each five-twelfths of the whole.

2. If each of the brothers under the will took a fee simple, then upon the death of Isaac N. and A. J., William G. became entitled to five-ninths and Margaret and Molcy each to two-ninths as heirs-at-law of the two deceased brothers.

3. If the brothers under the will became tenants in fee conditional, (and we think they did,) then upon the death of Isaac N. without children his one-third vested in the persons who were heirs to testator at that time; and upon the death of A. J. another third became vested in like manner, and one-ninth.

the interest which the said A. J. inherited from Isaac, vested in his own right heirs, to wit, his mother, brother and sister; then, upon the death of the surviving brother, the remaining third vested in such persons as were then heirs of testator, and the interests which he had inherited upon the deaths of his deceased brothers went to his mother and the children of his sister Molcy, then dead. This gave Molcy or her children thirty-five-fifty-fourths, Margaret, the mother, two-fifty-fourths, and left seventeen-fifty-fourths in the estate of William G. Stewart.

It is said by Harper, Ch., in Adams v. Chaplin, (1 Hill Ch., 269,) "that the right of reverter after fee conditional is no estate in land, but a mere possibility, and therefore it is no remainder can be limited after the preceding fee." "This right * * * must go, as at common law, to the person who can make himself heir to the grantor of the fee conditional when that estate determines." See, also, Deas v. Horry, (2 Hill Ch., 214,) to the same effect.

If there was a life estate in the Stuart brothers, there was a good limitation to the children as purchasers. To them during life, and after death to their children and their heirs forever, would make the children purchasers—a new stock of inheritance; but in the last clause of the will we have this language: "If either of my grandsons should die without leaving a child or children capable of inheriting the share of my property I have given to him as above recited, then and in that case it is my will that the share so given to him shall go and be divided between the survivors; or if two of them should die without either leaving children capable of inheriting their or either of their shares, then to

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the survivor during his life, *and then to his children forever." This shows the intention to be that the children shall take by inheritance the share of the parent, and makes "children" equivalent to heirs of the body or issue, and comes within "the rule in Shelley's case." The words "issue," "heirs of the body" and "children" are generally regarded as equivalent in a will.—2 Jarm., 73, (marg.)

To A and his children would, if A had children at the time, make them tenants in common, but if he had not children it would give to him an estate tail in England and in this State a fee conditional.—Wild's case, 2 Jarm.; Reeder v. Spearman, 6 Rich. Eq., 92.

To a man during his natural life, and then to the heirs or issue of his body forever, would certainly make a fee conditional.—as much so as if to him and the heirs of his body forever. (Whitworth v. Stuckey, 1 Rich. Eq., 404); and the words "during life" have not the effect to cut the interest down to a life estate in the first taker, with remainder to heirs of the body as purchasers; indeed, such like expressions have little or no effect generally when used in such a connection.

It is admitted that "children" is generally a word of purchase, but it is contended that the words "capable of inheriting" so qualify the word as to make it the same as issue of the body. Leave out the words "during his natural life" and the devise to each of the Stewarts will read "to him and then to his children forever;" then add the limitation over in the last clause, "but if he should die without leaving children capable of inheriting his share, then it shall belong to," &c.

"If the term used in the limitation is 'son' or 'child,' and it is used in the sense of heir and not as a 'designatio personæ,' but comprehending a class to take by inheritance, it is to be taken as a term of limitation, and comes within the rule in Shelley's case."—2 Washburn on Real Property, 560.

It is said that the word "leaving" should be construed to limit an otherwise indefinite failure of issue to a failure of issue living at the death of the first taker, to enable ultimate remaindermen to escape the objection of remoteness and take, when otherwise they would take nothing; so it is always construed when applied to personal property.—Whitworth v. Stuckey, 1 Rich. Eq., 411. "The word 'leaving' in an executory devise will restrain an otherwise indefinite failure of issue to the death of the first taker in regard to personal estate, but will not do so in the case

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of real estate."—1 *Bail. Eq., 48. But "leaving issue capable of inheriting" it is contended will admit of no such construction—leaving issue capable of inheriting is the same as "without issue," for children or issue, however remote, may inherit.

The intention was to include any and all issue of the body as inheritors from the grandsons, and it was not intended that they should take except through and from them; otherwise grandchildren and those more remote would not take at all, but only children living at the death of testator. It certainly was not the intention that if any one of the grandsons should die after testator's death, leaving no child, but a grandchild or descendant of more remote degree, that such child or descendant should take nothing, and this might have been the effect if the grandsons had a life estate only, upon the death of one or more of them leaving issue other than children. "It has been said," says Mr. Jarman, "where there is a total want of children, grandchildren may be let in; no such case, it is conceived, can be found, and the doctrine appears to rest solely upon some dicta," &c.—2 Jarm., 70, (marg.)

"An immediate gift to children * * * comprehends the children living at testator's death, and those only."—2 Jarm., 75; see also Swinton v. Legare, 2 McC. Eq., 440.

If, as we contend, the estate devised to the grandsons was a fee conditional, then what is called the residuary clause, so far as a remainder or reversion in the land is concern-

ed, has nothing to operate on. Fee conditional, as stated in Adams v. Chaplin, is the whole estate. That no remainder can be limited upon a fee conditional is undoubted law. "The possibility of reverter on the determination of the fee by the death of the tenant without heirs of his body is not an estate: it is neither the subject of inheritance or devise. * * *"—Adams v. Chaplin, 1 Hill Eq., 265.

But suppose there was only a life estate to the grandsons, with cross remainders amongst them, remainder to children of survivor or survivors, then upon the death of survivor without children what became of the estate? Under the authority of Hopkins v. Mazyck, (Rich. Eq. Ca., 279,) it is claimed that all interest, latent reversions, &c., pass by these words: "I also give all my other property, of every kind and description whatever, to my said three grandsons, to be equally divided between them at my death, or, if my wife should survive me, then at her decease."

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*To his wife, testator had not only devised and bequeathed his lands and negroes during life, but also all his stock, wagons, carts, &c. To his grandsons only lands and negroes after her death; then the clause above quoted was intended to pass the stock and all other personal property (except negroes) which otherwise would not be disposed of by the will after the widow's death. The residuary clause in Hopkins v. Mazyck is very different from this. The language is: "I give, devise and bequeath the rest, residue and remainder of my estate, real and personal, whatsoever and wheresoever, including any estate, real or personal, not hereinbefore particularly devised and bequeathed," &c.; and it was held that "the residuary clause carried the ultimate fee or reversion in the lands." In that case much stress is placed on the words "any estate, real or personal, not hereinbefore particularly devised or bequeathed."—words so comprehensive as to pass any real estate or interest in the same not before specifically devised. "A residuary bequest operates on all personal estates at the time of the death of testator, including void legacies, &c.; but a residuary devise is in its nature specific and operates on land not before expressed to be given by the will."—2 Jarm., 587. If there were nothing for this residuary clause to operate on except an interest in real estate, then there would be more ground for contending that it must operate upon such interest; but, even in that case, it is submitted that the language is insufficient to pass real estate which had been mentioned or expressed to be given by other clauses. This clause is not the last. It is succeeded by the one which (if the estates of the grandsons were only for life) gives the remainders and cross remainders. The well-established doctrine that the last clause in a will is to prevail would present a serious difficulty to appellant, even if the said residuary clause could operate so as to pass an interest in real estate, for the clause following would so limit and control it as to make the estates of the grandsons fees conditional only.

The will was republished by a codicil after the death of testator's wife, and without this residuary clause there was nothing in the will to pass other personal property besides negroes, which other personal property consisted of stock, wagons, carts, &c., and must have been of very considerable value; and in this clause real estate is not mentioned, and the words in it are apt and proper words to pass personal property, and we think this alone was the intention, and that this intention is clearly deducible, not only from this

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clause *but from the will considered as a whole, reconciling and giving effect to every clause in it, which is a well known rule of construction of wills.

January 18, 1879. The opinion of the Court was delivered by

HASKELL, A. J. A statement of the facts and a copy of the will are contained in the brief; and it is admitted that the testator's wife died before the republication of the will. This Court is called upon to construe the will to determine what estate each of the three grandsons took in the real estate devised "to him during his natural life and then to his children forever," and what, on the death of any of them childless, passed to the survivors or survivor, and what final disposition, if any, was made of the property in the event of all three grandsons dying childless. The comparatively recent cases, Reeder v. Spearman, (6 Rich. Eq., 89,) McCorkle v. Black, (7 Rich. Eq., 407,) and Gillam v. Caldwell, (11 Rich. Eq., 73,) seem to be in point.

The devise in Reeder v. Spearman was to A "and to his children after his death;" and in the event of A's "dying without issue," then and in that case to "revert to my estate and be divided among my surviving children or their issue." It was held that A took only a life estate, with remainder to his children.

In McCorkle v. Black the devise was to several persons, "to them during their lives, and after their death to their lawful issue," with a limitation over that "should any one or more" of the devisees "above mentioned die leaving no lawful issue, in that case it is my will that the portion or portions of him or her so dying shall be equally divided between the surviving brothers and sisters." The question was, as in Reeder v. Spearman, "Whether as to the real estate the said devisees take an estate in fee or fee conditional, or whether the issue take as purchasers by way of remainder after the termination of a life estate in the first takers." It was held that although the direct devise would, by

the force of its words considered alone, import a fee conditional, nevertheless the fee conditional was, by force of the context, cut down into a life estate to the first taker with a remainder to the issue as purchasers.

To thus cut down the fee to a life estate, it was necessary to construe "issue" to mean "issue living at the death of the first taker," and it was considered that such effect was

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produced by the limita*tion over being to the other devisees "as survivors." Gillam v. Caldwell merely affirms the authority of McCorkle v. Black. The difference between the present case and that of McCorkle v. Black is to the extent that the word "children" differs in its technical sense from the word "issue." The former is primarily "a word of purchase and not of limitation," while the latter, "issue," is nomen collectivum—"not less extensive in its import than heirs of the body; it embraces the whole line of lineal descendants. * * * It will be seen, however, that in some instances the word issue has been diverted from its general legal acceptation by the occurrence of words of distribution or other expressions which point at a mode of devolution or enjoyment inconsistent with an estate tail and have been decided to be insufficient to convert the term heirs of the body into children or to prevent its conferring an estate tail."—2 Jar., *331.

The limitation over to "survivors," while it diverts the term "issue" from its general acceptation into "children," only strengthens and confirms the primary legal meaning of "children" to take as purchasers under the direct devise as in this case.

It is immaterial whether the word "then," which occurs in the direct devise "to him during his natural life and then to his children forever," be interpreted "at his death" or "after his death." In the cases above cited the word is "after," and it was not even attempted to show that this made "the devise to A and his issue in one unbroken limitation" rather than "a devise to A for life and after his death to his issue," while in Markly v. Singletary (11 Rich. Eq., 393,) the learned Chancellor thought it worth while to observe the "peculiarly definite form of expression 'at her death'" as indicating the intention to use the word "issue" [in a deed] as "designatio personarum." It is argued, however, that the expression "children capable of inheriting their or either of their shares," as used in the limitation over, is equivalent to "issue" and qualifies the word "children" in the direct devise. By the authorities already cited, that would not change the conclusion, for "issue" would be construed to mean "children." But the proposition cannot stand. "Child capable of inheriting" is neither more nor less than a "legitimate descendant of the first generation of the person named. * * * Remoter descendants are sometimes permitted to take under an enlarged sense of the term 'children' in support of the intention of the testator. * * *

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Such liberal construction *of the term 'children' is never made except for the benefit of the issue of children or from the force of the context."—Matthis v. Hammond, 6 Rich. Eq., 399. The right to inherit is the right to a distributive share under the statute. To that each legitimate child is entitled, and "capable of inheriting" can be taken in no other sense. The expression is a mere description of children as named in the direct devise, and as connected with the specified portion of the property "as above recited," which was intended to go to the children of each of the three grandsons.

The conclusion is that each grandson took a life estate in the land devised to him with remainder to his children. It may, perhaps, be proper to remark that the same conclusion would apply to the negroes specifically bequeathed.

The last clause in the will contains the further provision that in the event that either of the "said grandsons should die without leaving a child or children capable of inheriting the share of my property I have given to him as above recited, then and in that case it is my will that the share so given to him shall go to and be divided between the survivors; or if two of them should die without either of them leaving children capable of inheriting their or either of their shares, then it shall belong to the survivor during his life, and then to his children forever." The portion thus limited over to the survivors or survivor is the "share * * * given to him as above recited," which is the property specifically devised and bequeathed to each for life and described in the recital above; but it does not embrace the property included in the residuary clause, which is to the three grandsons absolutely, to be equally divided between them. The estate of each in the share thus specifically described is for life. On the death of the first of the three brothers childless the estate which he had held for life passed to the survivors for life. That it goes to the two for life, with remainder to their children, is not said in so many words, but such was clearly the intention; and cross remainders must be implied, for it is expressly declared that should two of them so die the whole should go to the survivor for life, and then to his children forever. Two did die childless, and all the property embraced in the three shares specifically given was in the survivor for life, and he, in the course of time, died likewise childless. Thus the last specific devise failed, and the question is, whether the testator died intestate as to that portion of his property and it reverted to his estate to be

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distributed *amongst those who were his heirs-at-law at the time of his death, or was

it disposed of by him in any other portion of his will?

On this point the second proposition submitted on the part of the appellant seems to be sound, viz.: "That the reversionary estate in the lands was caught up by, and disposed of in, the residuary clause, in which the testator gives and bequeaths 'all of his other property, of every kind and description whatsoever, to' his 'said three grandsons, to be equally divided between them.'"

"Property of every kind and description whatsoever" includes real estate or any interest in real estate not otherwise disposed of by the will. "It has long been established that a devise of testator's estate includes not only the corpus of the property but the whole of the interest therein."—2 Jarm., *181, and cases cited; 1 Jarm., *665; Drayton v. Rose, 7 Rich. Eq., 328 [64 Am. Dec. 731]. And "the word 'property' is equivalent to 'estate' in its operation to pass the interest as well as the land."—Ibid, *190. The rule with regard to the residuary disposition of interests in real estate to which the testator was entitled at the time of making the will is thus laid down by Mr. Jarman, (Vol. I, *588): "A residuary disposition of real estate will carry all the contingent or reversionary interests which a specific devise may leave undisposed of."—Hopkins v. Mazyck, Rich. Eq. Ca., 263.

And "if the specific devise comprise only a partial or contingent interest in the lands, leaving an ulterior or alternate interest undisposed of, which would, in the absence of disposition, descend to the heir, such undisposed-of interest will, even in a will made before the year 1838, (Act of Victoria,) pass by a general residuary devise."

As "if a testator devised real estate to A for life, remainder to A's children living at his decease in fee, and the residue of the lands to B, it is clear that if A died either in the testator's lifetime or after his decease, without leaving a child surviving him, B would be entitled under the residuary devise."—Ibid, *591–2.

Thus in the case before us, the devises being to A, B and C for life, with cross remainders,—remainder in fee to their children or the children of the survivor,—and there being no ulterior or alternative disposition of the fee, and all the devisees for life having died without any of them having had a child, the fee was undisposed of by the specific devises, and passed, under the residuary clause, to the three grandsons, (Hopkins v.

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Mazyck, Rich. Eq. Ca., 263,) *unless there be qualifying words which limit the meaning of the residuary clause to other things. The will was drawn originally with the intention of giving to testator's wife the enjoyment for life of all his wordly possessions, encumbered with a legacy of one hundred dollars to a granddaughter, to be paid to her upon her marrying or attaining the age of twenty-one years. He then proceeds to carve out of the land and negroes an estate for each grandson during his life, and after his death to his children; but these devises and bequests do not embrace all the property which he had previously given to his wife for life, i. e., "stock of cattle, horses, hogs, sheep, wagons, carts, plantation tools, and all my other property of any and every description whatsoever, also any money I may have by me at my death."

The residuary clause manifestly was meant to embrace that property, and it was given to the three grandsons absolutely, "to be equally divided between them at my death, or, if my wife should survive me, at her decease."

If the wife had survived the testator, it might have been argued with some force that the provision that the residuary estate should go not until the decease of the wife would imply that it included only such property as she was to enjoy during her life. It is clear that she could not have held a right to the reversion in fee, and the estate to her was limited strictly for life. But the wife died during the lifetime of the testator, and after her death he republished his will. The will must, therefore, be read as if all that portion which provides for the wife or refers to such provision were erased, unless it should be found necessary to refer to such portion to expound some ambiguous part of the instrument. No such necessity exists, and the will is composed solely of the legacy to the granddaughter, the specific devises and bequests to the grandsons, with remainder to their children, and a residuary clause giving absolutely to the three grandsons "all" his "other property of every kind and description whatsoever," "to be equally divided between" them at his death. This, beyond question by all the authorities, includes the reversionary interest in the lands. And this conclusion is manifestly in harmony with the intention of the testator. After the death of his wife he had but one object before his mind—the welfare of his three grandsons. They were "the objects of his bounty in the first instance; * * * in the second instance, their issue. But for the expectation of such issue he would in the first instance have given the fee" to his grandsons.—Hopkins v. Mazyck, 275.

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*In fact, in this respect it is needless to draw any distinction between this case and that of Hopkins v. Mazyck, in which the Court says: "When stripped of the confusion of the different clauses devising to the sons respectively for life, and to their children after their deaths, the effect of the whole will taken together is that the sons * * * take a joint estate in fee in the land, to be defeated by all or either leaving issue living at their or his death, when the estate in fee would be severed, the issue taking in fee

the particular lands devised to their respective fathers for life."

The grandsons, William G., Isaac N. and Andrew J. Stewart, took a life estate in the tracts described in the will and specifically devised, "and also took a fee in the lands, liable to be divested only by the contingencies of their having issue alive at their own deaths." The contingencies having failed, the fee remained in them; and on the death of the last grandson, which rendered the contingency impossible, the land became distributable amongst those who were the heirs-at-law of the respective grandsons at the time of the death of each of them respectively, (or their devisees, in the event of their having disposed of it by will). In case they died intestate the surviving brothers would be distributees, together with their sister and mother, who is stated to have survived one or more of the three grandsons of the testator.

The judgment of the Circuit Judge is reversed and the cause remanded, that such further proceedings may be had as shall be found necessary to adjustment in pursuance of the views herein expressed.

Motion granted.

WILLARD, C. J., and McIVER, A. J., concurred.

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10 S. C. *431

*JORDAN v. MOSES.

(Columbia. Nov. Term, 1878.)

[*Courts* ⇐475.]

Where two Courts have concurrent jurisdiction, the one in which the action is first brought must adjudicate the questions involved, and neither party can be forced into the other jurisdiction.

[Ed. Note.—Cited in Witte Bros. v. Clarke, 17 S. C. 323; Ex parte Worley, 49 S. C. 57, 58, 26 S. E. 949.

For other cases, see Courts, Cent. Dig. § 1229; Dec. Dig. ⇐475.]

[*Executors and Administrators* ⇐414.]

The Court of Common Pleas of the County in which the executors reside has jurisdiction of an action by creditors to marshal the assets and settle up the insolvent estate of the testator, who resided in another County, in which his property lay and his will was proved.

[Ed. Note.—Cited in Fogle v. St. Michael Church, 48 S. C. 95, 26 S. E. 99.

For other cases, see Executors and Administrators, Cent. Dig. § 1628; Dec. Dig. ⇐414.]

[*Executors and Administrators* ⇐418.]

All the jurisdiction which the late Court of Equity possessed is vested by the Constitution of 1868 in the Court of Common Pleas.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1657; Dec. Dig. ⇐418.]

[*Executors and Administrators* ⇐414.]

Under a creditor's action to marshal the assets and wind up the insolvent estate of a testator, the Court has jurisdiction to order real estate of the testator lying in another County to be sold for the payment of his debts.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1627–1629; Dec. Dig. ⇐414.]

[*Courts* ⇐1.]

The provisions of §§ 41, 48, 49 and 73 of the Code of Procedure were designed to prescribe the limits of the jurisdiction of the several Courts of Probate in the different Counties of the State as between themselves, and not to limit the jurisdiction of the Court of Common Pleas.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 103; Dec. Dig. ⇐1.]

[*Courts* ⇐475.]

An order made in an action by creditors to settle up the insolvent estate of a testator, that all the issues of law and fact be referred to the Judge of Probate of another County, does not confer upon the Court of Probate of that County —though it be the County where the testator resided and his will was proved—jurisdiction, by an independent proceeding, to settle up the estate.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1229, 1231–1239, 1247–1259; Dec. Dig. ⇐475.]

[This case is also cited in Crane, Boylston & Co. v. Moses, 13 S. C. 563, as to facts, and in Bacot v. Lowndes, 24 S. C. 392, and distinguished therefrom.]

Before Shaw, J., at Marion, November, 1877.

This was a petition in the Court of Probate of Marion County by Richard Jordan against Franklin J. Moses and Montgomery Moses, executors of the last will and testament of Napthili Phillips, deceased, praying for an account and settlement of the estate of the testator and for a sale of the real estate for the payment of debts.

The petition was filed on the 9th January, 1877. The defendant F. J. Moses died very soon thereafter without having answered. The defendant Montgomery Moses answered, and for a defense thereto alleged that an action was pending in the Court of Common Pleas for Sumter County, in which Crane, Boylston & Co. were plaintiffs, and the executors above named and others defendants, praying for an account, for marshaling the assets (real and personal) of the testator, for an injunction, and, generally, for a settlement of the estate.

It appeared that the action of Crane, Boylston & Co. was commenced in 1872; that the usual order in such cases was shortly afterwards made therein, enjoining all the creditors of the testator from suing the executors and calling in creditors to prove their claims; that on October 9th, 1872, the previous order

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was modified *by giving creditors leave to prove their claims before the Judge of Probate for Sumter County; and that on the 18th of January, 1877, another order was made, modifying the previous order, and directing that the Judge of Probate for Marion County do take and state the accounts of the executors, and that all the issues of law and fact be referred to him.

It further appeared that the testator was, in his lifetime, a resident of Marion County; that he died there in the year 1864, leaving a considerable personal estate, and also some real estate lying in that County; that he left a last will and testament, appointing the defendants named in the petition executors thereof: that the will was admitted to probate in Marion County; that the said defendants duly qualified in said County as executors thereof; and that the defendants above named have always resided in the County of Sumter.

It further appeared that the testator had been in his lifetime trustee of one Mrs. Quinn and Mrs. McNeill, whose interests had passed to some infants; that the petitioner, Jordan, had been substituted as trustee in his place; that the testator's returns as trustee were made to the Court of Equity for Marion County, and that the claim of the petitioner, Jordan, was made on behalf of said infants, and was for the balance due by the said testator at the foot of his said returns.

The Judge of Probate overruled the defense of the surviving executor and made a decree against him for the amount of the petitioner's claim.

An appeal was taken to the Circuit Court, and His Honor Judge Shaw made a decree thereon to the effect that because of the pendency of the action in Sumter County the Court of Probate for Marion County had no jurisdiction in the premises; and he, therefore, ordered that the proceedings in the Probate Court be quashed and set aside, with costs.

The petitioner, Jordan, appealed to this Court upon a number of grounds, which sufficiently appear in the opinion of the Court.

Walsh, Evans & Evans, for appellant.
Harllee & Montgomery, contra.

January 18, 1879. The opinion of the Court was delivered by

McIVER, A. J. This was a proceeding originally instituted in the Court of Probate for

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Marion County by the appellant as a *creditor of the testator for the purpose of obtaining an account from the executors and a sale of the real estate of the testator, if necessary, for the payment of his claims. The defense was that there was another action then pending in the Court of Common Pleas for the County of Sumter, where respondents resided, brought by Crane, Boylston & Co., as creditors of testator, against his executors, legatees, devisees and other creditors for account, injunction and to marshal assets, under which an order had been passed enjoining creditors from suing and calling upon them to come in and prove their demands. The Court of Probate having overruled this defense, an appeal was taken to the Court of Common Pleas, which adjudged that the decree of the Court of Probate should be set aside and the petition dismissed, and from this judgment this appeal is now taken. If it can be made to appear that the Court of Common Pleas had jurisdiction of the case brought by Crane, Boylston & Co., it is very manifest that the judgment below must be sustained; for no proposition is better settled than that where two tribunals have concurrent jurisdiction, the one which first obtains possession of the subject must adjudicate, and neither party can be forced into another jurisdiction. So that, even assuming that the Court of Probate for Marion County had jurisdiction of a proceeding of this character, yet, as it is very clear to our mind that the Court of Common Pleas also had jurisdiction, and as the action there was first commenced and was still pending when this proceeding was instituted, the jurisdiction of the Court of Probate could not be exercised. It is argued here that the Court of Common Pleas in Sumter County had no jurisdiction as to the main "object of the suit of Crane, Boylston & Co., to wit, to sell the lands of the testator in Marion," and in support of this proposition Section 146 of the Code of Procedure is cited. That Section reads as follows: "Actions for the following causes must be tried in the County in which the subject of the action, or some part thereof, is situated, subject to the power of the Court to change the place of trial in the cases provided by statute: 1. For the recovery of real property, or of an estate or interest therein, or for the determination in any form of such right or interest, and for injuries to real property. 2. For the partition of real property. 3. For the foreclosure of a mortgage of real property. 4. For the recovery of personal property distrained for any cause."

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*It is difficult to conceive how the action instituted by Crane, Boylston & Co. can be brought under any one of the classifications mentioned in the four subdivisions of this Section. It was simply an action for account, injunction and to marshal assets, for which purpose a sale of the lands of the testator was asked for. But it was not part of the object of that action to recover any real property or any estate or interest therein, or to determine in any form any right or interest in real estate. On the contrary, it necessarily proceeded upon the assumption that there was no controversy whatever as to the title of the real estate of the testator, and, upon the assumption that it was his, sought to have it sold for the purpose of paying his debts. There is no pretense that the action could be classed under any of the other subdivisions.

The Court of Common Pleas is invested by the Constitution, Article IV, Section 16, with "jurisdiction in all matters of equity," and no one will deny that the object of the action brought by Crane, Boylston & Co. was one of which the Court of Equity, at the time of the

adoption of the Constitution of 1868, had cognizance. The fact that jurisdiction of such an action may also have been given to the Court of Probate does not oust the jurisdiction of the Court of Common Pleas under the principles established in the recent case of Walker v. Russell [10 S. C. 82], manuscript decision, filed 23d April, 1878.

Again, it is argued that the action brought by Crane, Boylston & Co. could not effect the purposes sought by the present proceeding:

1. Because the Court in Sumter could not order the sale of the land in Marion by reason of the provisions of Section 146 of the Code. This has already been considered and disposed of.

2. Because under that action the executors could not be called upon to account for a trust fund in Marion. If the Court of Common Pleas in Sumter had, as we have seen, the same jurisdiction as that originally possessed by the Court of Equity, we can see no force in this objection.

3. That the suit in Sumter was not, in fact, for the same purpose. The object of this proceeding was to obtain a judgment against the executors, and, if necessary, to obtain an order for the sale of the lands of the testator for the purpose of paying the claims set up by appellant against the estate of the testator; and as the object of the action in Sumter was to marshal the assets of the testator's

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estate *and for a sale of the lands, under which all persons claiming to be creditors of the testator were called in to establish their demands, we are unable to see any reason why the appellant could not have obtained the same relief which he now seeks by proving his claims under that order. The objection which he makes, that it was much more convenient for him to prove his claims in Marion than in Sumter, if entitled to any consideration, is fully met by the fact that the Judge of Probate for Marion County was originally appointed the Referee to take proof of claims, and that he could as readily prove his claims before him as Referee as he sought to do before him as Judge of the Court of Probate. As to the argument drawn from Sections 41, 48, 49 and 73 of the Code as tending to show that no proceedings could be had for the settlement of the estate of the testator except in the Court of Probate for the County in which his will was proved, it is very manifest that these provisions were only designed to prescribe the limits of the jurisdiction of the several Courts of Probate in the several Counties of the State by designating the particular Court of Probate in which such proceedings should be instituted, and not to confer exclusive jurisdiction upon that Court as against the Court of Common Pleas. But even if the language of these Sections admitted of no other interpretation than that the design was to confer exclusive jurisdiction upon the Court of Probate, such a construction would not be admissible in face of the constitutional provisions above adverted to.

The position taken by the appellant, that the order of the Court of Common Pleas in Sumter referring all the issues of law and fact to the Judge of Probate of Marion County after his petition was filed in the Court of Probate for Marion County gave that Court complete jurisdiction, cannot be sustained. This order simply constituted such Judge of Probate a Referee in the case, and in no way interfered with the jurisdiction previously acquired by the Court of Common Pleas in Sumter. The issues were referred not to the Court of Probate but to the person who then held the office of Judge of that Court, just as it frequently happens that issues are referred to the Clerk of the Court of Common Pleas.

The judgment of the Circuit Court is affirmed.

WILLARD, C. J., and HASKELL, A. J., concurred.

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10 S. C. *436

*McELWEE v. HUTCHINSON.

(Columbia. Nov. Term, 1878.)

[*Payment* ⇐63.]

Though, as a general rule, where plaintiff sues upon a note, the defendant cannot give payment in evidence without pleading the same, yet where complaint alleges certain credits, and that there is a specified balance due for which judgment is claimed, defendant can give other payments in evidence under a general denial of the allegations of the complaint.

[Ed. Note.—Cited in Addison v. Duncan, 35 S. C. 171, 14 S. E. 305; Long v. Southern Ry. Co., 50 S. C. 53, 27 S. E. 531; Brassell v. Silva, 50 S. C. 184, 27 S. E. 622; Latimer v. York Cotton Mills, 66 S. C. 139, 44 S. E. 559; Montgomery v. Seaboard Air Line Ry., 73 S. C. 511, 53 S. E. 987.

For other cases, see Payment, Cent. Dig. § 158; Dec. Dig. ⇐63.]

[*Accord and Satisfaction* ⇐8.]

Part payment of the amount due on a sealed note made in compromise of an action on the note *held* to be supported by sufficient consideration and to have discharged the balance due.

[Ed. Note.—For other cases, see Accord and Satisfaction, Cent. Dig. § 62; Dec. Dig. ⇐8.]

Before Aldrich, J., at York, September term, 1878.

Action by J. N. McElwee against A. E. Hutchinson.

The action was commenced in January, 1878, and the allegations of the complaint were as follows:

"1. That on the 4th of March, 1861, John L. Miller, L. H. Massey and the defendant made their joint and several sealed note to plaintiff in the sum of five hundred dollars, payable twelve months after date, and bearing interest from date.

"2. That said sealed note is entitled to the following credits, to wit: On the 1st of Feb-

ruary, 1869, the sum of three hundred and seventy-seven 80-100 dollars paid by the defendant, A. E. Hutchison; on the 12th of November, 1871, the sum of forty-one 23-100 dollars; on the 9th of February, 1876, the sum of six 65-100 dollars; and on the 10th of April, 1877, the sum of forty-one 93-100 dollars—the last three payments having been made by the assignee of the bankrupt estate of the said L. H. Massey.

"3. That there is still due and owing to plaintiff by defendant the sum of four hundred and fifteen 90-100 dollars, with interest from 1st of February, 1869, less the aggregate of all the credits except the first set out in paragraph 2, to wit, eighty-nine 81-100 dollars, to be taken from the debt on the day of the rendition of judgment.

"Wherefore plaintiff demands judgment against the defendant for said sum of four hundred and fifteen 90-100 dollars, with interest thereon from the 1st of February, 1869, less the credit of eighty-nine 81-100 dollars, as aforesaid, and for costs."

The answer contained nothing more than a general denial of each and every allegation of the complaint.

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*The plaintiff gave evidence tending to show the existence and contents of the note, and the credits thereon, as alleged in the complaint; that in 1866 the note was given to an attorney for collection, and that it was lost or mislaid.

The defendant gave evidence tending to show that Mr. Bell, the attorney of plaintiff, in whose hands the note sued on was placed for collection in 1866, had compromised the suit with the defendant in 1869 by taking from him one-half the amount then due, and a receipt by the attorney to the defendant, dated February 1st, 1869, was produced, which stated that he (the attorney) had received from the defendant $398.37, by way of compromise, at fifty per cent. on the dollar, in full of debt, interest and costs. The plaintiff and the attorney who made the compromise both testified that the compromise was made without the authority of plaintiff; that he had declined to ratify it, and had refused to receive the fifty per cent. paid as in full.

His Honor charged the jury that while an attorney could not compromise a claim without his client's authority, they might consider the question whether, by so long a delay before bringing the action, McElwee had not ratified his attorney's acts, if, in fact, he had given no authority in the first instance.

Before the jury retired, and at the request of plaintiff's counsel, His Honor also charged that the payment of the fifty per cent. to Mr. Bell on the note in suit, the defendant having been solvent, (though the receipt expressed that it was to be in full,) is not a satisfaction or discharge of the balance, unless there is a release under seal.

The jury found for the defendant, and the plaintiff appealed on the following grounds:

1. Because, it is respectfully submitted, His Honor erred in holding that testimony going to prove a compromise was admissible under defendant's answer denying each allegation of the complaint simply.

2. Because the verdict was contrary to the evidence adduced at the trial.

3. Because the verdict was against the weight of the evidence.

4. Because the verdict was contrary to the law of the case as charged by His Honor at plaintiff's request.

Witherspoon & Spencer, for appellant.

Hart & Hart, Witherspoon, contra.

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*January 18, 1879. The opinion of the Court was delivered by

McIVER, A. J. There can be no doubt but that, as a general rule, the defense of payment to an action on a note cannot be given in evidence under a general denial. This rule, however, only applies where the complaint is in the usual form, stating only such facts as are necessary to constitute a cause of action. If, however, other facts are stated, a denial of which raises an issue as to whether there has been a partial or total payment, then the defense of payment may be given in evidence under a general denial. As is said in Pomeroy on Remedies, (§ 691, p. 717,) after explaining the nature of "new matter" relied upon as a defense: "It cannot, then, be said, for example, that payment is always new matter, for the plaintiff may so construct his complaint that facts showing payment will be directly contradictory of a material averment embraced within it, and, therefore, plainly admissible under the general denial."

And again, in Section 692: "A particular defense may, therefore, when set up in answer to one complaint, be new matter and require to be pleaded; the same kind of defense, when set up in answer to another complaint, may not be new matter, but may be proved under the general denial without being specially pleaded. Undoubtedly the defense of payment, in its various phases, is the one which most frequently assumes this double aspect." The writer proceeds, amongst other authorities, to cite two cases, Quinn v. Floyed, 41 N. Y., 349, and White v. Smith, 46 N. Y., 418. In the former the action was to recover for work and labor. The complaint stated the agreement, the performance of services at a stipulated price, and that on a certain day named the defendant was indebted to the plaintiff in the sum of three hundred and thirty-three dollars, being the balance remaining due after sundry payments made by the defendant to the plain-

tiff. The answer was a general denial, under which the Court held that defendant could offer proof of payment. In this case Lott, J., said "the denial involved an issue upon all the facts above stated and denied, not only of the agreement and of the time which the plaintiff worked, but necessarily of the different payments made, so as to determine what in fact was the balance of the defendant's debt. The balance could not be ascertained without an inquiry as to the amount of the payments as well as the value of the work performed;" and Woodruff, J., said:

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"It was *not necessary for the plaintiff to sue for a balance as such. He might allege the contract performance on his part and claim payment; and then if the defendant desired to prove payments he must allege payment in his answer. But where the plaintiff sues for a balance he voluntarily invites examination into the amount of the indebtedness and the extent of the reduction thereof by payments."

In White v. Smith the action was for work and labor, in which the complaint alleged the services to a specified amount in value, and that there was a balance due the plaintiff, after deducting all payments made by defendant to plaintiff thereon, of $175. The general denial, it was held, entitled the defendant to prove all the payments which he had made. In the case now under consideration, the complaint, in the first paragraph, alleges the making of the note with its date and amount. In the second paragraph sundry payments are stated, and in the third paragraph the allegation is that there is a certain specified sum still due and owing, with interest from a certain date, (which is the balance due on the note after deducting the first payment stated in the preceding paragraph,) less the aggregate of the other payments stated, and demands judgment for such balance. This, we think, amounts to an allegation that nothing had been paid upon the note except as stated in the complaint, and that it was not subject to any other or larger credits, and, therefore, upon the principles above stated, the receipt, which was objected to as incompetent evidence, was admissible under the general denial, especially when it appears, as it does in this case, that the receipt was for a larger amount than that stated in the complaint. It may be very true that this excess might be accounted for by the costs in the case in which it was taken, but that would not effect the question of its admissibility as evidence, for it would be necessary to show the whole amount paid in order to show from what amount the costs were to be deducted, and in this view the receipt was clearly admissible in evidence. In addition to this it would seem from the "case" submitted to us that the receipt in question was actually put in evidence by the appellant's counsel, though, doubtless, from what was stated in the argument here, such was not his intention.

We do not think, therefore, that the motion here can be sustained on the ground that the Circuit Judge erred in receiving testimony tending to show that the payment

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made on the 1st of February, *1869, was intended to be in full discharge of the balance due on the note. There was no exception to that portion of the charge in which the jury were instructed "that while an attorney could not compromise a claim without his client's authority, they might consider the question whether by so long a delay before bringing the action McElwee had not ratified his attorney's acts, if, in fact, he had given no authority in the first instance," and therefore we are not called upon to consider it. If, as was contended here, this portion of the charge was nullified by the principle of law charged at the plaintiff's request, he certainly has no ground of complaint. While payment in part of an ascertained debt cannot be regarded as satisfaction of the whole, even where the parties so agree, unless there is some additional consideration for such agreement, or unless the balance is released under seal, yet, where a pending suit is compromised by payment of a part of the amount appearing to be due, such an agreement may rest upon the withdrawal of the defense as a sufficient consideration. As to the other grounds relied upon by the appellant, they are disposed of by the case of Brickman v. South Carolina Railroad Company, 8 S. C., 173.

The judgment of the Circuit Court is affirmed.

WILLARD, C. J., and HASKELL, A. J., concurred.

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10 S. C. 440

POOL v. DIAL.

(Columbia, Nov. Term, 1878.)

[*Equity* ⇐409.]

It is competent for the Court, in equity cases, to review the findings of a Referee upon questions of fact and reverse the same.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 922; Dec. Dig. ⇐409.]

[*Seals* ⇐6.]

Where an instrument requiring a seal is produced in Court with a seal opposite the name of the signer, and no suspicious circumstances appear upon the face of the instrument or otherwise, the onus is upon the party objecting to the introduction of the instrument to shew that it was not under seal when signed.

[Ed. Note.—Cited in Brown v. Brown, 44 S. C. 382, 22 S. E. 412.

For other cases, see Seals, Cent. Dig. § 9; Dec. Dig. ⇐6.]

[*Trial* ⇐76.]

Where secondary evidence of the existence and contents of a record are introduced, without

proof of its loss or destruction, and no objection is made at the time to the want of such preliminary proof, such objection cannot afterwards be made.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 188; Dec. Dig. ⟸76.]

[*Trusts* ⟸181.]

A compromise made by a trustee, without leave of the Court, sustained, it appearing that the compromise was just, fair, proper and for the best interests of the estate.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 328; Dec. Dig. ⟸181.]

Before Kershaw, J., at Laurens, ———— Term, 1878.

Action by Mary V. Pool and Albert Pool, her husband, against Allen Dial.

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*The case will be fully understood from the statement upon which the appeal was heard and the decision of the Circuit Judge.

The statement is as follows:

The facts conceded on both sides in this case are as follows: Allen Dial was appointed guardian of Mary V. Glenn, now Pool, in 1854, and on 31st January, 1855, gave his bond in the penalty of $12,000, conditioned for the performance of his duties as such guardian. The said Mary V. was born in March, 1847, and intermarried with John H. Little in 1862, being then about sixteen years of age. In 1875 Little died. In 187– she intermarried with the co-plaintiff, Albert Pool. William H. Glenn, the brother of Mary V., was appointed trustee of her estate in 187–. Early in the year 1873 he relinquished the trust—his final return being in July, 1873, stating, among other things, that he had turned over to Little, as trustee, a note for $2,500 on one Hudgens. In 1867 John H. Little and Mary V., his wife, filed their bill in the Court of Equity against the defendant Dial, as guardian, for account, &c. On 20th December, 1873, Dial made an agreement with Little, who styled himself trustee of his wife, to compromise her claim against Dial for the sum of $1,650. Of this sum, $200 was paid in cash by Dial to Little, and the balance of $1,450 was paid by Dial to J. W. Fowler, for Little, on 17th January, 1874, and afterwards turned over to him. Nothing further has been done in the suit in equity above mentioned. The said Mary V. petitioned the Court of Common Pleas for Laurens County, in February, 1877, reciting that Glenn, and afterwards Little, had been her trustee, and asking for the appointment of the plaintiff, Albert Pool, to that office. The Clerk of the Court, on reference to him, found the petition correct, and, on his recommendation, Pool was appointed. In 1875, after Little's death, Mary V., as his administratrix, sued said Hudgens on a note payable to Little as trustee, and prayed to have the proceeds of such suit settled to her sole and separate use. This action was commenced in August, 1877, for the purpose of having an account of Dial's guardianship, and of compelling him to pay over what should appear due upon such proceeding. The defendant pleaded the compromise above described. There is no record of the appointment of Little as trustee. There is no return from him as such trustee.

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*The facts in dispute are as follows: Whether John H. Little attached his seal to the agreement of compromise; whether he was ever trustee of the said Mary V.; whether the said Mary V. ever derived any benefit from the said compromise, and, if so, what; whether she by any means induced the said compromise, and, if so, how.

The questions of law in issue are: Whether the said Mary is estopped by the evidence of Little being her trustee, and of his making the compromise, from asserting the claim set forth in the complaint.

The Referee found that Little did not affix his seal to the agreement to compromise; that Little was never appointed trustee, and was wholly without authority to make a compromise of Mary V.'s rights; that Mary V. never contributed, actively or passively, to the compromise; that she was never benefited by the compromise; and that the proceedings referred to did not in law estop her from denying the trusteeship and going behind the acts of Little and claiming her estate of Dial, irrespective of his payments to Little. He therefore recommends judgment against Dial for the sum of $6,132.37, found due by the account taken upon Dial's returns and the conclusions above stated.

His Honor Judge Kershaw sustained exceptions to this report, and overruled the finding of the Referee in regard to the seal affixed to the compromise and also the finding in regard to the appointment of Little as trustee. And he also decided that the facts established estopped the plaintiffs from denying that Little was trustee. And he further decided that the compromise was proper. He in consequence ordered the complaint to be dismissed, with costs, against the plaintiffs.

The plaintiffs appealed.

Ball, Pope & Watts, for appellants.

Todd & Furguson, Simpsons & Holmes, contra.

January 18, 1879. PER CURIAM, McIVER, A. J.

We concur fully in the decision of the Circuit Judge, and, for the very satisfactory reasons therein given, the judgment of the Circuit Court is affirmed.

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*The following is the decision of the Circuit Judge:

KERSHAW, J. This case came on to be heard before me on exceptions to the report of J. F. J. Caldwell, Esq., Referee, (to whom were referred for a hearing all the issues of law and fact,) filed by defendant's attorneys, upon various grounds stated therein. The defendant, Dial, was the guardian of the plaintiff, Mary. In 1866 she was the wife of one John H. Little, and joined her then husband in a petition to the Court of Equity for the appointment of a trustee to recover her estate and for a settlement of the same upon terms that do not distinctly appear in the papers. Pending this petition, after a decree for a settlement, but before the appointment of a trustee, the same parties filed a bill in the same Court against the defendant, Dial, reciting the foregoing proceedings and praying that he account as guardian and pay over the funds in his hands as such to such trustee as should be appointed, or, if none, then to pay the same into Court. This bill was filed March 22, 1867. In June, 1867, the defendant filed an answer thereto, wherein, among other matters, it is stated that in the Fall of 1863 (the plaintiff, Mary, being then the wife of said Little, with whom she eloped in 1862, being then short of seventeen years of age,) application was made to defendant for a settlement with his said ward for her estate in his hands: that he agreed to settle, and made arrangements with money and a statement of his accounts accordingly, and, being thus prepared, waited until January following to make the settlement, and then was informed that nothing but South Carolina bills would be received in such settlement; whereupon, it being impossible to procure such bills, defendant, under advice, invested the funds of his said ward, or so much as she would be entitled to on settlement, in seven-thirty Confederate Treasury notes, to wit, the sum of three thousand seven hundred dollars, ($3,700,) which he reported and returned in his annual accounting to the Commissioner, and still held them, regarding that the best he could do under the circumstances. On the 20th day of December, 1873, the said suit being then pending and no progress appearing to have been had therein, the said Little entered into an agreement with the defendant to compromise the suit upon the payment to him of sixteen hundred and fifty dollars, ($1,650,) of which two hundred were paid in cash and the remainder to be paid on or before the 15th day of January, 1874.

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This agreement was in writing and con*cluded thus: "And on the payment of said sum the above case to be discontinued and the said Allen Dial released from all further claim as guardian of Mary Little." It was signed "J. H. Little, Trustee," and opposite his name was written in brackets the word "seal" in the handwriting of the person who drew the paper. The paper was signed in presence of two witnesses, one of whom testified that he witnessed the signature of the paper by Little, with the other subscribing witness, R. P. Todd,—the witness testifying being W. H. Glenn, who was unable to say whether or not there was a seal to the paper when signed. Upon the original paper is endorsed a receipt of J. H. Little, (per Fowler,) dated 14th January, 1874, for $1,450 in full of "the within compromise," witnessed by R. P. Todd, Esq., and it is established that the money was paid to Little. The complaint herein was served August 4th, 1877. It simply states the guardianship, the arrival at maturity and marriage of complainant, Mary, with her co-plaintiff, and the failure to account by defendant, praying that he account and pay over the amount found due to the plaintiff, Mary.

The answer of defendant, duly filed, admits the guardianship, maturity and marriage as alleged, and claims that he has been released and discharged from said accounting, stating that the interest of the plaintiff in the hands of defendant had been settled, by the order of the Court of Equity, upon the said Mary. Upon the application of herself and John H. Little, her then husband, William H. Glenn, the brother of plaintiff, Mary, was appointed trustee under said order and accepted the appointment, and subsequently John H. Little was substituted in his stead and compromised the said claim of plaintiff, Mary, with her full knowledge and consent, and that of her brother and former trustee, the said William H. Glenn, setting up the release hereinbefore described. The exceptions to the report mainly complain that the Referee did not allow full force and effect to the release as a discharge of the defendant. It was rejected by the Referee on several grounds:

1. Because it was not shown that the seal appended to the instrument was upon it when it was signed. This is a question of fact, which, it is urged by plaintiffs' counsel, this Court cannot review, and in support of that proposition several cases are cited, which, however, only hold that the Supreme Court of the State is not a Court of appeals in cases at law, but assumes jurisdiction only for the correction of errors of law in cases of

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that character. It is *very different in equity Courts: and when the testimony is in writing, as in this case, the Court is as competent as the Referee to pass upon questions of fact, and there is no question of the power or propriety so to do when a report is heard upon exceptions.—Gee v. Hicks, Rich. Eq. Cas., 20; Dewitt v. Atkinson, 6 S. C., 142. The general rule upon questions of this kind is, that "if a contract is regular on its face the burden of proof is on those who assail such regularity."—6 Whar. Ev., 13, 14. Here there was no question that the paper was signed. When produced, it had a seal attached, plainly written, and enclosed in a scroll in the

usual manner, and in the same handwriting as the body of the paper. It was acted on by both parties, and the maker of the instrument received under it all the benefit of the contract. Without the seal it could not have the effect which was its chief purpose. Clearly the burden of showing that the seal was fraudulently attached after the execution of the paper was upon the plaintiff. In O'Cain v. O'Cain (1 Strob., 404), the subject is fully discussed, and it is conceded there that when a party signs his name to an instrument having already plainly written upon it words, marks or letters importing a seal, his intention to seal is sufficiently indicated, even when the instrument does not demand a seal in order to give it effect. The point also is covered by the principle involved in the following passage from 1 Whar. Ev., 629: "When in a written contract inter vivos alterations or interlineations appear about which there is nothing suspicious, the presumption is that they were made before the execution of the instrument; hence the burden of proving that they were made after the execution falls upon the assailant of the instrument." And in the further proposition: "If there is nothing suspicious on the face of the instrument, but the alteration is one which appears to accord with the object of the instrument, then we should say that the burden of proving bad faith in this respect is upon the party asserting bad faith." Upon the same principle it is held that when any document purporting to be and stamped as a deed appears or is proved to be or have been signed and duly attested, it is presumed to have been sealed and delivered, although no impression of a seal appears thereon.—Steph. Dig. Ev., 100, and authorities there cited. The Court, therefore, is constrained, upon reason and authority, to hold that the instrument in question was properly sealed and executed by the said Little.

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*2. The next ground upon which the Referee avoids the effect of the release is that the proof is not sufficient to establish that the said Little was the trustee of the plaintiff, Mary. There was no direct proof of the appointment or substitution of Little to the trusteeship vacated by Glenn—that is, no recorded evidence of such substitution was produced, nor was there any proof tending to show that such a record ever existed and was thereafter lost or destroyed. The defendant resorted to other and secondary evidence without thus having laid the foundation for its introduction; but this was done, and the evidence admitted and heard without objection at the time by the plaintiffs' counsel. "Testimony legal in form, pertinent to the issue, and received without objection, cannot be stricken out by the Court merely because the foundation for its admission by preliminary inquiry has not been made."—U. S. v. Holmes, 1 Clifford, 98 [Fed. Cas. No. 15,382]. The reason given by Starkie in his treatise (page 432) is that if the objection had been made at the time the adversary might have supplied the omission. In Richardson v. Provost (4 Strob., 59,) it is said: "It is every day's practice to receive secondary evidence if not objected to. If objections to such evidence were not made at the proper time they should be considered waived." The evidence, having been received without objection, must be considered as if the foundation had been laid in the regular mode required.

The testimony offered to show the trusteeship of Little was as follows:

(a) Record of an action entitled Mary V. Little, as administratrix of John H. Little, deceased, against R. H. Hudgens, commenced 20th December, 1875, on a note payable to John H. Little, trustee, secured by mortgage of certain lands stated in the complaint to have been the consideration of the note, "which was money due the said John H. Little, trustee of Mary V. Little, for the purchase of the above described mortgaged property." The complaint prays, among other things, that "whatever amount is collected on the said sealed note be ordered to be paid over to whatever trustee may be appointed by the Court for the said Mary V. Little in the place of the deceased trustee, the said John H. Little."

(b) Defendant also introduced a certified copy of an account on file in the office of the Judge of Probate of Laurens County of a "settlement by W. H. Glenn, trustee of the

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estate of Mary V. *Little, wife of John H. Little, July 14, 1873," in which is the entry: "Turned over to John H. Little, trustee of Mrs. Mary V. Little, this day appointed, a note on R. H. Hudgens, dated, &c., &c., for $2,500." The paper was sworn to and subscribed in the presence of C. Lark, Judge of Probate.

(c) Also an office copy from the Court of Common Pleas of a petition on file in the Clerk's office, wherein these plaintiffs recite that an order had been heretofore made by the Court of Equity creating a trust over the property of Mary V., the plaintiff, appointing all her estate derived from her grandfather and through her guardian, Allen Dial, who held her funds derived from other sources, to her sole and separate use, and ordering that the marital rights of her then husband, or any future husband, should not attach or be liable to any debts that they might contract. That Ludy H. Little was appointed the trustee, who never gave bonds. H. H. Glenn was then appointed the trustee; was afterwards removed, and John H. Little appointed, &c. "That the said estate now consists of a tract of land in Laurens County, now in possession of R. H. Hudgens, which was inherited from the grandfather of your petitioner, Mary V. Pool, and chose in

action which will probably realize five hundred dollars." The petition prayed the appointment of Albert Pool, the plaintiff here, a trustee of the fund. An order was therefore made referring it to M. E. Babb, the Clerk of the Court, "to ascertain the truth of the facts stated in the petition, and report a suitable person to be appointed trustee," &c. February 12th, 1877, the Referee reported that he finds the statements in the petition true, and that Albert Pool is a suitable person to be appointed trustee, &c. Thereupon an order of Court was made appointing said Pool trustee for said Mary.

Here are solemn instruments containing admissions of the plaintiffs that Little was the trustee of the separate estate of the plaintiff, Mary; an official act of the Judge of Probate, the officer to whom the trustee accounted, recognizing the turning over of the trust estate by Glenn, the former trustee, to Little as his successor. If secondary evidence is to be considered at all, it is difficult to see how it could be doubted that this was sufficient in the present action to establish the fact that Little was the trustee. It is entirely satisfactory to my mind, and I conclude, therefore, that John H. Little was the trustee of the plaintiff, Mary, at the time when he undertook to make the compromise

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in question. The only cir*cumstance that would tend to throw any doubt upon the fact in my mind is that the Court of Equity long since laid down the rule that the husband would not be appointed the trustee of the wife.—Ex parte Hunter, Rice Eq., 293; Dean v. Langford, 9 Rich. Eq., 427. But it seems to have been disregarded in practice of late; and in this very case it appears that the present husband of the plaintiff, Mary, has been appointed by the Court as trustee in the place of her former husband; and I do not find, therefore, that the fact established by the evidence is negatived by the presumption arising from the rule referred to.

(d) Another ground upon which the Referee rejects the release is that if the said John H. Little was a trustee, he had no right to compromise the suit. It may be conceded that a trustee of this character possesses no such right unless authorized by the instrument creating the trust. Ordinarily, no doubt, it is the duty of the trustee, in a proper place, to apply to the Court for authority to make such a compromise; and in every case in which he fails to do so and acts without authority he takes the risk upon himself of satisfying the Court that he acted, under the circumstances, for the best interests of the trust estate. Where he does so satisfy the Court the compromise will be sustained. —Bacot v. Heyward, 5 S. C., 445; Lewin on Trusts, 417.

Upon looking into the pleadings of the case compromised with reference to such matters affecting the question growing out of the condition of the country as the Court will take notice of, I entertain no doubt that the Court, if appealed to, would have sanctioned the compromise made. If the statements made in the answer to the bill of Little and wife were true, then there was imminent danger of the loss of the entire claim against defendant. There is no charge of bad faith in the transaction; the circumstances tend to show knowledge of the settlement on the part of the cestui que trust and the receipt of a portion of the fund arising from the same; it does not appear that she made any objection, and in the proceedings whereby she sought the appointment of her present husband a trustee she makes no allusion to this claim against the defendant, but declares that the trust estate now consists of a tract of land and "choses in action that will probably realize five hundred dollars," which is an implied admission and recognition of this settlement. Under these circumstances the release must be sustained.

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*It is, therefore, ordered, adjudged and decreed that the decision of the Referee be reversed and the complaint dismissed, and that the plaintiffs pay the costs and disbursements herein of the defendants, to be adjusted by the Clerk of the Court.

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10 S. C. 449

MONTGOMERY v. SCOTT.

(Columbia. Nov. Term, 1878.)

[*Mortgages* ⇐87.]

Where, in an action by the mortgagor against the mortgagee to set aside a bond and mortgage on the ground of fraud and imposition, the question whether the plaintiff was guilty of negligence in the execution of such bond and mortgage is submitted to the jury, it is error to confine the inquiry to particular acts done or omitted to be done at the time of the execution of the instruments; but the jury should be directed to inquire whether, under all the circumstances surrounding the case, the plaintiff was guilty of negligence in signing the bond and mortgage.

[Ed. Note.—Cited in Moffatt v. Hardin, 22 S. C. 30; Ballou v. Young, 42 S. C. 170, 175, 20 S. E. 84; Baldwin v. Postal Telegraph Cable Co., 78 S. C. 423, 59 S. E. 67.

For other cases, see Mortgages, Dec. Dig. ⇐ 87.]

[This case is also cited in Moffatt v. Hardin, 22 S. C. 10, and distinguished therefrom.]

Before Pressley, J., at Richland, Fall Term, 1878.

This is the same case of Montgomery v. Scott which is reported at length in 9 S. C., 20 [30 Am. Rep. 1] to which, as there reported, reference should be had in order to understand the case as now reported.

The appeal was heard upon a brief, which is as follows:

This cause came to trial before His Honor B. C. Pressley at the Fall Term, 1878, on Calendar No. 1, as suggested in the decree of the Supreme Court ordering a new trial. The testimony in the cause was the same as in the preceding trial of the cause.

The testimony was that at the execution of the first bond and mortgage the plaintiff, who is illiterate, requested Houston to read over the paper to her, and that it was wrongly read by him as a recognizance bond. That at the execution of the second bond and mortgage the plaintiff asked Houston whether those papers were the same as those she had already signed, and was answered by him affirmatively. The papers were not read to her.

Mr. Rhett, the attorney of the defendants, Edwin J. Scott & Son, requested His Honor, as the true construction of the decree of the Supreme Court heretofore made in the cause, to charge the jury—

That if the plaintiff, being illiterate, did not ask to have the papers executed the second time, being the bond and mortgage in

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*question, read over to her before signing, it was an act of negligence on her part, and she was bound by the deed as against innocent holders for value without notice, though she did not mean it.

His Honor declined to give this charge, and charged as follows:

That he regarded what was said about the reading of the paper by the Supreme Court not a specific decision on that point, but only an illustration of the degree of diligence required; and if the jury believed the circumstance of the reading of the paper in the first instance, and the inquiries by the plaintiff in the second instance, taken together, to be diligence equivalent to the reading, then they could find as a question of fact before them whether she was guilty of negligence or not.

To this charge Mr. Rhett, the attorney of the defendants, Edwin J. Scott & Son, excepted.

The verdict was for the plaintiff; that she was guilty of no negligence, and that the bond and mortgage be delivered up and canceled.

The defendants appealed.

Rhett, for appellants.

Marshall, contra.

January 18, 1879. The opinion of the Court was delivered by

McIVER, A. J. This case was sent back for a new trial in order that the question (which had been ignored at the first trial) whether the plaintiff was guilty of negligence in signing the bond and mortgage in question should be determined.

This issue was referred to a jury, who were instructed by the Circuit Judge "that he regarded what was said about the reading of the paper by the Supreme Court not a specific decision on that point, but only an illustration of the degree of diligence required: and if the jury believed the circumstance of the reading of the paper in the first instance, and the inquiries by the plaintiff in the second instance, taken together, to be diligence equivalent to the reading, then they could find as a question before them whether she was guilty of negligence or not."

This instruction, to which exception was duly taken, as well as the request to charge, which was refused, that the omission by the plaintiff to ask for the reading of the papers

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on the second occasion *when they were executed was proof of negligence, we regard as tending to narrow the inquiries which the jury was called upon to make beyond what is contemplated by the law in such cases.

The question whether a person has been guilty of negligence is a mixed question of law and fact, and, as said by Story in his work on Bailments, Section 2, "is more a matter of fact than of law," and must be judged of by reference to all the surrounding circumstances. In 2 Kent Com., 561, it is said: "Diligence is a relative term, and it is evident that what would amount to the requisite diligence at one time, in one situation and under one set of circumstances, might not amount to it in another."

Sherman & Redfield, in their work on Negligence, at page 5, say: "Culpable negligence is the omission to do something which a reasonable, prudent and honest man would do, or the doing something which such a man would not do, under the circumstances surrounding each particular case."

We think, therefore, that the minds of the jury should not have been confined to the inquiry whether any particular act was done or omitted, as the doing or the omission of such act under one set of circumstances might be the strongest proof of negligence, while under another set of circumstances such act or omission might afford very slender evidence of negligence. Hence, when, as in this case, there were many other circumstances surrounding the transaction, the jury, after being instructed as to what was negligence, should have been directed to inquire whether, under all the circumstances surrounding the case, the plaintiff was guilty of negligence in signing the bond and mortgage in question.

The judgment of the Circuit Court is set aside and a new trial ordered.

WILLARD, C. J., and HASKELL, A. J., concurred.

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*MOORE v. BYRUM.

(Columbia. Nov. Term, 1877.)

[Reported and annotated in 30 Am. Rep. 58.]

[*Agriculture* ⟸11.]

A contract in writing, dated in December, by which a debtor, in consideration of indulgence, gave to his creditor "a mortgage on all my [his] cotton, corn and wheat that I may raise during the then next years, to secure the payment of the debt; and in default of payment by the 1st of November next, then I authorize the said" creditor or his agent to "take all the crops raised by me:" *Held*. As between the parties, to be a good and enforceable lien upon the crops mentioned therein, although they had not been planted when the contract was made.

[Ed. Note.—Cited in Hirshkind & Co. v. Israel, 18 S. C. 171; Hankinson v. Hankinson, 61 S. C. 203, 39 S. E. 385; Creech v. Long, 72 S. C. 32, 51 S. E. 614.

For other cases, see Agriculture, Cent. Dig. §§ 15–30; Dec. Dig. ⟸11.]

[*Chattel Mortgages* ⟸18.]

Though a mortgage on property to be subsequently acquired may not be valid or effectual at the time it is given, yet, if the mortgagee takes the property into his possession after it is acquired and before the rights of others as creditors or purchasers have attached thereon, the right to the mortgaged property passes from the mortgagor to the mortgagee.

[Ed. Note.—Cited in Perkins v. Loan & Exchange Bank, 43 S. C. 45, 20 S. E. 759; Davis v. Childers, 45 S. C. 145, 22 S. E. 784, 55 Am. St. Rep. 757; Armour & Co. v. Ross, 75 S. C. 207, 55 S. E. 315.

For other cases, see Chattel Mortgages, Cent. Dig. §§ 61, 63; Dec. Dig. ⟸18.]

[*Chattel Mortgages* ⟸12.]

Where a debtor, in consideration of indulgence, gives to his creditor a mortgage on crops to be afterwards raised, and the mortgagee gets possession of the crops under the contract, the mortgagor is estopped from disputing his right.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. § 60; Dec. Dig. ⟸12.]

[*Chattel Mortgages* ⟸18.]

Such possession may be acquired under a warrant issued by the Clerk under the Act in relation to agricultural liens.

[Ed. Note.—Cited in Creech v. Long, 72 S. C. 31, 51 S. E. 614.

For other cases, see Chattel Mortgages, Cent. Dig. §§ 61–66; Dec. Dig. ⟸18.]

[This case is also cited in Hankinson v. Hankinson, 61 S. C. 193, 39 S. E. 385, and distinguished therefrom.]

Before Reed, J., at Anderson, May, 1877.

This was an action by C. A. Moore against Joseph N. Byrum and Wm. McGukin, Sheriff, to recover the possession of personal property.

The case is fully stated in the judgment of the Court.

Harrison, for appellant:

I. A crop yet to be planted is the subject of the valid mortgage.—1 Hill. Mort., 4; 17 John., 283; 7 How., 250; 19 Wall., 544; Wyatt v. Watkins, Law and Equity Reporter, (Tenn.,) 240.

II. That the defendant is estopped from denying his own deed.—8 Wend., 480; 2 Bail., 269.

The Court will perceive that the small amount of money involved in this case would scarcely warrant an appeal from the order of the Court below; yet the principle as to validity of a mortgage of a crop not yet in the ground is novel in the Courts of this State, and from the repeal of the lien law becomes of great importance to the agricultural and commercial interests of the people of the State—hence a reason for this appeal; for in the advancement of the times, and the Legislature of the State having, from necessity, enacted a lien law and lately having repealed the operation of the same, it becomes the judiciary of the State, upon a proper case made, to decide whether such a mortgage, duly executed and recorded, is valid and binding upon the parties to it.

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*In Shumate v. Taylor, (7 How., 251,) it is decided that where an individual, by agreement with the owner of land, has an interest in a fallow thereon, for the purpose of raising a crop of wheat, where each is to have one-half, he can by a chattel mortgage bind his interest in the use of the land and in the wheat which is afterwards put in under the agreement.

In Cooper v. Douglas, (44 Barb., 409,) it is said the theory upon which future earnings or the result of future labor are sometimes allowed to be anticipated and appropriated to the payment or security of a present indebtedness is that they are connected with a contract or employment already in existence, or are the fruits of advances made or supplies furnished to carry on the business out of which the future property or earnings arise, and then the pledge attaches to this property or the earnings, not from the moment of the contract, but from the moment they spring into existence.

In Butt v. Ellet (19 Wall., 544,) the principle decided was: Although an instrument which purports to mortgage a crop, the seed of which has not yet been sown, cannot at the time operate as a mortgage of the crop, yet when the seed of the crop intended to be mortgaged has been sown and the crop grows a lien attaches. Mr. Justice Swayne delivered the opinion of the Court. In referring to the mortgage, he says: "The mortgage clause in the contract of lease of the 15th of January, 1867, executed by Sillers and Graham, could not operate as a mortgage, because the crops to which it relates were not then in existence. When the crops grew the lien attached and bound them effectually from that time," etc.

A still later case, embodying the authorities in favor of and against this doctrine, is Wyatt v. Watkins, from the Supreme Court of the State of Tennessee, reported in the 29th August number, 1877, of the Law and

Equity Reporter, page 240. The principle extracted is: "A crop yet to be planted is the subject of a valid mortgage."

The facts of the case now before this Court, briefly stated, are: Moore, the appellee, was the tenant of Byrum, the appellant, for the year 1875. At the close of the year he fell in debt to Byrum for his share of guano furnished for the crop of 1875. His share of the corn made on the place was still on the place and in possession of Byrum. Byrum refused to let him remove the corn unless he would secure his debt; and in consideration of the debt and getting possession of the corn, Moore executed the note and mortgage. At

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*the date of the mortgage Moore had rented lands of one McCully and had removed his family to such place. It was not claimed that the mortgage was a statutory lien, although the Clerk of the Court had treated it as such and irregularly issued his warrant. But when the officer seized the crop the two papers were attached together, and it is claimed that the seizure would be referred to the legal paper. Although this debt was not, eo nomine, for an advance to enable appellee to make the crop of 1876, yet substantially it was so, for he could not have made his crop without the corn; and certainly the appellee treated it as an advance, as the mortgage shows, and cannot now repudiate the transaction.

Now, is a chattel mortgage of a crop not yet planted only valid as between landlord and tenant—lessor and lessee? Is it a remedy which attaches to land, and not to the labor of individuals? If so, then its operation will be very restricted, and certainly would be an anomaly as to rights and remedies.

The authorities cited in Wyatt v. Watkins, (August 29th number of Law and Equity Reporter,) from the Supreme Court of Tennessee, are very numerous, and, so far as examined, fully support the decision. The doctrine seems first to be found in 1st Hobart, 132; 1 Powel on Contracts, 157–8, acknowledged and recited very fully in Andrew v. Newcomb, 32 N. Y., 417; 18 Pick., 168; 14 Pick., 497.

The second proposition, that the appellee is estopped by his act and deed, would seem not to admit of controversy. He has certainly conveyed his crop to be grown in 1876 to the appellant, and under his hand and seal authorized its seizure. This surely is good as between the parties. He has by his conduct reaped an advantage, and the appellant suffered a loss, if the appellee succeeds in repudiating the transaction, which should never be permitted by Courts of justice.

Murray & Murray, contra:

A brief statement of the facts in this case is necessary for the proper consideration of the legal questions presented for the consideration of the Court. The respondent, C. A. Moore, cultivated land of the appellant, J. N. Byrum, in the year 1875, giving as rent a portion of the crops produced. In December, 1875, C. A. Moore paid to Byrum the part of all the crops going to him, retaining his part of the crops. Upon a settlement be-

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tween them, Moore *fell in debt to Byrum in the sum of thirty-two 50-100 dollars, included in which sum was a debt Moore owed to McGrath & Byrum, the latter member of the firm being a brother of the appellant. Byrum refused to permit Moore to move the part of the crop going to Moore unless he would execute the note and contract contained in the first and second folios of the brief. Under these circumstances Moore executed the said contract. In the year 1876 Moore removed from Byrum's and cultivated the lands of another person. At the time said contract was made no part of the crop of 1876 was planted, nor was any part of this crop raised on any of the lands of Byrum. In November, 1876, Byrum made oath before the Clerk of the Court of Common Pleas that said written agreement was intended to be a lien under the statute, and the Clerk issued his warrant of seizure to the Sheriff of Anderson County, under the Act entitled "An Act to secure advances for agricultural purposes." Under this warrant the Sheriff seized the crops of Moore made in 1876, and Moore filed in the Trial Justice's Court a complaint for the delivery of personal property. The jury rendered a verdict for Moore for the property claimed. Byrum appealed to the Circuit Court, and it dismissed the appeal with costs, and thereupon Byrum appealed to this Court.

The facts in this case are not contested, and we will proceed to consider the several legal grounds upon which the decision of this case must depend. We maintain—

I. That the contract executed by C. A. Moore to Byrum could not operate as a statutory lien on the crops of Moore to be produced, because it was given to secure the payment of a debt already existing, and not for advances, either in money or supplies, for the production of the crop.—See Section 55, Chap. CXX, Gen. Stat., 557; Dunn v. Spears, 5 S. C., 17. It is not necessary to argue this position, as the appellant, seeing the hopelessness of his case, abandoned the contract on the trial as a statutory lien and seeks to establish it as a chattel mortgage at common law.

II. That the appellant having regarded the contract as constituting a statutory lien, and having seized the property under said statute, could not upon the trial of the cause abandon his case under the statute and seek to establish it under a mortgage at common law.—2 Sick., (47 N. Y.,) 430.

Having thus seen that the said contract could not operate as a statutory lien to bind

the crops of 1876, we proceed to show that it cannot be established as a mortgage at common law. We maintain

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*III. That the said contract is invalid as a mortgage, wanting words of conveyance or transfer which are essential to a mortgage.—Green v. Jacobs, 5 S. C., 283. By reference to the contract it will be seen that there is no mortgage, no words of transfer of property, but only "I, C. A. Moore, do hereby give to Joseph Byrum, Jr., a mortgage on all my corn, cotton and wheat." The only word of transfer, "give," refers to mortgage and not to property. A mortgage is an instrument of writing containing covenants and conditions, and the whole force and effect of mortgage depend on the covenants and conditions. The covenants and conditions make the mortgage, and the simple term mortgage cannot make the covenants and conditions. The paper here presented is wanting in the essentials of a valid mortgage. The term "mortgage" is the name of an instrument, and not the instrument. Here we have the name, but the words necessary to constitute the instrument known by that name are wanting. In the case of Green v. Jacobs, above cited, an instrument of writing purporting to be a lien on the maker's crops of cotton, corn, &c., to be made that year, to secure advances that day made, was given, and at the bottom of the instrument contained these words: "I, Frank James, consider the above instrument of writing a mortgage of all my personal property, such as wagons, horses, cattle," &c. It was duly recorded. This Court held in that case that the instrument was not a mortgage—that it was a mere declaration of what the instrument was to be considered in the place of the instrument itself. The present case is analogous to that, in this, that the party does not make the instrument, but declares that he hereby gives a mortgage.

But it may be said that in this contract a power to seize the crop is given in default of payment, and that under this power the appellant can hold the property seized. It is a clear principle of law that if a deed is invalid all the covenants and powers dependent on the interests conveyed by the deed are also void. If this instrument conveyed or transferred no property, then there was no property for subsequent covenants to affect.—See Vol. I of Law Library, p. 573, where it is said: "Whenever a deed is void all the covenants dependent on the interest professed to be conveyed by the deed are also void; for, if no estate passes by the deed, the covenants relating to and dependent on the estate purported to be passed must necessarily fail to take effect."

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*IV. That the contract cannot be supported as a chattel mortgage, valid at common law, because the crops were not in esse when the contract was made.—2 Hilliard on Mortgages, Chap. XLIII, §§ 2, 17, 18, 19, 20, 21; 55 Ga., 543; 3 Law and Equity Reporter, No. 17, p. 541, April 25, 1877; Dunn v. Spears, 5 S. C., 17; 1 Wait's Dig., p. 302, § 25; 17 John., 283; 7 How., 250; 19 Wall., 544; Wyatt v. Watkins, Law and Equity Reporter, (Tenn.,) 240.

The question is not as to the validity of a mortgage given on a growing crop, as made by appellant in his grounds of appeal from Trial Justice's Court, but of a crop not planted, and not connected with the land on which it is raised. The doctrine laid down in Hilliard, and to which we think all the decided cases may be referred, is that only property in existence, or a possibility founded or coupled with an interest on property in existence, can be the subject of a valid mortgage, and equitable liens will be recognized in equity only where the property is in existence at the time, out of which the future possibilities may arise.—Hilliard on Mortgages, Chap. XLIII, § 17. As in the cases of a mortgage on sheep and the wool that may grow on them and the rent of land with a lien on the crops to be produced on the land rented to secure the payment of rent. The latest decision on the exact case presented, that a sale or mortgage of a crop not planted is invalid, was made by the Supreme Court of Georgia in February, 1877, in the case of Redd et al. v. Burrus et al., (Law and Equity Reporter, April 25, 1877, p. 541,) in which the Court said: "It is clear that Redd & Co. acquired no title by the obligation made in 1874 to deliver them cotton out of a crop made in 1875. The law is well established that there can be no sale or mortgage of a crop until it is planted. In December, 1874, the cotton crop which matured in the Fall of 1875 was not planted, and there could be no sale of any part of it." This decides the precise question presented in this case, as it is admitted that at the time the pretended mortgage was given the crop seized was not planted nor coupled with any interest out of which the crop was produced.

A review of the cases presented and relied upon by the appellant and above cited, when analyzed and traced to the principles upon which they were made, sustain the positions assumed by respondent and show that the instrument claimed as a chattel mortgage cannot be established as such. In Hartwell v. Bissell (17 John., 128,) the question raised was between Hartwell, who levied a warrant

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for *taxes against L. B. on rye in the sheaf, and Bissell, who had previously levied his fi. fa. on the rye while growing in the field. The Court held that the fi. fa. took the crop. The question decided by that case was not one of mortgage, but of execution, and not one of a crop not planted, but of a growing crop, and decides nothing pertinent to the case now before the Court. In Shuart v.

Taylor, (7 How., 250,) another case cited by the appellant, the facts are: Cogswell made a note to Clark and executed a mortgage of all the right, title and interest of his "in and to about thirty acres of fallow or wheat on the farm of Ezra Taylor. Taylor sold his farm, reserving to Cogswell the right to sow the thirty acres on which the wheat was raised, with wheat on shares, his share being one half." The Court, in rendering judgment, says: "It is clear that Cogswell at the time of giving the mortgage had a right to the use of thirty acres for the purpose of raising a crop of wheat and having one half. Having such an interest, I see no good reason why the mortgage did not upon its execution become a lien upon it. The Referee has found that a part of the wheat was then sown; but however that fact may be, as the mortgage was upon the interest of Cogswell in the 'fallow,' I am of the opinion it bound his right to the use of the land and the wheat which was raised in the exercise of it. This is not the case of a mortgage of property which the mortgagor did not own at the time, but one of a mortgage upon an interest in property which then belonged to the mortgagor." This was certainly not the case of the mortgage of property not in existence, but of an interest in property then existing, coupled with future possibilities of interest. This is consistent with the rule laid down in Hilliard, and strongly intimates that the Court would not sustain as a mortgage an instrument which conveys or pledges property not in existence. The case of Butt v. Ellet (reported in 19 Wall., 544,) is a further illustration of the principle already stated. The facts in this case are, that Sillers leased a plantation for one year to Graham for a certain moneyed rent, Graham giving his note for it; and, to secure the payment of the note embodied in the lease by which the plantation was let, Graham inserted in the lease a mortgage clause of all the crops raised on the plantation for the year. In that case the Court held, Justice Swayne delivering the opinion, that the mortgage clause in the lease could not operate as a mortgage, because the crops to which it related were not then in existence, but that

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when the crops grew *the lien attached and bound them. The Court in that case announced its decision without giving its reason. The principle upon which it was founded was evidently that of a present interest in the land on which the crops were produced, and although a mortgage could not be sustained, because the crops were not planted, yet an equitable lien attached, as the lease gave to the lessee present rights to the land, coupled with future possibilities of interest growing out of those rights. The case of Wyatt v. Watkins (Law and Equity Reporter, Vol. IV, No. 9,) is a decision of the Supreme Court of Tennessee as to a deed of trust under the usages of conveyance in that State, and not of a mortgage at common law, and yet consistent with the principles already cited, being a conveyance to a trustee for certain uses of a piece of land with the crops thereon, and which is not similar to the case now submitted to the Court.

V. There remains only one other question submitted by appellant for decision, and that is: Is the respondent estopped from denying the validity of the instrument as a mortgage? The case of Green v. Jacobs, before cited, is one directly in point. In that case, analogous to the one before the Court, the instrument was held invalid as a mortgage. Every estoppel must be reciprocal and binding on both parties.—Viner's Abr., title Estoppel, 463. In the case before the Court the contract made by the respondent was to secure the payment of a pre-existing debt; the appellant yielded no right nor gave any consideration for the contract other than that of the pre-existing debt, and we know of no principle of law or equity which estops him from denying the validity of the instrument as a mortgage, and especially when the appellant has sworn that the instrument was intended to be a lien under the statute.

January 20, 1879. The opinion of the Court was delivered by

McIVER, A. J. This was an action brought in a Trial Justice's Court to recover the possession of certain personal property. The Trial Justice rendered judgment for the plaintiff, and upon appeal to the Circuit Court his judgment was sustained by that Court.

The facts of the case, as we learn them from the statement made by the respondent and conceded by the appellant, were as follows:

Moore cultivated land of Byrum in the year 1875, and at the end of the year, having fallen in debt to him, Byrum refused to permit Moore to remove the portion of the

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crop to which he was *entitled unless he would secure his debt by executing the note and agreement hereinafter mentioned, whereupon Moore, on the 4th of December, 1875, executed his note under seal, whereby he promised to pay the defendant, Byrum, on or before the 1st of November next after the date of said note, thirty-two 50 100 dollars, and, to secure the payment of such note, executed a paper of which the following is a copy:

"Know all men by these presents, That I, C. A. Moore, * * * do hereby give to Joseph Byrum, Jr., a mortgage on all my cotton, corn and wheat that I may raise during the year 1876, to secure the payment of the above note this day given by me; and in default of payment by the 1st of November next, then I authorize the said Byrum

to take all the crops raised by me, or any other person he may select so to do."

The crops mentioned in the foregoing paper were not planted at the time the same was given and were not raised on lands of the appellant. The note not having been paid at maturity, the defendant, Byrum, obtained from the Clerk of the Court of Common Pleas a warrant, under the provisions of the Act entitled "An Act to secure advances for agricultural purposes," directed to the defendant, McGukin, as Sheriff, under which he seized the cotton and other crops of the plaintiff; whereupon this action was commenced to recover possession of the same. At the trial, the defendants abandoned any claim to hold the property under the warrant issued by the Clerk, for the reason, as it would seem from the report of the Trial Justice, that the debt intended to be secured was an antecedent debt and did not arise from advances made at the time or after the execution of the agreement, but claimed that the agreement, although not effectual as an agricultural lien under the statute, was good as a mortgage, and that the taking of the property was justified under the provisions of such paper as a mortgage.

The Trial Justice instructed the jury before whom the case was tried "that a mortgage on personal property not in being was invalid as a mortgage, and that if they believed from the testimony that the crop was not planted at the time of the agreement, that then it was wholly invalid as a mortgage;" and, further, "that no evidence had been produced the legal effect of which was to estop the plaintiff."

To all these rulings the defendant excepted. The grounds upon which the Circuit Judge rested his decision are not stated, as

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he *simply dismisses the appeal and renders judgment for the plaintiff; from which we must infer that he adopted the rulings of the Trial Justice, and for this reason we have stated them. It would seem, therefore, that the agreement was regarded both by the Circuit Judge and by the Trial Justice as intended by the parties as a mortgage, though the defendants did at one time treat it as if it were also an agricultural lien under the statute. There can be no doubt that a paper, whatever may be its form, will, if intended by the parties as a mortgage, be so regarded by a Court of Equity. (Walling v. Aiken, McM. Eq., 1.) and we have as little doubt that the parties in this case did intend the paper here in question to be a mortgage, as it is so distinctly called in the body of the paper, and contains a provision, usually found in mortgages of personal property, authorizing the mortgagee, either by himself or by his agent, to seize the property mortgaged upon default in payment of the mortgage debt. The fact that Byrum at one time seemed to regard it as a lien under the statute does not negative this idea, for we know it is frequently the case that papers of this kind are so drawn as to give them both characters. Nor do we think that this can be controlled by the decision in the case of Green v. Jacobs, (5 S. C., 280.) for two reasons: First. Because that was a case in which the rights of third persons had intervened, while in this case the contest is between the original parties. Second. Because in that case there was no provision in the paper authorizing the mortgagee to take possession of the property mortgaged upon default in payment of the debt, while in this case there is such a provision.

This, it will be remembered, is an action to recover possession of personal property; it is not an action to recover damages for a trespass in unlawfuly seizing property in the possession of the plaintiff. But the action, if maintainable at all, must be maintained upon the ground that the property in question belongs to the plaintiff, or that, as against the defendants, he is entitled to the possession of it. If, therefore, the paper under which the defendants seek to protect themselves can be regarded as having the effect of a mortgage, then, clearly, the plaintiff cannot maintain this action. It is argued, however, that this paper cannot be regarded as a mortgage because at the time it was executed the property intended to be mortgaged had neither an actual or a potential existence, inasmuch as it is admitted that the crops had not then been planted and were not afterwards raised on land of appellant

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which he then *held either in his own right or as tenant of another. The authorities cited in respondent's brief do show that, in order to create a valid mortgage, the thing intended to be mortgaged must be at the time either in actual existence or it must be the prospective yield of something which has then an actual existence. But where there is a mortgage on property to be subsequently acquired, although the mortgage is not valid or effectual at the time when it is given, yet after the property is acquired and is taken into possession under the mortgage by the mortgagee, the right to the property passes from the mortgagor to the mortgagee. Unquestionably is this so where, as in the case now under consideration, the rights of third persons, either as creditors or purchasers, have not intervened and where the controversy arises between the original parties. As is said in the case of Moody v. Wright, (13 Metcf., 32,) "a stipulation that future-acquired property shall be holden as security for some present engagement is an executory agreement of such a character that the creditor with whom it is made may, under it, take the property into his possession when it comes into existence and is the subject of transfer by his debtor and hold it for his security; and whenever he does so take it

into his possession, before alienation thereof, such creditor, under his executory agreement, may hold the same." So in the case of McCraffrey v. Woodin, (65 N. Y., 459,) reported also in 22 Amer. Rep., 644, it was held that a provision in a lease which amounted to a chattel mortgage on after-acquired property, while it conveyed no present legal title, inasmuch as the property mentioned was not then in existence, was yet a valid license to enter and seize the property as soon as it was acquired or came into existence; and after such entry and seizure the title vested in the mortgagee even at law, and that in equity the lien would attach and bind the property as soon as it was acquired or came into existence, even before it was taken possession of by the mortgagee.

This doctrine was fully recognized in the case of Williams v. Briggs, (11 R. I., 476,) although the controversy there was not between the original parties, but between the mortgagee and an assignee of the mortgagor. It is true that in this case the decision was in favor of the assignee of the mortgagor, but it was placed upon the ground that the action was brought at law and not in equity, and that the mortgagee had never taken possession of the property mortgaged. The mort-

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gage was upon the tools, fixtures, *stock in trade for the manufacture of carriages, and all carriages made or in process of manufacture then in the carriage factory of the mortgagor, and also upon all stock, tools, fixtures and carriages, whether manufactured or in process of manufacture, "that may be hereafter purchased by me to be used in or about my business of buying and selling, making and repairing carriages." It appeared at the trial that only a small part of the property in controversy was in the possession or ownership of the mortgagor at the time of the making of the mortgage, the larger part of it having been subsequently acquired. Durfee, C. J., in delivering the opinion of the Court, says (the italics being ours): "The case, therefore, raises the question whether a mortgage of property to be subsequently acquired conveys to the mortgagee a title to such property when acquired which is valid at law as against the mortgagor or his voluntary assignee. * * * We think such a mortgage is ineffectual, to transfer the *legal* title of the property subsequently acquired, *unless* when acquired possession thereof is given to the mortgagee or taken by him under the mortgage." This case is cited as presenting, together with that of McCaffrey v. Woodin, (supra,) a very full collection of the authorities establishing the propositions herein announced. See, also, Frazer & Co. v. Hilliard, (2 Strob., 309,) where it is said: "If one sells goods in which he has no property at the time of the sale, and subsequently acquires a title, the property, as soon as a title is acquired by the seller, will vest in the buyer."

We think, too, that the plaintiff is estopped from maintaining this action. In consideration of indulgence on a debt then due, the plaintiff, by the paper in question, executes to the defendant, Byrum, an agreement intended as a mortgage, by which he stipulates, if the debt is not paid at the expiration of the period of indulgence, that Byrum shall be authorized to take the crops to be raised by him into his possession; and although, as against third persons, such agreement might not be held to be a valid mortgage, for the reasons above indicated, and possibly might not be sufficient to authorize the bringing of an action by Byrum against Moore to recover possession of the property mentioned, after default in payment of the debt, (about which, however, we express no opinion,) yet certainly when, upon default in payment of the debt, the property has been taken possession of by Byrum or by his agent, the plaintiff cannot be allowed to recover it back; for to do so he must re-

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pudiate *his own agreement under which he obtained the desired indulgence. Having got what he wanted—indulgence—in consideration that Byrum should have authority to seize the property in question upon default in the payment of the debt, he is estopped from now denying such authority. The fact that the property was taken possession of under the warrant issued by the Clerk to enforce the supposed statutory lien, and not under the mortgage, eo nomine, cannot, in our opinion, make any difference. If Byrum had authority, as we have seen that he had, to take the property into his possession, it matters not how he acquired the possession so that he did not violate the criminal law. —Wolf v. O'Farrel, 1 Tr. Con. Rep., 155. Where the Sheriff levies upon and sells property under an execution which confers no authority, yet if at the time he has in his office an execution which does give such authority his action will be referred to that which confers the authority. So here, while the warrant issued by the Clerk may not have been sufficient to authorize the seizure, yet the paper upon which it was issued and to which it was attached, regarded as a mortgage, was sufficient to authorize the seizure of the property, and under it the taking could be justified.

The judgment of the Circuit Court is set aside and a new trial ordered.

WILLARD, C. J., and HASKELL, A. J., concurred.

10 S. C. 464

PLYER v. PARKER.

(Columbia. Nov. Term, 1878.)

[*Judgment* ⇐207; *Set-Off and Counterclaim* ⇐44.]

A separate judgment in favor of one of several defendants may be rendered against the plaintiff for the recovery of money upon a counter claim showing a separate cause of action in favor of such defendant.

[Ed. Note.—Cited in Copeland v. Young, 21 S. C. 290; Haygood v. Boney, 43 S. C. 65, 20 S. E. 803; Pope Mfg. Co. v. Charleston Cycle Co., 55 S. C. 528, 535, 33 S. E. 787.

For other cases, see Judgment, Cent. Dig. § 380; Dec. Dig. ⇐207; Set-Off and Counterclaim, Cent. Dig. § 85; Dec. Dig. ⇐44.]

Before Mackey, J., at Lancaster, August Term, 1877.

This was an action by Pleasant M. Plyer against L. A. Parker and Britton Parker on two sealed notes given by the defendants.

The defendant L. A. Parker pleaded a counter claim for money due to himself upon an account for agricultural supplies furnished by him to the plaintiff.

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*At the trial the plaintiff requested the Court to charge the jury "that they could not find a verdict in favor of defendants for any part of the counter claim." The request was denied.

The jury found the following verdict: "We find for the defendants $319.50."

His Honor made an order, which, reciting the facts of the case and stating that the amount found by the jury was due to the defendant L. A. Parker, directed that judgment be entered in his favor for said amount.

The plaintiff appealed on the ground that His Honor refused to charge the jury that they could not find a verdict in favor of the defendants for any part of the counter claim.

Moore, for appellant.

Allison, contra.

January 22, 1879. The opinion of the Court was delivered by

HASKELL, A. J. There appears to have been some misapprehension in the case as to whether the plaintiff has a right to appeal. Such question, however, was waived, and the case was heard upon the following ground of appeal: That the Circuit Judge erred in refusing to instruct the jury that they could not find a verdict in favor of the defendants for any part of the counter claim set up in the answer, for the reason that the action was against more than one defendant on a joint and several obligation, while the counter claim was a cause of action against the plaintiff in favor of only one of the defendants. The Code of Procedure (§ 173, Rev. Stat., 606,) directs that "the counter claim" * * * must be one existing "in favor of a defendant and against a plaintiff between whom a several judgment might be had in the action." It is not disputed that the claim set up in the answer is within the statutory definition of a counter claim, and it is "in favor of a defendant and against a plaintiff;" but the question is whether between them, the said single defendant and the plaintiff, "a several judgment might be had in the action." Section 298 of the Code, Revised Statutes, page 639, that "judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants," is very comprehensive and permits a judgment severally to be given between any two or more parties in a

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suit whenever a distinct, sepa*rate and complete cause of action between them has been established. There can be no question, therefore, that whenever the cause of action is several or severable in its nature judgments can be rendered severably. The test is, would the plaintiff, or some of the plaintiffs, demanding judgments severally against the defendant, or against some of several defendants, have been entitled to judgment had the action been brought separately by the party or parties demanding judgment against the party or parties defendant against whom severably the judgment is demanded? Whenever such right to judgment in a separate action is shown, it entitles the parties to a several judgment in an action where they have been combined with others and in which they have set up this right. The same test applies in the case of counter claim, and the same rule fixes the relation between the parties. The plaintiff or plaintiffs against whom the claim is set up must be such as would be entitled to seek a several judgment against the defendant or defendants setting up the claim, and the said defendants must show a cause of action which would entitle them to a several judgment against the plaintiff or plaintiffs against whom the claim is presented. For in pleading the counter claim the defendant becomes the actor and is governed by the same rules which would apply were he the plaintiff in a separate action on the cause set up by him in the defense. The action could have been brought on the joint and several note against L. A. Parker alone, or a several judgment could have been obtained against him. He, therefore, had a right to set up a separate cause of action held by himself against the plaintiff.

In the case of Byrd v. Charles, (3 S. C., 352,) relied on by the appellant, the circumstances were entirely different. The counter claim was a cause of action held by the defendant against a late partnership concern of which the plaintiff had been a member, but neither the partnership nor its members were parties in the action. The defendant thus undertook to bring an action without

there being proper parties, and, therefore, the counter claim was properly rejected. "Nothing can be more firmly settled than the general rule that, in the absence of a statutory provision to the contrary, where an action is brought by a partnership on a claim due the firm, no demand in favor of the defendant against one or more of its members can be used as a counter claim." —Pomeroy on Rem., 756. The same rule, for the same reason, applies when a mem-

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ber *of a firm is plaintiff and the claim set up by the defense is against the partnership concern, which was the case in Byrd v. Charles.

The judgment of the Circuit Court is affirmed.

Motion refused.

WILLARD, C. J., and McIVER, A. J., concurred.

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10 S. C. 467

BROWN v. MORRIS.

(Columbia. Nov. Term. 1878.)

[*Attachment* ⇐92.]

An attachment set aside on the ground that the affidavit on which it was issued was insufficient.

[Ed. Note.—Cited in Cureton v. Dargan, 12 S. C. 125; Darby & Co. v. Shannon, 19 S. C. 530; Myers v. Whiteheart, 24 S. C. 202.

For other cases, see Attachment, Cent. Dig. §§ 238, 239; Dec. Dig. ⇐92.]

[*Attachment* ⇐100.]

[Cited in Monday v. Elmore, 27 S. C. 131, 3 S. E. 65, to the point that, while the grounds of attachment may be stated on information or belief, the affidavit must contain a statement of the particular facts on which the allegations rest, and the sources from which the information is derived.]

[Ed. Note.—For other cases, see Attachment, Cent. Dig. § 255; Dec. Dig. ⇐100.]

[*Attachment* ⇐113.]

[Cited in Ivy v. Caston, 21 S. C. 588; Kerchner & Calder Bros. v. McCormac, 25 S. C. 465; Baum v. Bell, 28 S. C. 209, 5 S. E. 485; Wando Phosphate Co. v. Rosenberg, 31 S. C. 307, 9 S. E. 969, to the point that, under Rev. St. p. 623, § 252, authorizing an attachment whenever it shall "appear" that a cause of action exists against defendant, and that he has removed or is about to remove any of his property from the state with intent to defraud his creditors, etc., the affidavit must contain a statement of the particular facts on which the allegations rest, and the evidence thus presented must be of such a character as would in an action at law prima facie establish such allegations.]

[Ed. Note.—For other cases, see Attachment, Cent. Dig. § 311; Dec. Dig. ⇐113.]

[This case is also cited in Darby & Co. v. Shannon, 19 S. C. 531; Ivy v. Caston, 21 S. C. 588, as to the question of procedure in setting aside attachments.]

Before Aldrich, J., at Richland, July Term, 1878.

This was an action by Edmonds T. Brown against Manuel Morris.

The action was commenced on the 15th day of January, 1877, the answer filed in February thereafter, and on the 14th day of February a warrant of attachment was issued in said action upon an affidavit by the plaintiff's attorneys, setting forth:

1. That he is plaintiff's attorney in the above entitled case, and, as such, has possession of the notes hereinafter mentioned as the grounds of the plaintiff's claim against the defendant, which notes have been admitted by the defendant to this deponent to be just and valid obligations of his outstanding; that the defendant, Manuel Morris, is justly and truly indebted to the plaintiff, Edmonds T. Brown, in the sum of three hundred ninety-seven and 75–100 dollars, with interest on two hundred and fifty-five dollars from the fourteenth day of December, 1876, and interest on one hundred forty-two and 75–100 dollars from the seventh day of January, 1877, due upon two several sealed notes, as follows, to wit: A note made, sealed and delivered by the defendant, Manuel Morris, dated on the fifteenth day of September, 1876, whereby he promised to pay to the order of Edmonds T. Brown, the plaintiff herein, at the Central National Bank of Columbia, S. C., ninety days after the date thereof, two hundred and fifty-five dollars; and a further note, made, sealed and delivered by the de-

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fendant, Manuel Morris, dated *on the ninth day of October, 1876, whereby he promised to pay to the order of Edmonds T. Brown, the plaintiff herein, at the Central National Bank of Columbia, S. C., ninety days after the date thereof, one hundred forty-two and 75–100 dollars; and deponent verily believes that said plaintiff is justly entitled to recover said sum.

2. That this deponent verily believes that the said defendant, Manuel Morris, has disposed of or secreted, and is about to dispose of and secrete, his property, with intent to defraud his creditors, because: Deponent, having numerous claims for collection against the said defendant, called on him repeatedly during the month of January, 1877, defendant all along admitting said claims; that defendant, upon all such occasions, referred deponent to his son, —— Morris, stating that he, his said son, had the management of his business; that deponent, having brought suit on the various claims, admitted by the defendant to be due, as aforesaid, the defendant, in bad faith, put in sham defenses to said suits, for the sole purpose of delaying the deponent in obtaining judgment in said suits, as the defendant's said son, —— Morris, admitted to this deponent, and thereby prevented this deponent from obtaining judgments on said claims at the February Term, 1877, of this Court; that in the meantime

the defendant, as this deponent is informed and verily believes, procured his entire stock of goods and merchandise, at his store in the city of Columbia, to be levied upon and seized by Jesse E. Dent, Esq., Sheriff of Richland County, by virtue of an execution issued under judgment, for two thousand and eight hundred dollars, in the case of Eva Elias v. Manuel Morris, the defendant herein, which judgment, this deponent verily believes, was fraudulent, and was obtained by collusion with the said defendant, Manuel Morris, for the sole purpose of defrauding his creditors of their just and valid claims, the said Eva Elias being the daughter of the said defendant and a woman of such limited means as to make it exceedingly improbable that she should have a valid claim against said defendant for so large an amount, and it having been stated to this deponent by defendant's said son, —— Morris, that the husband of said Eva Elias is insolvent, and because the said defendant allowed said judgment to be taken in the County of Kershaw, said defendant residing solely in the County of Richland, and has never before disclosed said debt until said levy was made, but is now endeavoring to force a compromise with his creditors by means of said levy.

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*3. That the said plaintiff has commenced an action in this Court by issuing the summons hereto annexed against said Manuel Morris upon the cause of action above stated.

A motion was made for an order vacating and discharging said warrant of attachment. It was heard at the present term of the Court and was granted.

The plaintiff appealed.

Lyles, for appellant.

Melton & Wingate, contra.

January 27, 1879. The opinion of the Court was delivered by

HASKELL, A. J. The appeal is from an order of the Circuit Judge which set aside an attachment because of the insufficiency of evidence. The proceeding by attachment is a reverse remedy allowed only under circumstances designated in the statute, and the evidence that those circumstances exist should be clear. When the defendant is a resident of the State, as in this case, the warrant may be issued whenever it shall appear that a cause of action exists against him, and that he has removed, or is about to remove, any of his property from the State with intent to defraud his creditors, or has assigned, disposed of or secreted, or is about to assign, dispose of or secrete, any of his property with like intent.—Rev. Stat., p. 623, § 252. These facts must be made to "appear by affidavit." It is sufficient that they be alleged or stated on information or belief on the part of the applicant. The affidavits in such cases must contain a statement of the particular facts upon which the allegations rest and the sources from which the information is derived. The evidence thus presented must be of such a character as would in an action at law prima facie establish the facts alleged. In no other than in such sense and by such means can the requisite facts be made to "appear" to the Judge or other proper officer before whom the motion is made.

In the case of Smith & Melton v. Walker, (6 S. C., 169,) in considering the effect of an affidavit which merely alleged that the defendant had departed to avoid legal process and "disposed of his property with intent to defraud his creditors," the Court says that had the validity of the attachment rested upon such evidence alone "a serious question of irregularity would have been presented, for

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*charges of this nature should be supported by a statement of the facts on which they are founded." The plaintiff in the present case, the appellant, has, perhaps, attempted to conform to the rule, at least in form; but the grounds upon which he rests are either not facts but mere inferences or hearsay, or they are irrelevant or self-contradictory.

The foundation of the whole proceeding is that the plaintiff's attorney in the cause, in the affidavit, "verily believes that the said defendant, Manuel Morris, has disposed of or secreted, and is about to dispose of and secrete, his property with intent to defraud his creditors," because: 1. "Deponent having brought suit on the various claims admitted by the defendant to be due as aforesaid, the defendant, in bad faith, put in sham defenses to said suits," &c. The appellant's own showing admits that the Circuit Judge, on a motion made by deponent to strike out said answers on the ground that they were "sham," had decided that they were not sham. That proceeding, too, seems to have preceded the motion before the Clerk. 2. The next fact alleged is, that a judgment had been recently obtained against the defendant by a daughter of said defendant in the County of Kershaw. From this fact, and from the consequent fact of a levy on the goods of defendant to satisfy said judgment, the affiant proceeds to deduce conclusions totally unwarranted by any rule of evidence; and with regard to a solemn judgment of the Court, unassailed at any time by any proceeding on the part of the plaintiff or any other person, (for this Court asked the question,) the affiant proceeds, without a title of proof, to say "which judgment, this deponent verily believes, was fraudulent." There are no further facts of any importance alleged, and it is needless to further discuss the affidavit, for it presents no ground for an attachment.

Property in the hands of the Sheriff, by virtue of a levy under execution, cannot be regarded as removed from the State or dis-

posed of, assigned or secreted in the sense in which those words are used in the statute. The property was actually in the custody of the law, in the position most advantageous to the interest of creditors, according to affiant's showing. Such being the condition of the property, the judgment under which it was held had to be assailed before fraud could be set up. Until such proceeding had been had or begun, allegations of fraudulent intention were entirely immaterial. The removal or disposal and the intent to defraud must co-exist before the remedy

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by attachment can be had. The proof *of either would by itself be insufficient. It is but fair, however, in this case to say that there is as little evidence of fraudulent intent as there is of disposal of the property. The Sheriff's return shows that the defendant's property has gone to the payment of his debts under judgments, and that the only harm done to the appellant is that he was not suffered by the defendant to obtain judgment in advance of others. The law provides that "in all cases the defendant may move to discharge the attachment, as in the case of other provisional remedies."—Rev. Stat., 628. The only taint of fraud which could have attached to the defendant in this case would have been in his failing to protect his just creditors by not moving to set aside the unwarranted preference which seemed to have been gained by the appellant.

The order of the Circuit Judge is affirmed.

Motion refused.

WILLARD, C. J., and McIVER, A. J., concurred.

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10 S. C. 471

MOBLEY v. DENT.

(Columbia. Nov. Term, 1878.)

[*Landlord and Tenant* ⇐264.]

The remedy by distress for rent was restored by the Act of June 8th, 1877.

[Ed. Note.—Cited in Wallace v. Johnson, 17 S. C. 456; Sullivan v. Ellison, 20 S. C. 484; Ex parte Knobeloch, 26 S. C. 334, 2 S. E. 612; Jennings v. Parr, 51 S. C. 219, 28 S. E. 403.

For other cases, see Landlord and Tenant, Cent. Dig. § 1061; Dec. Dig. ⇐264.]

[*Statutes* ⇐140.]

[An act may be amended by an enactment that certain words shall be stricken out from the act amended.]

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 208; Dec. Dig. ⇐140.]

Before Aldrich, J., at Richland, June, 1878.

This was an action by Samuel W. Mobley, as trustee of Victoria Walker, against Jesse E. Dent, as Sheriff of Richland County, to recover damages for wrongful taking by the defendant from the possession of the plaintiff certain goods and chattels.

The facts were that the plaintiff was the landlord of one Catherine L. Koenig: that on the 29th day of January, 1878, the said Catherine L. Koenig was indebted to the plaintiff in the sum of $252 for rent in arrear; that the plaintiff procured a distress warrant for said rent and seized certain goods and chattels under the same, and that said goods and chattels were taken out of the possession of the plaintiff by the defendant. At the trial the defendant moved for a nonsuit on the ground that the remedy by distress for rent had not been restored by the Act of June 8th, 1878.—16 Stat., 264.

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*His Honor the presiding Judge overruled the motion.

The defendant excepted to the ruling, and, a verdict having been rendered for the plaintiff, the defendant appealed.

Lyles, for appellant:

I. Distress for rent in arrear was expressly abolished by two separate and distinct Acts of the Legislature, the first of which is found in 14 Stat., 106, and the second in Chap. LXXXIV, § 15, of Gen. Stat. Moreover, distress for rent, as it existed before the passage of the Act of 24th September, 1868, (14 Stat., 106,) was regulated and controlled exclusively by statute.—the English statutes, made of force and adopted by the Act of 1712, having superseded the common law upon the subject in every particular.

Chap. CXLVI, § 3, of General Statutes provides that "The repeal of the Acts and resolves, and parts of Acts and resolves, revised and re-enacted herein, or repugnant to the provisions hereof, shall not revive any law heretofore repealed or superseded nor any office heretofore abolished." Chapter CXLVII expressly repeals the Act of 1712 and every part thereof subject to the provisions of Chapter CXLVI.

II. "If a rule of law be altered by several statutes, a repeal of one Act or two, and not of all, does not revive the rule itself."—Potter's Dwarris on Stats., 159, citing The Bishop's case, 12 Rep., 7, and Tottle v. Greenwood, 4 Bing., 496.

III. The Act of June 8th, 1878, (16 Stat., 264,) does not repeal either of the Acts found in the General Statutes.

1. The latter Acts are not mentioned.—Potter's Dwarris on Stats., 113.

2. There is no general repealing clause.

3. There is no necessary implication of a repeal.

"A repeal by implication is not favored; the leaning of the court is against the doctrine, if it be possible, to reconcile the two Acts of the Legislature together."—Justice Swayne in McCool v. Smith, 1 Black, (U. S.,) 470; see also cases cited in Potter's Dwarris, 155 and 156.

"Where some of the provisions of an Act are void for unconstitutionality, a general

repealing clause does not repeal an Act which conflicts only with that part."—Horbeck v. Mayor, 10 Bosw., 366.

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*Therefore, on the 29th day of January, 1878, the right of distress for rent in arrear, through which alone the plaintiff could make out his case, if it existed at all, did not exist by virtue of a restoration of the common or statutory law upon the subject by the repeal of all subsequent Acts, but depended entirely upon the express enactment of the Act of June 8, 1878, seeking to restore the right affirmatively.

IV. The Act of June 8, 1878, except for the purpose of repealing Section 20 of the Act entitled "an Act to regulate attachments," was, in technical language, "broader than its title," and was in conflict with Section 20 of Article II of the State Constitution which is as follows, viz.: "Every Act or resolution having the force of law shall relate to but one subject, and that shall be expressed in its title."

This Court will always liberally construe the Constitution so as to give full force to its provisions, as was said in the case of Purdy v. The People, 4 Hill, N. Y., 418: "To maintain the Constitution is our first duty; and if the Legislature has for any cause encroached upon that sacred instrument, or if any erroneous construction has been given to it, we are imperatively called upon to declare its meaning and to assert its supremacy."

With a similar provision in the Constitution of the State of New York as to "private or local bills," their Courts have been exceedingly strict in restraining the Legislature within its provisions. Chief Justice Godwin, in the case of The Mayor, &c., v. Colgate, (2 Kern., 146,) says: "Now, it is notorious that the discrepancy between the headings and subjects of our laws were so frequent that a constitutional provision was deemed necessary to guard against any imposition upon a class of legislators whose knowledge of bills was supposed to be gathered principally from its title."—See also People v. O'Brien, 38 N. Y., 195; People v. Hills, 35 N. Y., 452; The People v. The Commissioners, &c., 53 Barb., 72; and Smith v. Mayor, 34 How., 508; see also the language of the Supreme Court of Michigan in the case of People v. Mahoney, 13 Mich., 491.

Who, from the title of this Act, would ever suppose that the Legislature intended to restore so harsh a remedy, which had been again and again condemned? They sought to do so by repealing the most obscure of all of the provisions upon the subject, covered up in an enactment upon an entirely different subject.

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*In the words of Chief Justice Davies in The Sun Mutual Insurance Company v. The Mayor, &c., 4 Seld., 259, "It would be impossible to devise a title more calculated to mislead or throw off suspicion or inquiry as to the real subject of the Act. To sanction such a procedure would be to override and nullify a clear, plain and mandatory provision of the Constitution."

Bachman & Youmans, Monteith, contra: The question is entirely one of law. Did the Circuit Judge err in refusing a nonsuit? If distress for non-payment of rent did not exist in this State, the Circuit Judge erred; if it did exist, the Circuit Judge was correct. It certainly existed until September 24, 1868. The 20th Section of an Act to regulate attachments, (14 Stat., 106,) "Distress for non-payment of rent, as heretofore existing, is abolished," is unconstitutional, because broader than its title.—Cons. of 1868, Art. II, § 20.

The same provisions in General Statutes (Chap. LXXXIV, § 15, p. 436,) has only the same force and validity as A. A. 1868, (14 Stat., p. 106, § 20,) and is the same. The side notes and references to the original text show this.—A. A. March 9, 1869, § 2; preface to Revised Statutes; Doyle v. Wisconsin, 4 Otto, 51. The A. A. June 8, 1877, settled beyond doubt the legislative intent to do away with said Section 20, and that such intent has been accomplished.

January 27, 1879. The opinion of the Court was delivered by

HASKELL, A. J. The question in this case is whether or not the remedy by distress for non-payment of rent has been restored by the Act of June 8, 1877, entitled "An Act to alter and repeal Section 20 of an Act entitled 'An Act to regulate attachments,' approved September 24, A. D. 1868, which enacts that the first ten words of Section 20 of an Act entitled 'An Act to regulate attachments,' approved September 24, A. D. 1868, be stricken out, and the rights and remedies in such cases existing before the passage of said Act are hereby restored." The said ten words of said Section 20 of the Act of 1868 are as follows: "Distress for nonpayment of rent, as heretofore existing, is abolished."—14 Stat. 106. If the entire Act of June, 1877, is valid, there is an end to the matter, for the Act contains not only the repeal of so

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much of *the Act of 1868 as abolishes the remedy by distress, but also positively re-enacts the law on that subject as it existed prior to the passage of said Act of September 24, 1868. What the law was prior to that time is not questioned. Whether or not Section 20 of the Act of 1868 was re-enacted or the Act of 1712 repealed in the General Statutes, February 10, 1872, is, therefore, wholly immaterial.

No practice is more common, however objectionable in some instances it may be considered, than the entitling of Acts passed for

the repeal or amendments of Acts or portions of Acts by reference merely to the title and Section of the Act repealed or amended, without referring more specifically to the subject or branch of the subject to which the subsequent Act relates. Indeed, in many cases the practice goes further, and not only entitles the Act by mere reference by its title to the Act amended or repealed, but proceeds to enact by striking out or adding, not sentences which might convey the meaning, but separate words, thus rendering it absolutely necessary to refer to the former Act, and that both be read together before the subject-matter or purpose of the subsequent Act can be ascertained. But this cannot be said to be in violation of that Section (20 of Art. II) of the Constitution which directs that the Act "shall relate to but one subject, and that shall be expressed in the title," for the subject of an Act to repeal or amend is the Act or portion of the Act repealed or amended, and reference to that Act is technical obedience to the Constitution. Not only is the former Act the subject of the succeeding Act which relates to it, but naturally and of necessity the subject of the prior Act becomes the subject of the latter Act.

The subject to which the first ten words of Section 20 of the Act of 1868 relates is "distress for non-payment of rent." The same becomes the subject of the Act of June, 1877, which is an Act "to alter and repeal" that portion of Section 20 of the Act of 1868. Of that subject alone the Act of 1877 disposes, and in so doing it enacts that "the rights and remedies in such cases existing before the passage of said Act are hereby restored." "Such cases" are the "cases" to which the first ten words of Section 20 of the Act of 1868 relate. Those words relate to all cases of non-payment of rent in which, prior to the Act of September 24, 1868, remedy by distress could be had. The Act of June, 1872, therefore, stands upon the same ground as if the subject "distress for rent" had been

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*named in terms in the title and the Act had proceeded to re-enact the law upon that subject as it had stood prior to September 24, 1868.

The re-enactment of the Act of 1868 in the Revised Statutes, even if it were taken in the light of an original Act, and the repeal of the Act of 1712, which made the remedy by distress of force in this State, are alike immaterial, for the reason that the one would be repealed and the other revived, by implication, by the Act of June, 1877. "Leges posteriores priores contrarias abrogant." "If two inconsistent Acts be passed at different times, the last, said the Master of the Rolls, is to be obeyed; and if obedience cannot be observed without derogating from the first, it is the first which must give way."—Sedgwick on Stat. and Con. Law, 125. An Act can always be made to revive a previously existing law by reference to the law as it stood at a certain time, and without recital declaring that that shall be the law. What was the law can be ascertained.

The Act of June, 1877, is, therefore, held to be of force, and the remedy by distress restored.

The judgment of the Circuit Court is affirmed.

Motion refused.

WILLARD, C. J., and McIVER, A. J., concurred.

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10 S. C. 476

LAMAR v. RAILROAD COMPANY.

(Columbia. Nov. Term, 1878.)

[*Damages* ⇐69; *Waters and Water Courses* ⇐178.]

The Court of Equity had jurisdiction of a bill by the owner of a dominant tenement to restrain the owner of the servient tenement, through whose lands a water course flowed, to compel defendant to remove obstructions which he had erected to the flow of the water, and to compensate the plaintiff for all damages which he had sustained on account of such obstruction, as well those which accrued before the filing of the bill as those which accrued afterwards; but he is not entitled to interest on the damages annually sustained by him.

[Ed. Note.—Cited in Bath South Carolina Paper Co. v. Langley, 23 S. C. 146; Bouland v. Carpin, 27 S. C. 239, 3 S. E. 219; Busby v. Mitchell, 29 S. C. 452, 7 S. E. 618; Ragsdale v. Southern Ry., 60 S. C. 391, 38 S. E. 609.

For other cases, see Damages, Cent. Dig. § 140; Dec. Dig. ⇐69; Waters and Water Courses, Cent. Dig. § 251; Dec. Dig. ⇐178.]

Before Aldrich, J., at Richland, August, 1878.

This was a bill in Equity, filed in 1866 by Robert G. Lamar, trustee of Mrs. Eliza Stark, wife of Theodore Stark, and others, against the Charlotte and South Carolina Railroad Company.

The case will be fully understood from the following reports of Referees, to whom the case was referred:

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*Report of Henry D. Lesesne, Special Referee:

This cause has been referred to me by order of the said Court in the following terms:

"It is ordered that the Hon. Henry D. Lesesne be appointed Special Referee in this case, and that his report be taken and deemed to be the decree of the Circuit Court, subject to be appealed from as in other cases; this order being made in accordance with the Act of Assembly in such case made and provided."

The bill of complaint alleges that the plaintiffs have been for a long time seized of a tract of land near the city of Columbia, known as Stark's farm, in which there is a valuable piece of low ground or meadow land which was well and sufficiently drained by a natural water course or "brooklet" into

Fisher's mill pond; that about the year 1848 the defendants constructed their road-bed and embankment on the said tract of land, and at the point where it crosses the water course built a culvert, as well for the security of the embankment as for the purpose of venting the water coming from above, so that the drainage of the said meadow land should not be obstructed; but that the floor of the culvert is higher than the level of the field, so that the water has been kept back, and the field ponded ever since the building of the road, and rendered valueless for agricultural purposes, whereas before the obstruction existed it yielded average crops of forty to fifty bushels of corn to the acre. The bill prays that the defendants be enjoined from continuing the obstruction complained of and compelled to remove the floor of the culvert and dig the passage under the embankment of sufficient depth to allow the water to flow freely so as to restore the proper drainage of the land; also that it be referred to the proper officer of the Court to inquire and report what damage has been suffered by the plaintiffs through the said obstruction and what compensation should be awarded to them therefor.

The answer sets forth that the defendants constructed their railroad from Charlotte, in North Carolina, to a point on the South Carolina Railroad a little below Columbia, by virtue of a charter granted by the State of South Carolina, contained in two Acts of the General Assembly, passed respectively on the 18th day of December, 1846, and the 19th day of December, 1848; that said charter gave them power to construct all works that might be deemed necessary for the proper comple-

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tion of the road, also to *use all land through which they might desire to conduct the same, with some restrictions, a limit as to the width of the land so used, and a proviso that dwelling houses, yards, gardens and graveyards should not be invaded, and, further, that if any land or right of way so required could not be obtained by agreement with the owners, the same might be taken at a valuation, to be made by five Commissioners, or a majority of them, to be appointed by a Court of the State having common law jurisdiction, the proceedings of the Commissioners, with a full description of the right of way, to be returned under the hands and seals of a majority of them to the Court, and be a record of the same,—the land or right of way so valued to vest in the company in fee simply on payment or tender of payment of the valuation. That the defendants found it necessary to lay out their road over the land of the plaintiffs, and at October Term, 1848, of the Court of Common Pleas for Richland District, Commissioners were duly appointed according to law, who at the same term of the Court made the valuation and assessed the damages sustained by the plaintiffs, allowing one hundred dollars per acre for eight acres of uplands and two hundred dollars per acre for two acres of meadow land, which sums were duly paid by the defendants, who thereupon commenced the construction of the road, and contracted with the Hon. Theodore Stark, one of the plaintiffs, to make the embankment over the said land, which was accordingly done by him. That the vent of the culvert, which was planned and constructed by some of the best engineers in the County, is greater than is necessary to discharge all of the water from the head of the valley in the heaviest rains; and no remonstrance was ever heard by defendants as to their work, although plaintiffs lived on the spot and were daily witnesses of the construction. That about eight years afterward a suit was commenced by them, but speedily abandoned, for damages caused by the obstruction now complained of, and from that time until just before the filing of the bill no pretense has ever been set up, or is by the bill, that the culvert is not of sufficient dimensions to discharge at all times all the waters of the valley; that the damage complained of is owing to plaintiffs' neglect to keep open the drains on the land intended to lead the water into the vent; that the writ issued to the Commissioners as aforesaid directed them in making the valuation to take into consideration the loss or damage which might occur to the owners in consequence of the land be-

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ing taken, or the right of *way surrendered, and, the sum awarded being more than twice the value of the land at the date of the return, they must have taken into consideration any damage that might arise from the embankment causing the drainage of the valley to be more difficult, so that plaintiffs were paid in advance for the very damage now complained of, if any such exist. And, lastly, the answer excepts to the jurisdiction of the Court as a court of equity, and submits that it is the proper function of a Court of law to abate nuisances and assess damages, and prays to have the benefit of this exception as fully as if the same were presented by plea or by demurrer.

The above, I think, will be found to be a fair and sufficient abstract of the pleadings, which are very complete and particular, and consequently quite voluminous.

It appears that, by a consent order made by ex-Chancellor Carroll in 1867, the late W. H. Talley had been appointed Special Referee to take testimony in the cause, Mr. D. B. DeSaussure, then Commissioner in Equity, being the husband of one of the parties interested in the cause; but this order was not brought to my notice at the hearing hereinafter mentioned; I learned it some time after from the Referee, who offered to send me the testimony taken by him. I declined to receive it, because it had not been introduced at the hearing.

The cause was heard before me, then one of the Chancellors of the State, at June Term,

1868, not long before my exclusion from office under the operation of the present State Constitution. I was unable to prepare by that time, in consequence of an immense pressure of business up to the last hour of my official existence, and repeated spells of ill health have also hindered me in the preparation of this report.

No testimony being before me, I must consider the questions involved and discussed with reference only to the case presented by the bill and answer.

The answer affirms that until just before the filing of the bill no pretense was ever set forth, "or is by the bill," that the culvert is not of sufficient dimensions to discharge at all times all the waters of the valley; but the bill in fact charges that the floor of the culvert is higher than the level of the field, so that the water has been kept back and the field ponded ever since the building of the road.

The answer excepts to the jurisdiction of the Court and prays to have the benefit of the exception as if it were presented by plea or

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*demurrer; but demurrer admits the allegations of the bill, and it is better for defendants to give them the benefit of their answer, as it denies plaintiffs' main allegation, to wit, the insufficiency of the culvert.

I will now consider the questions involved in the case thus presented, which are: whether a Court of Equity has jurisdiction in such a case; and, if so, what sort of relief, if any, the plaintiffs are entitled to.

1. Unquestionably if the grievance complained of were a mere trespass the law Court only could take cognizance of the case. But where the case is remediless by the mode of relief to which that Court is restricted, or attended with permanent results, destroying or materially altering the estate, the Court of Equity, with its peculiar power to give the exact relief called for, is the proper forum. Abundant authority might be adduced for this proposition, but as our own well-considered case of Bird v. The Wilmington and Manchester Railroad Company (8 Rich. Eq., 46 [64 Am. Dec. 739],) is precisely in point, I will do no more than refer to it.

2. If the improper construction of this culvert, with its floor higher than the level of the land above it, be in fact the cause of the insufficient drainage of the plaintiffs' land, (which drainage the defendants have no right to obstruct by their embankment,) the mischief is indeed without adequate remedy in the law Courts, and attended with permanent results, destroying or materially altering the plaintiffs' estate. The proper remedy for preventing future mischief would be abatement of its cause by a mandatory injunction, which the Court of Equity has the power to grant and enforce.—2 Story's Eq. Jur., §§ 926, 927; 2 Redfield on Railways, 358. And having thus obtained jurisdiction of the cause, that Court has also the power to give full relief and thereby prevent multiplicity of suits by ascertaining the damage, if any, to which the plaintiffs are entitled for loss already suffered, and enforcing their payment.

The answer makes this point, to wit: That inasmuch as the writ issued to the Commissioners to make a valuation of the lands of the plaintiffs directed them, in making such valuation, to take into consideration the loss or damage which might occur to the owners in consequence of the land being taken or the right of way surrendered, and the sum awarded (as the answer assumes) was more than twice the value of the land at the date of the return, they must have taken into considera-

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tion any damage that might arise from *the embankment causing the drainage of the valley to be more difficult, so that the plaintiffs were paid in advance the very damage now complained of, if any such exist. I do not think that the idea of such damage as that now complained of could have been in the minds of the Commissioners, because, obviously, with a sufficient culvert the drainage would be as free as before; and the answer insists that in fact "the vent of the culvert is far greater than is necessary to discharge all of the water from the head of the valley in the heaviest rains."—1 Red., p. 341, §§ 82 and 87.

Lastly, it was argued that the lapse of time before the commencement of this suit implies acquiescence in the alleged injury and bars the claim now made. It was well said in reply that such an injury is developed gradually; that the effect of the culvert could be learned only by experience; that its sufficiency might not have been subjected to an adequate test for a long time; and, moreover, that for more than four years before the commencement of the suit the country was in a state of war and the Courts closed. But it is held that mere delay will be no ground for refusing relief where the plaintiff's right is clear.—Hilliard on Injunctions, p. 26, § 44; 2 Redfield, p. 353, § 220.

My judgment is that a Special Referee ascertain by testimony to be taken by him, and report to this Court, whether the plaintiffs have suffered any and what amount of damages from the imperfect drainage of their land since the building of the railroad embankment across it; whether the same were owing to insufficiency of the culvert constructed by the defendants; whether it is practicable to construct a culvert which would afford free and adequate drainage of said lands, or so to reconstruct or alter the present one as to make it sufficient for the purpose, and the manner in which the construction of such new culvert or reconstruction or alteration of the present one should be made; the testimony taken by Mr. Talley to be adopted and used by the Referee in his investigation and report. And that upon the

coming in of the report such order be thereupon made as the Court shall deem proper.

Report of John T. Rhett, Special Referee:

Pursuant to the order of R. B. Carpenter, Judge of the Fifth Circuit, of date 2d March, 1877, ordering, among other things, me, as Special Referee, to "report whether the plain-

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tiffs have sustained *any and what amount of damages from the imperfect drainage of their land since the building of the railroad embankment over it; whether the same were owing to insufficiency of the culvert constructed by the defendant; whether it is practicable to construct a culvert which would afford free and adequate drainage of said lands, or so to construct and alter the present one as to make it sufficient for the purpose; and the manner in which the construction of such new culvert or reconstruction or alteration of the present one should be made," etc., I have taken the testimony herewith filed; have had read over the testimony heretofore taken in the cause; have, after careful examination of the plats submitted, in company with parties representing both plaintiffs and defendant, visited the lands in question and carefully inspected the same—the drains, culverts and railroad embankment—and have heard argument, on the part of the plaintiffs Messrs. Pope and Youmans, and on the part of the defendant Mr. Rion, and report as follows:

As to the first question submitted, to wit, whether any and what amount of damages have been sustained since the building of the railroad, I have, after most careful consideration and some doubt at first, come to the conviction that the case of the plaintiffs is made out as a matter of fact, and that they have been damaged by the imperfect drainage of their land, the result of the building of the embankment of the railroad, and that they are entitled to the amount hereinafter mentioned. To my mind, the testimony of the defendant, in large part that of experts who never saw the land until called upon to go there for the purpose of testifying, was totally insufficient to overthrow the positive and direct testimony on the part of the plaintiffs of parties who spoke from their own knowledge and experience of the very land in question. As to this point I am fully satisfied. But right here, in connection with the finding just made, as well as all the other findings to be made, I desire to state that I consider that as I, as Referee, have only to do with questions of fact and not at all with any questions of law that may have arisen, or appeared to have arisen, on the testimony and in the argument, I have not considered, therefore, the questions of the liability or non-liability of the railroad by reason of the water being surface water or not surface water, or whether the damages were included in the return of the Commissioners assessing the right of way, or any other point of law that did arise or may be raised on the testimony in the cause, but solely the

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naked, and, in *the order of reference, clearly-stated, questions of fact. As to this special finding, I will say that my own inspection not only did not increase my first doubt, but, in fact, tended to increase my conviction in the direction I have decided.

As to the second part of the first question submitted, to wit, what amount of damages are the plaintiffs entitled to, I must own that I have been exceedingly perplexed. It presented a question of far more difficulty to me than is contained in all the other questions submitted in the order. Although I have become convinced that the lands of the plaintiffs have been damaged by the imperfect drainage, and that that imperfect drainage is not the fault of the plaintiffs, as contended for on the part of the defendants, except in a very much less degree, as I will more particularly hereinafter refer to, but is the direct and unavoidable result of the construction of the railroad embankment, yet I find great difficulty in arriving at a proper measure for the damages to which, according to the view of the facts taken by me, the plaintiffs are justly entitled. I have not seen how I could take the measure claimed for the plaintiffs, even supposing the facts on which it is predicated were found to my entire satisfaction, which was by no means the case. Indeed, one view, as warmly urged by the plaintiffs, would give damages many times exceeding the fullest value of all the land claimed to have been affected. I have not been able to come to any such conclusion. To satisfy me on such a point, it would have been necessary to prove actual losses—that is, each separate crop planted, its cost and its loss, all together or in part. I will, then, first indicate the method by which I have measured the damages, and then give the amount. I do not find it possible for me even then to account for each separate dollar of that amount. I must even then find the damages somewhat in round numbers. I consider the value of the land claimed to be affected as fairly proved at three thousand dollars. I think that, in estimating damages, the plaintiffs are entitled to its full value at the time the right of way was purchased. I do not think I should go farther back than four years before the commencement of the suit, and that I should come up to the present time—that is, about sixteen years, from four years previous to filing of the bill (7th May, 1866,) to last of January, 1878. Did I believe that during all that time the land was made perfectly worthless, and that there was no fault whatever on that point to be attributed to them,

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the plaintiffs, I *would feel compelled to find their damages to be the amount of the

interest, at seven per cent., on the three thousand dollars, increased, possibly, by the unavoidable charges sustained by them, in spite of its total non-use or non-service. But from the testimony I am convinced that the land has been of some use to them,—parts of it, at least, for planting, pasturing and hay-making,—however. Although I have not been convinced, as claimed by the defendants, that the defective drainage is altogether the fault of the cultivators of the land, their imperfect system of drainage and neglect of keeping the ditches in perfect condition,—on the contrary, believe that no change of system nor attention would perfectly drain the land or the larger part of it so long as the railroad embankment and culvert stand as they do now and have stood,—yet I do feel sure that had the main drain in the upper part of the tract been carried down near the Western side, along the natural bottom of the valley, instead of across to the Eastern side, and the sharp angles in said main ditch truncated and proper side ditches dug, some portion of the tract, though not a very large part, could have been kept in good condition. The natural fall is sufficient to drain a portion of the upper part of the tract had it been treated as I have indicated and as suggested in the testimony of the engineers, in spite of the great obstruction below. It is just here that I find my greatest difficulty in estimating the damages. I find it difficult, almost impossible, to exactly estimate the value the land has been actually to the plaintiffs in its present condition; and I find the same when I come to consider what quantity of the land might have been saved by proper construction of drains and proper keeping them open. I do not, however, consider that in either case the estimate should be large nor the deduction very large that I feel should be made on the amount of damages awarded by me. I feel it necessary, therefore, after giving the method I have followed to find the damages, and the reasons why the full amount that would be given in a certain condition of the case should be subject to some deductions,—I feel it necessary, for the reasons given, to deal in round numbers. The amount which, to my mind, fully represents the damages of the plaintiffs is twenty-two hundred and fifty dollars ($2,250,) and I so find.

The next question—"whether the same were owing to insufficiency of the culvert constructed by the defendant"—must necessarily have been much considered in deciding

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the questions of fact *just hereinbefore made. As to the upper culvert in the railroad bank, it appears to me perfectly clear that it never has had, nor could have, in its present construction, any bad effect on the drainage of the place. The claim that it should be constructed diagonally, and so as thereby to bring the water fast on the land, appears to me unreasonable, and such a construction absolutely unnecessary. It is large enough for all purposes, high enough and low enough, and properly constructed in every way. I find, therefore, that the upper culvert in no way impairs or interferes with the drainage of the place. As to the lower culvert, after a careful consideration of all the testimony, I find that it is really the cause of all the trouble. It is large enough—that is, high enough and broad enough, but its bottom or flooring is too high. This is the main cause—almost the whole cause—of the imperfect drainage of the place; and, in my opinion, the land, or at least by far the larger part of it, will always be of comparatively little value, a good deal absolutely worthless, so long as the lower culvert remains in its present condition. I am convinced that the floor of that culvert is above the natural bed of the stream, and that it should have been made lower than that natural bed, inasmuch as after the construction of the embankment that culvert had to do the work of three ditches, two of which the railroad embankment stopped up. The fall below the culvert is considerable, amounting to four feet below the mouth [lower] in a short distance. Had the flooring of the culvert been made from four to five feet lower than it is now, I feel convinced, from the testimony, that the drainage would have been as perfect as before the railroad was constructed. I find, therefore, as matter of fact, that the damages sustained by the plaintiffs were owing to the insufficiency of the culvert constructed by the defendants at that point where the stream leaves the plaintiffs' land.

The next question submitted is: "Whether it is practicable to construct a culvert which would afford free and adequate drainage of said land." As to this, it appears to me a matter of no doubt whatsoever that a culvert can be so constructed, and I do so find as matter of fact; but from the view indicated by me before, and now specifically decided in the next question submitted, I see no necessity for constructing a new culvert. It would be a useless expense, and not necessary to the perfect enjoyment of plaintiffs' rights.

As to the remaining questions—whether it is practicable to "so reconstruct and alter the present one [culvert] as to make it suffi-

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*cient for the purpose, and the manner in which the construction of such new culvert or reconstruction or alteration of the present one should be made,"—I have necessarily, in deciding the other matters of fact, been obliged to indicate my decision as to them. As I have just said, I think a new culvert, similar in size to the present culvert, could be constructed, with its floor much lower, at a point in the embankment somewhat higher up the railroad, say about half way be-

tween the present culvert and the opposite side of the valley, which would perfectly drain the place. But, as I have said, I see no necessity for it, for the present culvert, at the outflow of the water, can be so altered as to make it in every way sufficient for the purposes of draining. It was contended by the plaintiffs that this could not be effected without changing the direction of the culvert so as to make it cross diagonally the railroad. I can see no reason why such a change should be made, or even why it should have so been constructed in the first instance. The culvert is large enough to carry off many times the water that ever flows through it, and the stream is of no such dimensions nor rapidity as to require a straight course. Were the culvert, as to its depth, properly constructed, I feel sure, from the testimony, that it would easily flow without any rise on account of the fact that it bends in flowing into it. I find, therefore, as a matter of fact, that the present culvert can be made sufficient for all purposes; and the manner in which that alteration, deemed necessary, should be, is that the flooring of said culvert should be lowered at least four feet, and, if it be possible, (and I see no reason, from the testimony, why it should not be possible,) five feet, along its whole length and breadth.

To recapitulate: I find, as matters of fact, that the plaintiffs have sustained damages to the amount of ($2,250) two thousand two hundred and fifty dollars, from the imperfect drainage of their land, since the building of the railroad embankment across it. I find that the same was owing to insufficiency of the lower culvert constructed by the defendants; that it is practicable to construct a culvert which would afford free and adequate drainage of said lands, or so to reconstruct and alter the present one the [lower] as to make it sufficient for the purpose. And I find that the manner in which to construct a new culvert is to build it like the present one, with its floor much lower, say from four to five feet, or to reconstruct and alter the present one by lowering the floor

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along *its whole length and breadth at least four feet, and, if it be possible, five feet.

Defendant's Exceptions to Referee's Report:

1. For that the said Referee found that the plaintiffs had been damaged by the improper structure of the lower culvert by the defendants.

2. For that the said Referee did not find that the defective drainage of plaintiffs' lands was owing to their own bad management and neglect.

3. For that the said Referee did not find that the plaintiffs were not entitled to receive damages from the defendants on account of the defective drainage of plaintiffs' lands being caused in part by the bad management and neglect of the plaintiffs.

4. For that the said Referee found that the whole thirty acres of plaintiffs' land was damaged by the improper structure of the lower culvert, when it was found that the elevation of the upper and more remote part of said thirty acres, above the floor of said culvert, was too great for its defective drainage to be attributed to the height of said floor.

5. For that the said Referee found damages excessive in amount.

6. For that the said Referee found damages from four years before the commencement of plaintiffs' suit up to the last day of January, 1878, i. e., for sixteen years.

7. For that the said Referee assessed any damages sustained by the plaintiffs by reason of the defective drainage of the land after 7th May, 1866, the date of the filing of plaintiffs' bill.

Opinion of His Honor the Circuit Judge:

Aldrich, J. I was seduced into the hearing of this cause by my plausible friends, Mr. Fickling and Mr. Pope, who represented to me that it was a short matter, coming up on exceptions to a Referee's report. Having consented that Mr. Rion should be summoned from Winnsboro, I would not retract, although I had been steadily worked for six weeks, with the thermometer in the nineties. It is no better now, but unless I file my judgment there will be no time to consider the case until after my Fall Circuit. Let me hope that my old friends will be satisfied with this proof of my amiability and not put me to such a test again, at least in the Summer time.

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*The bill was filed 7th May, 1866; several references have been had and reports made. It now comes up on exceptions to the report of Mr. John T. Rhett, to whom it was last referred by order of Judge Carpenter, dated 2d May, 1877. I have waded through the mass of testimony, and if Mr. Rhett, an educated gentleman and experienced lawyer, who had the advantage of examining the witnesses, and also of a personal inspection of the locus in quo, found it difficult to come to a conclusion on the facts, how can it be expected that I will be able to render a more satisfactory judgment on the mere reading of the evidence? Both parties to the action except to his findings of fact, which goes to prove the wisdom of the rule, of universal application, that where Judge, jury or Referee find the facts the appellate tribunal will not interfere unless the finding is not in conformity with the proof. Besides, after a careful examination of the testimony, I do not see what better rule could have been adopted to ascertain the damages than the one recited by Mr. Rhett. It is manifest

that he could not have estimated the damages sustained each year by the loss or deterioration of crops, for that would have led him into the field of speculation without sufficient data on which to form a correct opinion; he would have had to take into consideration not only the seasons, the mode of culture, and all the accidents and contingencies to which a crop is subject, but also the skill of the planter, which no man of ordinary sagacity would attempt. I see no reason to interfere with his findings of fact. On the part of the defendants, the railroad company, it is contended that the plaintiffs can only claim damages for the years preceding the commencement of the suit, and that no damages can be awarded after that. The proposition is that the plaintiffs' action is "for a private nuisance, not a public nuisance nor a trespass, hence can only recover damages for the four years prior to the action brought." This position was maintained by Mr. Rion with his usual clearness and force, supported by reference to high authority. But, after reflection and careful consideration of the authorities, I confess I do not see the force of the position; it certainly is not the rule that has heretofore obtained in this State. Here is a case in possession of the Court, on the equity side. All the parties in interest are before it; the litigation has extended over twelve years; the evidence has been carefully taken and submitted. Why not decide it? Why send it back to be tried again, between the same parties, on the same evidence, and upon the

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iden*tical questions of law and fact? It appears to me not only a useless expense, but a violation of one of the cardinal rules of the Court of Equity: to prevent a multiplicity of suits. If the Court is satisfied that these plaintiffs have the right to recover, it would be hard, after twelve years waiting, to subject them to further delay. Nor do I think, from our new cases, that this is the rule in South Carolina. In our old actions of trespass to try title, in the law Court, the damages were always assessed up to the day of trial; and so, in suits where the lands of the riparian proprietor above were overflowed, by an obstruction erected by the proprietor below, the damages are assessed up to the rendition of the verdict. I cannot, for the life of me, see the difference between a nuisance and a trespass, where both are continuing,—why a different rule should prevail in assessing damages. It appears to me to be a mere technical distinction, not founded in reason, and not calculated to advance the ends of justice. Nothing can be gained if this Court refuses to assess the damages beyond 1866, when this bill was filed. It will be forcing another suit on the same cause of action, between the same parties, and on the same evidence, the single result of which will be to extend the delay and increase the expense. It seems to me impossible for any such rule to be adopted by a Court having a just regard for the rights of suitors.

The plaintiffs except that the damages should have been measured by the annual amount of damage allowed by the Referee, together with the interest accruing thereon to the date of the report. I have already shown how difficult it would be to adopt a more satisfactory measure of damage than the one I have approved. The Referee examined the witnesses, inspected the land, saw the condition of things as they have existed from the erection of the embankment to the day of his survey. After weighing all the facts and carefully and intelligently considering the same, he has come to a conclusion which is satisfactory to me. I will not disturb it.

It is ordered and adjudged that the exceptions of the plaintiffs and defendants be overruled and the report of the Referee, Mr. Rhett, be confirmed and made the judgment of the Court.

Exceptions of Defendant to His Honor's Judgment:

I. For that His Honor overruled the defendant's first exception to the report of the Referee herein, John T. Rhett, Esq., whereas he should have sustained said exception.

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*II. For that His Honor overruled the defendant's second exception to the report of the said Referee herein, whereas he should have sustained said exception.

III. For that His Honor overruled the defendant's third exception to the report of the said Referee herein, whereas he should have sustained said exception.

IV. For that His Honor overruled the defendant's fourth exception to the report of the said Referee herein, whereas he should have sustained said exception.

V. For that His Honor overruled the defendant's fifth exception to the report of the said Referee herein, whereas he should have sustained said exception.

VI. For that His Honor overruled the defendant's sixth exception to the report of the said Referee herein, whereas he should have sustained said exception.

VII. For that His Honor overruled the defendant's seventh exception to the report of the said Referee herein, whereas he should have sustained said exception.

Exception of Plaintiffs:

For that His Honor erred in not sustaining the third exception of the plaintiffs to the report of John T. Rhett, Esq., the Referee herein, which exception was in words following, to wit: "Because the Referee should have allowed interest on the annual damage as estimated by him."

Both parties appealed.

Fickling & Pope, for plaintiffs.
Rion, contra.

February 20, 1879. The opinion of the Court was delivered by

WILLARD, C. J. The grounds of appeal are the refusal of the Circuit Judge to sustain the exceptions to the Referee's report on the amount of damages sustained by the plaintiff. The bill alleges that the defendants, in the course of constructing their railroad over lands adjoining the plaintiff's land, had caused an obstruction to a natural water course, by which the water accumulating on plaintiff's land had been used to discharge itself, to plaintiff's damage. When the lands of one proprietor are drained by a natural

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*water course continuing over the land of an adjoining owner, the proprietary right of such adjoining owner is subject to a servitude to suffer such drainage to continue, whether the flow of water is continuous or intermittent.—Master v. Riddle, 26 Penn., 415, note; Earl v. DeHast, 1 Beasley, (N. J.,) 280. When by misuse of the servient premises, contrary to such servitude, damage is sustained by the dominant premises, in the nature of a private nuisance, the owner of the last named premises is entitled to a remedy in equity by injunction and order of abatement, and equity obtaining jurisdiction for that purpose will hold the bill for compensating damages sustained by the plaintiff, in order that full justice may be done and resort to a Court of law rendered unnecessary.—Earl v. DeHast, 1 Beasley, 280; Bird v. Railroad, 8 Rich. Eq., 46 [64 Am. Dec. 739]; Hammond v. Fuller, 1 Paige Ch., 197; Van Buren v. Van Buren, 2 Johns. Ch., 272. In the present case the facts entitling the plaintiff to a decree are clearly established, and it only remains to be considered whether the Referee has erred in his finding as to the amount of damage. The report of the Referee must be taken as true in point of fact, inasmuch as the testimony taken before him, if any was so taken, is not set out in the brief. Whatever conclusion of fact was reached by personal inspection on the part of the Referee must be regarded as conclusive in the absence of any objection to that mode of ascertaining the facts. Assuming the truth of the facts stated by the Referee, it is clear that the failure of the defendants to place the floor of their culvert at or below the bottom of the water course was sufficient ground for charging the defendants with all actual damage sustained by the plaintiff by reason of such improper construction.

The objection that the Referee did not allow to the defendants the benefit to which they were entitled from the fact that the injury sustained to plaintiff's premises was in part due to neglect on his part to keep the ditches on his land in good condition, is not well founded. The Referee appears to have allowed force to such fact in settling the amount of damage, distinguishing that due to the misconduct of defendants. As the amount of damage found was a gross sum, we cannot say, as appellant alleged, that the Referee arrived at that amount by ascertaining an estimated sum per acre and multiplying that sum by the whole number of acres, and, therefore, the objections stated to the application of that method is inapplicable to the case. There is nothing in the

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mode of computing *the damages stated in the report that would justify our setting it aside. We have no means of determining that the damages found by the Referee are excessive, and the concurrence of the Circuit Judge with the Referee leads to the opposite inference. It was proper for the Referee to find damages for the whole period during which the suit was undergoing prosecution. A bill of this kind is in the nature of quia timet. The direct ground of jurisdiction is future, not past damage, thus constituting a material difference between the legal and equitable remedies in such cases. The ascertainment of past damages is incidental merely. The future damage contemplated by the bill is that arising at any time after the filing of the bill. Thus damage done during the pendency of the suit is within the principle on which the jurisdiction rests, and this appears by the fact that the Court may guard against such intermediate damages by injunction in cases that admitted of that remedy. To affirm that the Court may not compensate for that which it has a right to prevent, is inconsistent. The fact that in the present case the only mode of arresting the damage is abatement, and cannot be accomplished by an injunction, does not affect the question of jurisdiction as it regards damages. The nature and consequences of the jurisdiction are the same, whether the case calls for an injunction or a decree of abatement. To turn the plaintiff out of Court to find compensation for damages, pendente lite, at law, would be contrary to all the principles of equity. Such Courts often assume jurisdiction to prevent a multiplicity of suits, but none decline a jurisdiction clearly their own for the sake of multiplying remedies.

Under this view, it is not necessary to inquire whether the Code, adopted since the commencement of this suit, has worked any changes in the scope of the issues. The foregoing disposes of all of defendants' grounds of appeal. The plaintiff demands that interest should have been to the amount of damage found. There is no ground on which this could be done. Interest is in the nature of damages for the detention of money and is never allowed in unliquidated damages.—Ancrum v. Slone, 2 Speers, 594. Nor

can damages found as matter of fact be regarded as liquidated from the time of such finding. When the damages are included in a judgment, they are merged in an obligation of record that is certain as to the amount and time of payment, and upon such an obligation interest runs.

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*The plaintiff's appeal must be dismissed. The appeal of the defendants must also be dismissed and the decree of the Circuit Court affirmed.

McIVER, A. J., and HASKELL, A. J., concurred.

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10 S. C. 493

BARDIN v. DRAFTS.

(Columbia. Nov. Term, 1878.)

[*Replevin* ⇐93.]

In an action for the recovery of personal property, where the plaintiff takes possession by proceedings for "claim and delivery," (Code, § 229,) it is competent for the jury to find a verdict "for the return of the property or $507.95," such verdict being an alternative one for the return of the property or for $507.95, the value thereof.

[Ed. Note.—Cited in Richey & Miller v. Du Pre, 20 S. C. 9; Finley v. Cudd, 42 S. C. 127, 20 S. E. 32; Bossard v. Vaughn, 68 S. C. 98, 46 S. E. 523.

For other cases, see Replevin, Cent. Dig. § 366; Dec. Dig. ⇐93.]

[*Appeal and Error* ⇐842.]

The Court cannot consider a ground of appeal that a verdict for the value of property was not conformable to the evidence, there being no question of law involved in such ground.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3316–3330; Dec. Dig. ⇐ 842.]

[*Appeal and Error* ⇐1034.]

An objection that the verdict was not endorsed on the complaint is no ground for an appeal from the judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4066; Dec. Dig. ⇐1034.]

[*Appeal and Error* ⇐930.]

[Cited in Parish v. Smith, 66 S. C. 432, 45 S. E. 16; Phœnix Furniture Co. v. Jaudon, 75 S. C. 230, 231, 55 S. E. 308; Murdoch v. Tuten, 76 S. C. 505, 57 S. E. 547, to the point that every reasonable presumption must be made in favor of the verdict.]

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3755–3761; Dec. Dig. ⇐ 930.]

Before Pressley, J., at Lexington, September Term, 1878.

This was an action by Isaac V. Bardin against Samuel P. Drafts, as Sheriff of Lexington County, for the recovery of personal property which the defendant had seized as the property of Elkins and Bardin under process against them.

The plaintiff executed the proper undertaking with sureties, and thereupon the Coroner received the property from the defendant and delivered it to the plaintiff.

The defendant by his answer denied that the plaintiff was the owner of the property and demanded a return of the property or its value, which he alleged to be $3,000.

The jury found the following verdict: "We find for the defendant the return of the property or $507.95."

The plaintiff appealed on the following grounds:

1. Because the verdict of the jury is not in accordance with the law, in this: that the jury by their verdict have not assessed the value of the property in dispute.

2. Because, in actions of this kind, the finding of the jury can only be, if for the plaintiff, for the recovery of the possession, or, if this cannot be had, then the value of

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the property, with damages *for detention; or if they find for the defendant, it must be for a return of the property, or the value in case return cannot be had, and damages for withholding the same.

3. Because the title to the property is not settled by the jury. The proof is that the property is worth $1,500, while the verdict of the jury is: "We find for the defendant the return of the property or $507.95. Signed, O. C. Able, Foreman."

4. That the verdict is endorsed on the summons in the action and not in the complaint.

5. And, failing in this and on a new trial, because the verdict is contrary to the law and the evidence adduced.

Meetze, Mordecai, for appellant.

1. That the verdict of the jury is not in accordance with the law, in this: "that the jury have not, by their verdict, assessed the value of the property in dispute."

2. That in actions of this kind the finding of the jury can only be, if for the plaintiff, for the recovery of the possession, or, if this cannot be had, then the value of the property, with damages for retention; or, if they find for the defendant, it must be for a return of the property, or the value in case a return cannot be had, and damages for withholding the same.

The Code, Section 285, requires:

"In an action for the recovery of specific personal property, if the property have not been delivered to the plaintiff, or if it have, and the defendant, by his answer, claim a return thereof, the jury shall assess the value of the property if their verdict be in favor of the plaintiff or if they find in favor of the defendant and that he is entitled to a return thereof, and may at the same time assess the damages, if any are claimed in the complaint or answer, which the prevailing party has sustained by reason of the detention or taking and withholding such property."—Vide Wait's Prac., Vol. III, p. 192.

This question has been fully considered by the Supreme Court of New York, in the case of Glann v. Younglove, (27 Barb., 481,) where

Welles, J., delivering the opinion of the Court, says: "The jury should have found for the defendant generally, and have assessed the value of the property, together with the damages for the taking and withholding thereof. It was the right of the

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plaintiff to *return the property, instead of paying the value of it, which could only be required in case a return could not be had, and it was the right of the plaintiff to have the damages for the taking and withholding of the property assessed."

New trial ordered. Here the principle is distinctly laid down, that the jury must assess the value of the property; and, having assessed the value, as well as the damages for the wrongful withholding, their verdict, if for the defendant, must be for the return of the property, and if a return cannot be had, then for so many dollars, the value of the property as assessed by the jury, with so many dollars' damages. In the present case, the proof was that the property was worth fifteen hundred dollars. The jury have neither assessed the value of the property nor damages. His Honor the Circuit Judge, in charging the jury, expressly directed that in case they "found for the defendant," their verdict should be for a return of the said property to the defendant or its value. The verdict does not assess the value, nor is it in accordance with the law as laid down in the books. The case of Glann v. Younglove, before referred to, so completely expounds the law on this subject that we deem further citation of authority unnecessary.

The Court below says: "I regard it as a special verdict suited to the circumstances of the case." The Court instructed the jury that their verdict, if for the defendant, should be for a "return of the property, or its value, as assessed by them." They violated this charge. The verdict is not special, for it does not find all the facts which are requisite to enable the Court to say upon the pleadings and verdict, without looking into the evidence, which party is by law entitled to judgment.—Eisemann v. Swan, 6 Bosw., 668; 3 Wait's Prac., 196.

Where there is a special verdict, no fact not stated in it can be inferred from the facts found.—Allan v. Tyler, 6 Rich., 57.

The assessed value of the property is not given.—Vide also 1 Tiffany & Smith, 566.

2. The appellant submits that there is no law requiring bills of sale of personalty to be proved or recorded, as charged by His Honor the Circuit Judge.

Arthur, contra:

The respondent submits that the appeal cannot be sustained:

1. Because there were no exceptions taken to the rulings of His Honor the presiding Judge on the trial, nor to any points in his

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*charge, and, therefore, they have brought up properly no points of law for the decision of this honorable Court.—Floyd, Administrator, v. Abney et al., 1 S. C., 114; State v. Bailey, id. 1; Winsmith v. Walker, 5 S. C., 473.

2. Because when an appeal is taken from the decision of the Judge, on a motion for new trial, a case or exceptions should be settled in the usual form.—§ 288 of Code, last clause. This has not been done in this case, but it is brought up on the original grounds and subject to the objection above stated.

Apart from the general grounds, the respondent further submits:

1. That the first ground of appeal is not sustained by the authorities in cases of this nature. There might be some force in the ground if this were a general verdict; but it is not so. On the contrary, it is a special verdict, found by the jury under the express directions of the Judge. His right to authorize such a verdict is given in the latter part of Section 285 of the Code: "In every action for the recovery of money only or specific real property, the jury, in their discretion, may render a general or special verdict. In all other cases the Court may direct the jury to find a special verdict in writing upon any or all of the issues; and in all cases may instruct them, if they render a general verdict, to find upon particular questions of fact, to be stated in writing, and may direct a written finding thereon." The value of the property was not brought in issue, and hence the case cited from 6 Rich., 57, (Allen v. Folger) is not in point. The main issue in that case was to "try title," and the jury should have found in whom the title really was. But if the objection has any weight, it is fully removed by the decision in Massey v. Duren, 7 S. C., 310. A special verdict need not find facts admitted by the pleadings.—Barto v. Himrod, 8 N. Y., (4 Seld.,) 483.

2. The second ground is really embraced in the first, and is fully disposed of by Section 285 of the Code granting power to the Court to order a special verdict. And, further, in construing a "special verdict," the Court will keep in mind the issues made by the pleadings.—McCarty v. Hudson, 24 Wend., 291; Richmond v. Tallmadge, 16 Johns., 307, as quoted in 3 Wait's Practice.

3. The third ground of appeal is not insisted on in the argument, and has no force, because the question is directly settled by the finding of the jury for the defendant, to the extent of his claim, to wit, the amount of the executions and costs in his office as Sheriff.

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*4. The fourth ground can have no weight with the Court, because that amendment to the Code, embraced in Section 21, is a special provision respecting the obtaining judgments by default, and has no bearing on the case before the Court.—A. A. 1873-74, p. 502.

5. The fifth ground has already been dis-

posed of as fully as deemed necessary.—Vide last clause of Judge Pressley's decree.

February 20, 1879. The opinion of the Court was delivered by

WILLARD, C. J. The first question is whether in an action for the recovery of personal property, where the plaintiff takes possession of the property in suit, by proceedings for "claim and delivery," (Code, § 229,) it is competent for the jury to find as follows: "We find for the defendant the return of the property or $507.95." The jury having found for the defendant and the property having been taken by the plaintiff under the preliminary proceedings, it was their duty to assess its value and to assess the damages, if any were claimed in the answer, which the defendant had sustained by the taking of the property under the preliminary proceedings or its detention. As the plaintiff is the appellant he cannot object that the jury have not assessed damages for the taking and detention by him.

The question here is not as to the sufficiency of the verdict in point of form, but whether it is a substantial compliance with the requirements of Section 285 of the Code of Procedure. Informalities of procedure cannot be the subject of appeal to this Court, unless they are of such a nature as to involve substantial injury to the rights of parties."—Blakely v. Frazier, [11 S. C. 122.]

The question, then, is whether "the return of the property or $507.95" can properly be understood as intending that sum as the value of the property. It can be construed in no other sense. The payment is wholly conditional upon the non-return of the property, and, therefore, cannot be taken to include damages for the taking and detention, for a claim to such damages would be independent of whether the property was returned in specie or its equivalent in money paid. Every reasonable presumption must be made in favor of the verdict, and that would render it necessary to construe it as conformable to the requirements of the law where

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such construction *is possible. We consider that the jury have found the value of the property, and, therefore, the first ground of appeal is insufficient.

The second ground of appeal is merely an amplification of the first and is already disposed of.

The third ground of appeal is based on an alleged difference between the testimony as to the value of the property and the sum of $507.95 placed in the verdict. If the jury reduced the value of the property below what the testimony warranted, that fact could not prejudice the plaintiff; but, independently of that fact, it could not, under the circumstances, give rise to any question that can be considered by this Court. It would only raise a question of the conformity of the verdict to the evidence, and in an action in the nature of an action at law that objection could not be entertained in this Court, as not involving error of law.

The objection that the verdict was not endorsed on the complaint is not valid. There is no direction in the Code on this subject, and, even if it was clearly informal, such informality, involving no substantial injury, could not be considered on appeal in this Court.

The objection to the rulings of the Circuit Court are met by the statements of the Circuit Judge that no exception to rulings were taken at the time.

The appeal must be dismissed.

McIVER, A. J., and HASKELL, A. J., concurred.

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10 S. C. 498

POTTS v. BONDS.

(Columbia. Nov. Term, 1878.)

[*Appeal and Error* ⇨706.]

An order granting a new trial, on the ground that the verdict is unsupported by or contrary to the evidence, cannot be reversed on an allegation that such conclusion was erroneous.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2947; Dec. Dig. ⇨706.]

Before Mackey, J., at Lancaster, August Term, 1877.

Two actions by Louisa A. Potts against William Bonds on two sealed notes.

The defendant pleaded in each case a receipt in full and also a counter claim. The jury found for the plaintiff in both cases, and the defendant moved for a new trial, and, in support of the motion, relied upon affidavits of newly-discovered evidence.

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*His Honor made an order that the motion be granted and that the verdict of the jury be set aside.

The plaintiff appealed, on the ground that the affidavits upon which the order was granted disclosed no sufficient ground to entitle the defendant to a new trial.

De Pass & Jones, for appellant.

Clark, Allison & Connors, contra.

February 20, 1879. The opinion of the Court was delivered by

WILLARD, C. J. The order appealed from granted a new trial. We cannot assume from the statements of the brief, or the terms of the order, that the decision of the Circuit Court was based upon the affidavits relating to newly-discovered evidence alone. It was competent for the Circuit Judge to grant a new trial on the ground that the verdict was unsupported by the evidence or clearly contrary to it. Looking at the evidence, we

see ground sufficient to exclude from our minds the conclusion that the Circuit Judge confined his attention exclusively to the question of granting a new trial on the ground of newly-discovered evidence. As the Circuit Judge had fully before him the question whether the verdict was consistent with the evidence, and as his order granting a new trial was general, we cannot say that he necessarily erred, even if allowing a new trial on the ground of newly-discovered evidence upon the affidavits before him would have been erroneous. An order granting a new trial on the ground that the verdict is unsupported by or contrary to the evidence cannot be reversed in this Court in an allegation that such conclusion was erroneous. Had a new trial been refused on such grounds we could not review such refusal, as we have frequently said, because such a question does not properly involve error of law. The nature of the question is unchanged where it comes up on an appeal from an order granting a new trial. We are equally excluded in both cases from determining the convincing force of the evidence. The motion must be denied and judgment absolute given for the defendants under the stipulation to that effect in the notice of appeal.

McIVER, A. J., and HASKELL, A. J., concurred.

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10 S. C. *500

*STATE v. WHALEY.

(Columbia. Nov. Term, 1878.)

[*Slaves* ⇐=25.]

Where two slaves contracted in form the relation of husband and wife before emancipation, and were living together at the time of the passage of the Act of 1865, they must be regarded in law as husband and wife.

[Ed. Note.—Cited in Myers v. Ham, 20 S. C. 527; Clement v. Riley, 33 S. C. 80, 11 S. E. 699; Knox v. Moore, 41 S. C. 361, 19 S. E. 683; Watson v. Ellerbe, 77 S. C. 234, 57 S. E. 855.

For other cases, see Slaves, Cent. Dig. § 114; Dec. Dig. ⇐=25.]

[*Bigamy* ⇐=11.]

Where a party has contracted a valid marriage and then marries a second time, his cohabitation and acknowledgment of the marriage relation between him and the second wife is not evidence of the validity of the second marriage.

[Ed. Note.—Cited in Clement v. Riley, 33 S. C. 82, 11 S. E. 699; Davis v. Whitlock, 90 S. C. 248, 73 S. E. 171, Ann. Cas. 1913D, 538.

For other cases, see Bigamy, Cent Dig. § 51; Dec. Dig. ⇐=11.]

Before Shaw, J., at Richland, April Term, 1878.

This was an indictment for bigamy against Nathan Whaley for marrying one Charity Collins when Betsy Moore, alleged to be the wife of the defendant, was still living.

The evidence was to the effect that the defendant, a man of color, was a slave, and that some time before emancipation took place he went through the form of marriage with one Pleasants, also a slave; that they cohabited together as husband and wife from the time of their marriage until emancipation and had children, and that for a year or eighteen months thereafter they still cohabited as man and wife; that during the life of Pleasants he married one Betsy Moore, but that after the death of Pleasants, and in August, 1873, he married Charity Collins.

His Honor the presiding Judge instructed the jury as follows:

1. "That the marriage between defendant and Pleasants whilst slaves, however formally celebrated in faciæ ecclesiæ, was legally invalid, and that mere cohabitation after their emancipation would not, without proof of recognition on their part of the marital relation, validate the prior invalid marriage.

2. "That the legal marriage between defendant and Pleasants being once established it continued until her death, (there being no allegation of divorce,) and that the marriage of defendant with Betsy during the lifetime of Pleasants was invalid.

3. "But assuming Pleasants to have been his legal wife, if, after her death, defendant acknowledged the second marriage to Betsy, and recognized her as his legal wife, that this, at common law, would constitute such a marriage as would make the third marriage to Charity bigamous.

4. "That if Pleasants was not his legal wife, defendant's marriage to Betsy (if proved to the satisfaction of the jury) was a valid one, *and any marriage he may have subsequently contracted with Charity, in the lifetime of Betsy, was bigamous."

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The defendant excepted to the charge.

The jury, thereupon, on the 7th day of April, 1878, found the defendant guilty, and he appealed.

Pope & Haskell, for appellant.

Abney, Solicitor, Muller, contra.

March 3, 1879. The opinion of the Court was delivered by

WILLARD, C. J. The defendant was convicted upon an indictment for bigamy, alleging that "he feloniously did marry one Charity Collins, the said Betsy Moore, his former wife, being then alive." To establish the offense, it was necessary to prove that defendant had been previously married to Betsy Moore. To resist this, conclusive proof was offered to show that previous to the alleged marriage with Betsy Moore the defendant was lawfully married to a woman by the name of Pleasants. It was in evidence that such marriage with Pleasants was celebrated in form while the parties were both slaves and with the consent of their respective mas-

ters. The Circuit Judge charged "that the marriage between defendant and Pleasants whilst slaves, however formally celebrated in faciæ ecclesiæ, was legally invalid, and that mere cohabitation after emancipation would not, without proof on their part of the marital relation, validate the prior invalid marriage." This charge is clearly inconsistent with the recent decision of this Court in Davenport v. Caldwell, 10 S. C., [317]. The fact that at the date of the passage of the Act of 1865 (13 Stat., 290,) the defendant and Pleasants were living together as man and wife under a marriage solemnized while they were slaves, if established to the satisfaction of the jury, brought the case within the second Section of that Act.—Davenport v. Caldwell. There was evidence that the defendant and Pleasants continued to live as man and wife after emancipation for a year or eighteen months. If the jury concluded from this testimony that they so lived for that length of time after the general emancipation of slaves, then they should have found the existence of a marriage. The charge precludes such a finding and was, therefore, erroneous. It is unnecessary to consider the question of the validity of the

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marriage with Pleasants independently *of the fact of cohabitation after the passage of the Act of 1865. As was intimated in Davenport v. Caldwell, there are considerations connected with that question involving the validity of marriages in due form between slaves with the full consent of their owners, independently of the Act of 1865, but the Court did not feel called upon in that case to pass upon such question. Nor does the present case demand such an inquiry, as the fact of cohabitation after emancipation does not appear to have been contraverted.

The third charge was as follows: "But assuming Pleasants to have been his legal wife, if after her death defendant acknowledged the second marriage to Betsy and recognized her as his legal wife, that this at common law would constitute such marriage as would make the third marriage to Charity bigamous." Was this a proper direction to the jury? The law does not make the marriage contract, but it is altogether the act of the parties, the law merely declaring its consequences. The question is one of understanding and intent, having reference to a particular time when such intent was consummated by cohabitation. If the parties are legally competent to enter the marriage relation, then the law effectuates such consummated understanding and intent. If the parties are incompetent to contract marriage together, as when either is under the age of legal consent, or previously married, having a lawful husband or wife living, the marriage is invalid and cohabitation resulting therefrom illicit. Cohabitation having its origin in an illicit compact is presumed to continue in that character until changed by the lawful understanding and consent of the parties into the relation of marriage. The conduct of parties such as their declarations and actual cohabitation, may be proved as evidence to infer the existence of the marriage contract. It is erroneous to say that such declarations, accompanied by cohabitation, make the contract; they are merely circumstances entitled to weight with all other circumstances properly bearing on the question, such weight to be admitted with due regard to the legal presumptions affecting the question. This part of the charge may readily have been construed as meaning that if after the death of Pleasants the defendant acknowledged the fact of having been married to Betsy Moore during the lifetime of Pleasants, that such an acknowledgment was entitled to be received as evidence of marriage. Such an inference would clearly be erroneous, as that marriage, assuming its original illegality, could not become the source of the legal relation of marriage

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through *any acknowledgment of the fact of its existence. Recognition of the marriage relation by the parties is generally accepted as ground for inferring a contract of marriage; but if the nature of that recognition is such that it points exclusively to an illegal transaction as the source from which that relation has sprung, it could not have the effect to change a state of illicit cohabitation into the legal state of marriage. The recognition must be of such a nature as to point to a contract of marriage at some time when the parties are able to contract. When such is the case a starting point of the new relation is found, material in the case where children are born of such cohabitation both before and after the time of such contracted marriage, as it regards questions of legitimacy. The principles on which the foregoing conclusion rest are so fully illustrated in the cases in this State that it is unnecessary to subject them to particular examination. They are: State v. Hilton, 3 Rich. 434 [45 Am. Dec. 783]; State v. Barefoot, 2 Rich., 209; Fryer v. Fryer, Rich. Eq. Ca., 85; and Jewell v. Magwood, Rich. Eq. Ca., 113.

The judgment must be set aside and a new trial granted.

McIVER, A. J., concurred.

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